JUDICIAL REVIEW AND THE GOVERNMENTAL RECOVERY OF VETERANS' BENEFITS

Recipients of government pensions and similar benefits have generally been denied judicial review of governmental determinations made in dispensing them.[1] When the present Veterans' Administration was created in 1933, a provision barring review was included. The current version of the statute, section 211(a), reads as follows:

> [D]ecisions of the Administrator on any question of law or fact concerning a claim for benefits or payments under any law administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision.[2]

At first glance this provision seems clear and all-encompassing. Nevertheless, in a recent decision, *DiSilvestro v. United States*,[3] the Second Circuit held that it did not prohibit review of the evidentiary basis for a Veterans' Administration decision forming the foundation of the Government's attempts to recover monies allegedly paid out in error to the veteran.

Winning acceptance of this principle by the Second Circuit was Mr. DiSilvestro's first, albeit probably pyrrhic, victory in twenty years of litigation with the Government. To follow his name through the federal reporters of the past two decades is to receive a thorough introduction to judicial interpretation of section 211(a). Mr. DiSilvestro, who always represents himself, includes among his many other credits three petitions for certiorari, all rejected.[4] This litigation has arisen from his claim that a service-connected disability entitled him to a pension. After some initial skirmishing the pension was granted to him in 1948. In 1953, the Veterans' Administration became suspicious of certain entries in DiSilvestro's records. His claim was rerated and disallowed on the grounds that the entries were not authentic. In 1954, after further investigation, the Veterans' Administration concluded that DiSilvestro had falsified his records. They therefore declared a for-

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[1] *See* notes 24 & 38 *infra*.

[2] 38 U.S.C. § 211(a) (1964).

[3] 405 F.2d 150 (2d Cir. 1968).

[4] *See, e.g.*, DiSilvestro v. United States, 181 F. Supp. 860 (E.D.N.Y.), *cert. denied*, 364 U.S. 825, *rehearing denied*, 364 U.S. 897, *rehearing denied*, 364 U.S. 917 (1960); DiSilvestro v. United States Veterans' Administration, 151 F. Supp. 337 (E.D.N.Y. 1957), *cert. denied*, 355 U.S. 935, *rehearing denied*, 355 U.S. 968 (1958); DiSilvestro v. United States Veterans' Administration, 132 F. Supp. 692 (E.D.N.Y. 1955), *aff'd*, 228 F.2d 516 (2d Cir.), *cert. denied*, 350 U.S. 1009, *rehearing denied*, 351 U.S. 928 (1956). For a fuller account of the earlier history of the *DiSilvestro* case, see F. Davis, *Veterans' Benefits, Judicial Review, and the Constitutional Problems of "Positive" Government*, 39 IND. L.J. 183, 190-94 (1964).

feiture of his rights as a veteran and determined that he owed the Government $2026.06 for funds already paid out to him.[5]

DiSilvestro's every effort to contest this action in the courts failed because of section 211(a) and its predecessors.[6] Thereafter the Government began withholding dividends to which he was entitled under a National Service Life Insurance policy.[7] DiSilvestro seized this opportunity to reassert his claim. He brought suit seeking (1) the withheld dividends, (2) setting aside of the revocation of his disability award, and (3) damages resulting from the wrongful denial of medical and hospital care by the Veterans' Administration.[8] The last two claims were dismissed as res judicata.[9] With regard to the first, the district court held that review of the evidentiary basis of an affirmative government claim was not barred by section 211(a). It then reviewed the record in the forfeiture proceeding, since it assumed that it was the forfeiture, rather than the initial rerating and disallowance of the award, that created the Government's alleged right of setoff. The court sustained the administrative finding that the relevant entries in the record were not authentic, but granted summary judgment for DiSilvestro because it found that the Government failed to sustain its burden of proof that he had the capacity to form the intent necessary for fraud at the time the records were altered.[10]

On appeal, the Second Circuit also rejected the Government's contention that section 211(a) should have been held to bar judicial review.[11] But it was a dubious victory for DiSilvestro, since the court went on to agree with the Government that its setoff right was created by the finding that payments had been made erroneously and did not depend on the forfeiture proceeding and its finding of fraud. The district court had already sustained the finding that the records were not authentic. Nevertheless, the case was remanded, apparently for the district court to decide whether there was substantial evidence in the record to support the finding that but for the false records DiSilvestro would not have been granted a disability award.[12]

