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# JUDICIAL DETERMINATIONS OF MILITARY STATUS

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THE demobilization of millions of Americans who served in the armed forces during the Second World War and the Korean conflict has left in its wake a variety of disputes between these individuals and the government. Like most controversies in our society, these ultimately have found their way into the courts. And they are likely to become a permanent feature of our jurisprudence, assuming a continuing military establishment of the present magnitude. Most of these cases involve complaints by former servicemen as to the nature of their separation from the armed services, or challenges to the military's refusal to grant retirement—litigation involving what is referred to as "military status." The course of this litigation has been complicated by a bifurcated system of remedies within the federal courts and by persisting misconceptions of the role of the judiciary in military status litigation. The result has been undesirable confusion, chiefly as to the legal impact of these status decisions upon the executive.

The term "military status" has two meanings. "Status" may be employed in a broad sense to classify the entire population into two groups. Persons with "military status" are those in the armed services in any capacity, either active or inactive; all others are civilians. Such military status attaches at the moment of entry into the service by induction, enlistment or appointment. As in marriage or naturalization, the relationship created is more than contractual and can only be terminated by law.[1] The word has a narrower meaning, however, and is more often used, particularly in these litigated cases, in describing an individual's position or category within the armed forces. For example, we speak of a person's status as a commissioned officer or an enlisted man, and of reserve, retired, or active duty status.[2] Legal purists may find this disturbing, and it may be that some of these legal perplexities would be clarified by abandoning the "status" terminology altogether. But the word is entrenched in the military vocabulary and both its broad and narrow meanings do suggest legally created relationships out of which stem certain rights and duties, spoken of as

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1. *In re* Grimley, 137 U.S. 147, 151-53 (1890).

2. See, *e.g.*, 10 U.S.C. § 1335 (1958) ("inactive status"); 10 U.S.C. § 1332(b)(7) (Supp. III, 1962) (status other than that as commissioned officer, warrant officer, flight officer or enlisted member). The word "status" is used this way by the courts in the judicial opinions cited throughout this Article. The problems discussed here involve the term chiefly in this sense.

the incidents of status. Controversy over these incidents, usually economic, is what gives rise to the litigation over military status.

When the government alters or terminates a person's military status it may be to his detriment both financially and otherwise. If the action conforms with the Constitution and is authorized by statute, or regulation, there is no recourse. Irremedial personal hardships have always resulted from the demands of national defense. But where detrimental status action is contrary to regulatory, statutory or constitutional directives, our notions of government under law call for a remedy. We take it as an article of faith that a government must obey its own laws. Moreover, there is today an enlarged public interest in affording redress since the military now touches the life of almost every male citizen and may leave lasting benefit or prejudice.[3] Congress and the armed services, in response to this interest, have created a network of remedial boards within the Defense Department.[4] However, individuals who find these administrative remedies unavailing have been turning increasingly to the courts with claims involving military status questions, usually questions of the legality of a discharge or of a refusal to grant retirement. The Judiciary, like Congress and the military, has not been able to ignore public insistence that in this era of near universal military service our armed establishment treat people in accordance with law.

The result is an expanding body of decisions in which the courts have been revitalizing old theories and evolving new ones to afford relief from harmful military status actions. For example, it is now recognized that a discharge from the service will be held to have no legal effect if it were issued without lawful authority or issued in violation of a regulation, a statute, or the Constitution.[5] A court, on these same grounds, may likewise invalidate a release from active to inactive duty, or an order retiring the plaintiff from the service without disability pay.[6] Even a refusal to retire an individual may be held illegal if the court finds it to be arbitrary.[7] The development of these theories would not

3. See, *e.g.*, Note, *Discharging the Inactive Reservist for Political Activities Affecting His Security Status*, 69 YALE L.J. 474 (1960). There are presently over 23,000,000 veterans of the armed forces. See Lerner, *Effect of Character of Discharge and Length of Service on Eligibility to Veterans' Benefits*, 13 MILITARY L. REV. 121 (1961).

4. See, *e.g.*, 10 U.S.C. § 1552 (1958) (boards for correction of military records); 10 U.S.C. § 1553 (1958) (discharge review boards); 10 U.S.C. § 1554 (1958) (retirement review boards).