Buried in this curious and ironic history is the interesting question whether in these circumstances the statute should be read to permit the

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[5] 405 F.2d at 152. While a rerating merely involves a redetermination of the facts of a recipient's case, leading to the conclusion that a former factual determination of his status was erroneous, forfeiture is a statutory penalty for misconduct. The current forfeiture provisions of the Veterans' Benefits Law are 38 U.S.C. §§ 3503-05 (1964).

[6] *See, e.g.*, cases cited note 4 *supra.*

[7] A statute permits the Government to collect overpayments by setoff against "benefits payable pursuant to any law administered by the Veterans' Administration and relating to veterans . . . ." 38 U.S.C. § 3101(b) (1964). It has apparently been assumed that this authorizes withholding dividends on National Service Life Insurance policies.

[8] DiSilvestro v. United States, 268 F. Supp. 516, 518 (E.D.N.Y. 1966).

[9] *Id.* at 519.

[10] 405 F.2d at 153.

[11] *Id.* at 154-55.

[12] *Id.* at 155.

Government to enforce a money judgment without the basis of its claim ever being subject to judicial scrutiny. On this point the courts are divided.[13]

The language of the statute clearly bars judicial review of any action of the Veterans' Administration denying benefits. Although the District of Columbia Circuit has held otherwise,[14] the statute would appear to bar judicial review of the revocation or forfeiture of benefits. But the statute may be read to cover even a further situation. Where the Government pays out money erroneously, it has a right to recover it, even in the absence of a statute creating such a right.[15] It is not clear from the language of the statute whether or not Congress intended to bar judicial review of the legal and factual determinations of the Administration underlying such an affirmative governmental claim. Nor is the question resolved by the legislative history of the section.

There is now little doubt of the constitutionality of barring judicial review of administrative decisions granting or denying benefits.[16] An explicit no-review section has been a feature of the scheme of the Veterans' Administration ever since its inception, and attacks on the section have not been successful.[17] But there are very serious doubts about the propriety of denying judicial review of administrative decisions giving the Government a right of recovery.[18] Such doubts cannot be dispelled simply because, as was the case in *DiSilvestro*, the same determinations of which review is sought would properly be unreviewable were the question limited to the denial or revocation of benefits. When in 1953 the Veterans' Administration determined that payments to DiSilvestro had been made erroneously, he lost the right to further benefits. The loss of this right was unreviewable.[19] The same finding created a right of recovery in the Government for payments already

[13] *See* United States v. Gibson, 207 F.2d 161 (9th Cir. 1953) (permitting review), *rev'd on other grounds*, 225 F.2d 807 (9th Cir. 1955); Gongora v. United States, 183 F. Supp. 872 (D.D.C. 1960); United States v. Lawrence, 154 F. Supp. 454 (D. Mont. 1957); United States v. Owens, 147 F. Supp. 309 (E.D. Ark. 1957); Hormel v. United States, 123 F. Supp. 806 (S.D.N.Y. 1954); *cf.* Tracy v. Gleason, 379 F.2d 469 (D.C. Cir. 1967). *But see* United States v. Mroch, 88 F.2d 888 (6th Cir. 1937) (refusing review); United States v. Oxner, 229 F. Supp. 58 (E.D. Ark. 1964); United States v. Rhode, 189 F. Supp. 842 (D.S.D. 1960); United States v. Crockett, 158 F. Supp. 460 (D. Me. 1958); United States v. Perry, 141 F. Supp. 443 (E.D.N.C. 1956).

[14] Tracy v. Gleason, 379 F.2d 469 (D.C. Cir. 1967); 81 HARV. L. REV. 1861 (1968).

[15] United States v. Wurts, 303 U.S. 414, 415 (1938); Grand Trunk W. Ry. v. United States, 252 U.S. 112, 120-21 (1920); DiSilvestro v. United States, 405 F.2d 150, 155 (1968); Stone v. United States, 286 F.2d 56, 58-59 (8th Cir. 1961).

[16] Lynch v. United States, 292 U.S. 571, 577 (1934); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 382-83 (1965). *But see* F. Davis, *Veterans' Benefits, Judicial Review, and the Constitutional Problems of "Positive" Government*, 39 IND. L.J. 183 (1964); *cf.* Reich, *The New Property*, 73 YALE L.J. 733, 785-86 (1964).

[17] *See, e.g.*, Strong v. United States, 155 F. Supp. 468 (D. Mass. 1957), *appeal dismissed*, 356 U.S. 226 (1958).

[18] *See* text accompanying note 45 *infra*.

[19] *But see* Tracy v. Gleason, 379 F.2d 469 (D.C. Cir. 1967).

made. To deny judicial review to the extent of scrutinizing the record to see if the result was supported by substantial evidence (which was what the court required in *DiSilvestro*) might constitute a deprivation of property without due process of law. The correct reading of the statute, therefore, is one which avoids this question.

A. *The Language and Legislative History of the No-Review Clause*

Section 211(a) is the latest version of section 5 of the Economy Act of 1933, which created the present Veterans' Administration. The language of the Act was very broad:

> All decisions rendered by the Administrator of Veterans' Affairs under the provisions of this title . . . shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision.[20]

A broader statute, not limited to the provisions of the 1933 Act, was enacted in 1940, using slightly different language:

> Notwithstanding any other provisions of law . . . the decisions of the Administrator of Veterans' Affairs on any question of law or fact concerning a claim for benefits or payments under this or any other Act administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decisions.[21]

In 1957, with the consolidation of the Veterans' Benefits legislation, the two prior versions of the statute were replaced by the current section 211(a).[22]

These changes in language are not very significant, and courts have paid them little attention.[23] They certainly have no obvious bearing on the question of reviewability of affirmative governmental claims.

The accompanying legislative history is not much more helpful. The Economy Act of 1933 was passed under crisis conditions with al-

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[20] Act of Mar. 20, 1933, ch. 3, § 5, 48 Stat. 9.

[21] Act of Oct. 17, 1940, ch. 893, § 11, 54 Stat. 1197.

[22] Veterans' Benefits Act of 1957, Pub. L. No. 85-56, § 211(a), 71 Stat. 92, *as amended*, 38 U.S.C. § 211(a) (1964). The Congressional reports express the view that the change was merely one of consolidation; they give no indication of any change in the purpose of § 211(a). *See* H.R. REP. No. 279, 85th Cong., 1st Sess. 1 (1957); S. REP. No. 332, 85th Cong., 1st Sess. 1 (1957).

[23] *See, e.g.*, Hahn v. Gray, 203 F.2d 625 (D.C. Cir. 1953) (contention that 1940 amendment was intended to mitigate harshness of 1933 act by permitting review in some circumstances rejected). *But see* Hospoder v. United States, 209 F.2d 427 (3d Cir. 1953) (omission of reference to mandamus in 1940 act taken as permitting review in some circumstances).

most no legislative consideration.[24] It has been suggested that one immediate purpose in denying judicial review was a critical need for governmental economy.[25] Even if this is true, denial of judicial review was already an accepted feature of veterans' benefits law, and reflected more permanent administrative policy.[26] When amendment of the no-review provisions was contemplated in 1952, the Administrator wrote a letter to the subcommittee considering the amendment, which set forth both the policy behind the existing law and the reasons for its retention.[27] The letter first outlined as "the policy of the Government" the old maxim that there is no right to judicial review of the denial of governmental "bounty."[28] The more concrete reasons offered were that the administration of veterans' benefits involved questions of great technical complexity which an agency could handle more adequately and with greater uniformity than could the courts; and that allowing judicial review would be costly, both in terms of the burden on the courts and the expense of defending the suits.

This policy analysis does little to answer the question whether the no-review clause was intended to apply in situations where the Government is seeking affirmative relief. Insofar as it indicates a broad policy of barring review, it suggests that no determination of the Veterans' Administration should ever be reviewable. On the other hand, it is difficult to see how a narrow exception to the broad rule,

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[24] The 1933 Act was introduced in the House in the afternoon of Friday, March 10. It was considered in committee for 5 minutes. The next day it was debated for 2 hours and passed. 77 CONG. REC. 198, 223 (1933). It received little more consideration in the Senate, although it was there stated that § 5 "gives to the Veterans' Administration only such authority as the Administrator now has." *Id.* 254.

The 1940 Act received little more consideration. An objection to the no-review clause was silenced by the answer that such an objection might destroy the entire bill, and that the bill contained important benefit provisions which must be passed. 86 CONG. REC. 13490 (1940). It was, however, explained in the Senate that

> the bill only confirms what has been the accepted belief and conviction, that with respect to any pension, [or] gratuity, . . . there is no right of action in the courts . . . . It is not so much a limitation as a restatement of what is believed to be the law upon the question.

Id. 13383. The debate in the House added that

> [the provision] is desirable for the purpose of uniformity and to make clear what is believed to be the intention of Congress that the various laws shall be uniformly administered in accordance with the liberal policies governing the Veterans' Administration.

Id. 13491.

[25] *See* F. Davis, *Veterans' Benefits, Judicial Review, and the Constitutional Problems of "Positive" Government,* 39 IND. L.J. 183, 188 (1964): "Times were difficult, and it was thought that the country could not afford to waste money and time quibbling over legal technicalities in court." While this may be a satisfactory explanation of the features of the 1933 act which reduced existing benefits, it appears there may have been other reasons for the no-review provision even in 1933. *See* note 24 *supra.*

[26] *See* note 24 *supra.*

[27] *Hearings on H.R. 360, 478, 2442 & 6777 Before a Subcomm. of the House Comm. on Veterans' Affairs,* 82d Cong., 2d Sess. at 1961-63 (1952) [hereinafter cited as *1952 Hearings*].

[28] *See* notes 24, 38 & text accompanying notes 38-43 *infra.*

limited to situations in which the Government seeks a money judgment, would run counter to the stated policies. While a payment may be "bounty" when made, it is the property of the veteran when the Government seeks thereafter to recover it. Moreover, the volume of such cases would presumably be very small, involving little expense.[29] No interference with the Veterans' Administration's evolved standards for dealing with the difficult technical problems presented need be feared; the scope of judicial review can be limited to the Government's right to recovery, without affecting the veteran's right to receive benefits in the future.

Furthermore, the language of the statute is readily susceptible to the creation of such an exception. Most of the courts which have held for the Government on this issue have simply accepted the breadth of the statute as controlling this and every other situation.[30] However, those courts which have permitted judicial review have had no difficulty with the statutory language. The usual argument is that where the Government seeks to recover payments already made, this does not involve a "claim" within the meaning of the statute. Consequently, the underlying decision of the Veterans' Administration is not within the no-review provision.[31] This argument is serviceable rather than convincing. While it is true that a government claim is not a "claim" within the meaning of the statute, review of the evidentiary basis of the Government's claim necessarily involves examination of a prior decision "of the Administrator on [a] question of law or fact concerning a claim of benefits." [32] A possible response to this contention is that once the court finds that the claim before it is not within the meaning of the statute, the statute becomes inapplicable, and the court need not be concerned that it is in fact reviewing a prior decision of the Administrator. The resolution of the issue should not, however, turn on such niceties. The essential point is that, for the purposes of a defendant trying to secure judicial review of a government claim against him, the language of the statute is by no means fatally unpliable.

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[29] In fiscal 1965, the Board of Veterans' Appeals disposed of 22,798 claims. 16,784 of these were denied. ADMINISTRATOR OF VETERANS AFFAIRS, ANNUAL REPORT 1965, table 91, at 309 (1965). In the 1952 hearings, it was estimated that the Board of Appeals was at that time hearing approximately 52,000 cases a year. The Administrator declared himself unable to estimate how many of these cases would be appealed to the courts if all Veterans' Administration decisions were made reviewable. *1952 Hearings* 1963. Representative Ervins was willing to guess that about 1,000 cases would be appealed to the courts if the law were changed. *Id.* 1991. Evidently, a rule universally adopted in 1969 that Administration decisions underlying affirmative government claims were entitled to judicial review would not flood the federal courts with excessive litigation.

[30] *See, e.g.,* United States v. Mroch, 88 F.2d 888 (6th Cir. 1937); United States v. Oxner, 229 F. Supp. 58 (E.D. Ark. 1964); United States v. Rhode, 189 F. Supp. 842 (D.S.D. 1960).

[31] *See, e.g.,* United States v. Gibson, 207 F.2d 161 (9th Cir. 1953), *rev'd on other grounds,* 225 F.2d 807 (9th Cir. 1955); United States v. Lawrence, 154 F. Supp. 454 (D. Mont. 1957); Hormel v. United States, 123 F. Supp. 806 (S.D.N.Y. 1954); *cf.* Tracy v. Gleason, 379 F.2d 469 (D.C. Cir. 1967).

[32] 38 U.S.C. § 211(a) (1964).

B. *Reviewability: Presumptively and Constitutionally Required*

On the whole, the opinions which have allowed review of Veterans' Administration decisions underlying affirmative government claims have not been distinguished by depth of analysis. It is tempting to regard these cases as nothing more than illustrations of Professor Davis's remark that "a court with a strong enough will to correct what it believes to be injustice can usually contrive a way around even a statutory withdrawal of the court's jurisdiction." [33] Even courts faced with suits clearly barred by section 211(a) often supplement their reliance on the section with an alternative holding that the veteran would lose on the merits.[34] Decisions which refuse to apply section 211(a) to government claims generally make very clear their disagreement with the merits of the administrative determinations involved.[35] *DiSilvestro* was exceptional in this respect: despite the fact that the court insisted on judicial review, DiSilvestro's claim was a weak one, and the case was remanded for determination of an issue on which he was almost bound to lose.[36]

There are of course grounds for decision other than the immediate hardship in a given individual case. Professor Jaffe has written that "an individual whose interest is acutely and immediately affected by an administrative action presumptively has a right to secure at some point a judicial determination of its validity." [37] Such a presumption in most veterans' benefit cases is destroyed by the existence of section 211(a). But the statute is a codification of the old notion that dispensation of government largesse need not be subject to judicial process.[38] The presumption must therefore revive at the periphery of the statute's coverage, in the absence of any conflict with the section's other administrative policies. This is most clearly true in the case in which the Government is pressing its claim against a veteran. In this situation, there is no question of the receipt of any bounty, and a most palpable interest of the individual is affected: an attempt is being made to extract a money judgment from him.

Akin to the presumption of reviewability are some vaguely defined constitutional limitations on the lengths to which Congress can go in

[33] 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.15, at 78 (1958).

[34] *See, e.g.*, Hahn v. Gray, 203 F.2d 625 (D.C. Cir. 1953). *Contra*, Tracy v. Gleason, 379 F.2d 469 (D.C. Cir. 1967) (review of forfeiture allowed where forfeiture was based on failure of veteran confined as a homicidal lunatic to fill out and return questionnaire).

[35] *See, e.g.*, United States v. Gibson, 207 F.2d 161 (9th Cir. 1953), *rev'd on other grounds*, 225 F.2d 807 (9th Cir. 1955) (record failed to show dual payments were made on account of administrative oversight); United States v. Owens, 147 F. Supp. 309 (E.D. Ark. 1957) (record failed to sustain claim that veteran knowingly misstated income since V.A. income reporting form did not make clear that income from credit sales was to be reported at time of sale and not of receipt); Gongora v. United States, 183 F. Supp. 872 (D.D.C. 1960) (Government's contention that plaintiff's husband had not been in the army rejected because a certificate that he had been in the army was submitted after the V.A. ruling).

[36] *See* text accompanying note 12 *supra*.

[37] L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 336 (1965).

[38] *See* note 24 *supra; 1952 Hearings* 1973-81.

denying judicial review of administrative action. The law on this question cannot be stated with much confidence. The Government almost never seeks to move against individual interests while attempting to block judicial review. Occasionally it does so, almost fortuitously, in cases involving relatively minor interests; such is the case with recovery of overpayments of veterans' benefits. In these cases courts do not give much attention to the enormously complex issues of principle involved.[39] While this may not be a very serious failure, a greater awareness of the problem, even if it is unlikely to produce definitive answers to the questions involved, supports a reading of section 211(a) which avoids constitutional doubts.

Relatively settled, though frequently attacked,[40] is the proposition that

> [t]he United States is not, by the creation of claims against itself, bound to provide a remedy in the courts. It may withhold all remedy or it may provide an administrative remedy and make it exclusive, however mistaken its exercise.[41]

The basis of this doctrine is highly theoretical.[42] It seems to lie partly in the notion that where Government performs functions, the nature and

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[39] The § 211(a) cases which considered the constitutional issue, *see, e.g.,* United States v. Lawrence, 154 F. Supp. 454 (D. Mont. 1957); United States v. Owens, 147 F. Supp. 309 (E.D. Ark. 1957); Hormel v. United States, 123 F. Supp. 806 (S.D.N.Y. 1954), have tended to treat it in fairly general terms. The most thorough discussion is in *Owens,* which argues that barring review of government claims would open the door to administrative arbitrariness and discrimination, that allowing the Government to be the judge of its own case would "be repugnant to fundamental notions of fair play," and that the statute should be construed to avoid constitutional "doubts."

[40] *See, e.g.,* F. Davis, *Veterans' Benefits, Judicial Review, and the Constitutional Problems of "Positive" Government,* 39 IND. L.J. 183 (1964); *cf.* Reich, *The New Property,* 73 YALE L.J. 733 (1964); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439 (1968).

[41] Dismuke v. United States, 297 U.S. 167, 171-72 (1936).

[42] It is frequently pointed out that it does not correspond very closely with real life. During the hearings on the proposed amendment to the no-review provision in 1952, Representative Rogers stated:

> I cannot get my thinking to the place where if a man goes into the defense of this country and gets a leg shot off or gets some disease or some injury, that the Government is giving him anything, because he gave up quite a bit. As a matter of fact, the consideration that he is paid from what I think would ripen into a right is more than is present in most contract situations.

1952 Hearings 1986.

In discussing the kindred notion that administrative remedies in the dispensing of benefits presumptively exclude judicial review, Professor Jaffe states:

> The notion of "privilege" is in this context a perversion of thought and of language. Pensions and annuities are created under a system of law, usually for service given or other sufficient reason; they are paid out of the tax funds to which all individuals including the claimants have contributed. As Government takes over more and more services and amenities, and to finance them takes a larger and larger part of the citizen's dollar, it is both absurd and dangerous to look upon these services as "privileges." It is precisely in a field such as this, in which vast numbers of the citizenry are deeply affected in their daily life, that the rule of law is most pertinent. Though it may be appropriate in certain situations to exclude judicial review, it is not sound to infer exclusion on the basis that the claim is a "privilege."

JAFFE, *supra* note 37, at 369.

manner of which are not constitutionally compelled, and especially where such functions consist of giving out what is thought to be in the nature of charity, it may provide for their execution in whatever way it chooses.[43] Similarly the recipient of benefits is not thought to have a claim on the attention of the courts which reaches constitutional dimensions. Nothing is being taken from him; he is not being made to do anything. He is simply complaining to the court that the Government will not give him "bounty."

Whatever the merits of this theory, its applicability is open to question in the case of a statute barring judicial review of a Government claim for recovery of overpayments. *United States v. Rhode,* one of the cases upholding the application of section 211(a) to the recovery of overpayments by the Government, states that "[v]ested rights are not involved in this case. The record deals with overpayment of a veteran's benefit. Such benefits are gratuities." [44] The suggestion apparently is that the status of the veteran's claim to amounts in his possession corresponding to those already received as benefits is no different than that of his claim to receive benefits in the future: the Veterans' Administration can dispose of either without judicial review. This poses the question whether the government claim is to be seen merely as a kind of accounting adjustment or as a cause of action for the recovery of money. The Government is authorized by statute to recover overpayments by charging them against funds in its possession which it would otherwise pay out; it is therefore not immediately compelled to go to court. It may be argued that since it could proceed without a court, there should be no requirement of judicial review of the merits when, for some reason, it chooses to seek a judgment. But the fact that the Government does proceed by seeking a judgment from a court must itself make a difference. If the notions of due process and of the nature of the judicial function mean anything, they must require a court to examine questions of law, including the question of the substantiality of the evidence underlying the judgment it is being asked to give, where no other court has yet done so.[45]

Furthermore, where the Government does proceed by self-help, as in *DiSilvestro,* it is not clear that judicial review is not required. Professor Hart puts the question but never really answers it.[46] The

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[43] Van Alstyne, *supra* note 40, at 1442 n.11.

[44] 189 F. Supp. 842, 844 (D.S.D. 1960).

[45] *See* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic,* 66 HARV. L. REV. 1362, 1375-79 (1953); *cf.* JAFFE, *supra* note 37, at 384:

> *We can then conclude that, when a person is the object of an administrative order which will be enforced by a writ levying upon his property or person, he is at some point entitled to a judicial test of legality.*

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> Suppose Congress authorizes a program of direct action by Government officials against private persons or private property. Suppose, further, that it not only dispenses with judicial enforcement but either limits the jurisdiction

interest of the injured individual is the same, regardless of whether the Government sues him or withholds other funds and compels him to sue it. But where the individual is suing the Government, he must overcome the obstacle presented by the doctrine of sovereign immunity.[47] The usual form of such litigation is a suit for National Service Life Insurance dividends, which is specifically authorized by statute.[48] Section 211(a) may be read as an exception to such authorization. Since the suit is clearly a suit for money against the United States, it falls in the area where the much criticized doctrine of sovereign immunity is still thought to have the most vitality.[49] But to deny judicial review would be to rely on the power of Congress to regulate the jurisdiction of the federal courts, and on the doctrine of sovereign immunity, to reach a result which courts should properly take pains to avoid: it would establish the constitutional power of the Government, at least in some circumstances, to deprive an individual of vested rights without judicial process. The technique of statutory construction is readily available to avoid such a holding, and it should be used.[50]

CONCLUSION

The proper construction of section 211(a) is one which permits judicial review of government claims of prior erroneous payment. This raises the question whether a judicial decision favorable to the veteran should also bind the Veterans' Administration concerning prospective payments to the veteran. If DiSilvestro had established that the record did not contain substantial evidence that the relevant records were not

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of the federal courts to inquire into what the officials do or denies it altogether.

Hart, *supra* note 45, at 1387.

Professor Hart goes on to suggest that the answer is that the court should examine the Government's action on the merits, and if it is invalid to declare the jurisdictional limitation invalid and proceed under its general grant of jurisdiction. *Id.* But this argument does not face the problems raised by the situation in which the individual's complaint is one that will only be satisfied by the payment of money by the Government, and in which the doctrine of sovereign immunity may therefore be applicable.

[47] *See generally* JAFFE, *supra* note 37, at 197-231; Carrow, *Sovereign Immunity in Administrative Law—a New Diagnosis,* 9 J. PUB. L. 1 (1960).

[48] 38 U.S.C. § 784 (1964).

[49] *E.g.,* Dugan v. Rank, 372 U.S. 609 (1963). *But see* Carrow, *supra* note 47, at 13-17.

[50] *Cf.* Lynch v. United States, 292 U.S. 571 (1934). The beneficiaries of government insurance policies sued for amounts due thereunder. The Economy Act of 1933 had repealed all acts pertaining to the insurance policies involved. The question was whether the beneficiaries had thus been deprived of property without due process of law, although reference was also made to the fifth amendment prohibition on taking property without just compensation. The Court held that the policies were contracts creating vested rights. It distinguished between the rights and the remedy. While the Government could withdraw its consent to be sued without (in a constitutional sense) impairing the rights involved, the Court held that Congress intended to abrogate the right rather than to withdraw the remedy, and it therefore held for the beneficiaries. The curious reasoning is a good example of the reluctance of courts to ascribe to Congress an intent to use the doctrine of sovereign immunity to make ineffective what would otherwise be constitutional rights. Hart, *supra* note 45, at 1371.

authentic, should the court have directed the Veterans' Administration to resume payments? On the question of his right to future payments, there would be nothing to distinguish such a case from any other in which the veteran asserts that the Administration's decision denying him benefits is erroneous. Section 211(a) is clearly applicable and there is no countervailing constitutional limitation. Judicial review should be given effect only to the Government's claim, and not to the right to future payments.