5. See, *e.g.*, Harmon v. Brucker, 355 U.S. 579 (1958); Bland v. Connally, 293 F.2d 852 (D.C. Cir. 1961); Clackum v. United States, 148 Ct. Cl. 404, 296 F.2d 226 (1960); Smith v. United States, No. 28-60, Ct. Cl. Dec. 6, 1961; Meador, *Some Thoughts on Federal Courts and Army Regulations*, 11 MILITARY L. REV. 187 (1961); Note, *Discharging the Inactive Reservist for Political Activities Affecting His Security Status*, 69 YALE L.J. 474 (1960). *Cf.* Ingalls v. Zuckert, 309 F.2d 659 (D.C. Cir. 1962).

6. Friedman v. United States, 141 Ct. Cl. 239, 158 F. Supp. 364 (1958); Register v. United States, 131 Ct. Cl. 98, 128 F. Supp. 750 (1955); Cravens v. United States, 124 Ct. Cl. 415 (1952).

7. *E.g.*, Furlong v. United States, 138 Ct. Cl. 843, 152 F. Supp. 238 (1957). A claim is also possible on the theory that plaintiff was illegally reduced in grade or that a promotion to which he was entitled was wrongfully withheld. See, *e.g.*, Caddington v. United States, 147 Ct. Cl. 629, 178 F. Supp. 604 (1959); JAGA 1961/3726, Feb. 23, 1961.

have been possible without a concomitant broadening of the scope of judicial review of military action. The traditional judicial reluctance to intrude in this "specialized community"[8] has been yielding to the circumstances of the times.

Debate understandably continues on the delicate questions raised by such judicial intrusion into military activity—a governmental area long committed to almost exclusive executive control. Clear thinking is hampered, however, by persisting misconceptions which arise from inadequate analyses of what the courts actually decide in these status cases, what they have jurisdiction to decide, and the legal effects of their decisions. For example, there is uncritical acceptance of the adage that a court cannot "confer" military status, that is, appoint an individual to a military position which the military does not acknowledge him to hold. Similarly it is asserted that the Court of Claims cannot "restore" a person to active duty after he has been issued a discharge. And often it is said that the Court of Claims lacks jurisdiction to decide any status questions and that its decisions on such matters do not compel executive action. These and like notions must be carefully qualified, if, indeed, they are correct at all. Yet they are usually taken at face value.[9] One result is that judgments of the Court of Claims have been denied their full legal effect.

The purpose of this Article is to clarify the relationship of forum, remedy, and the doctrine of collateral estoppel as it applies in military status litigation and thereby to demonstrate the misconceptions involved in traditional notions of the power of the Court of Claims and the federal district courts in such litigation. In order to focus precisely on these unexamined aspects of status determinations, the scope of review question, though of much contemporary importance, will be treated only peripherally to indicate its interrelation with jurisdictional and remedial aspects of military status litigation.

## I. The Forum: Court of Claims or District Court

In judicially attacking military administrative action which affects his status, a plaintiff may sue in the Court of Claims or in a federal district court.[10] The forum is determined entirely by the remedy desired, and there are several remedial possibilities based on currently developed theories. The plaintiff may recover a judgment for the monetary benefits which he lost as a result of the challenged action. For example, on the theory that he was issued a legally inoperative discharge he can obtain a judgment for active duty pay due him after the date of that purported separation.[11] Or if he was entitled by statute to be

8. Orloff v. Willoughby, 345 U.S. 83, 94 (1953); Jaffe, *The Right to Judicial Review II*, 71 Harv. L. Rev. 769, 782-83 (1958).

9. Most of these ideas can be found in Philos, *Suits in the Court of Claims Involving Status—A Dilemma*, 16 Fed. B.J. 103 (1956). Though unofficial, this is fairly representative of the views generally held by military lawyers.

10. State courts presumably lack jurisdiction to entertain such actions. See Hart & Wechsler, The Federal Courts and the Federal System 388-91 (1953).

11. Clackum v. United States, 148 Ct. Cl. 404, 296 F.2d 226 (1960); Shapiro v. United States, 107 Ct. Cl. 650, 69 F. Supp. 205 (1947). In this Article the terms "legally inoperative," "void," "invalid," and "nullity" are used synonymously. They all mean that the action so described is wholly without legal effect, as though it never had happened.

retired but was wrongfully discharged instead, he can recover retirement pay.[12] On the other hand, plaintiff might not assert a money claim but seek merely a declaratory judgment adjudicating, for example, the invalidity of a purported discharge.[13] Furthermore, mandamus or mandatory injunction might be available in some circumstances to compel the military authorities to take certain action concerning plaintiff's status.[14] Where allegedly illegal administrative action is pending or threatened and not yet final, a person may attempt to prevent it by injunction.[15]

If a money recovery is sought, the sole forum is the Court of Claims. Suits for monetary benefits stemming from military status are based on the legislation authorizing the benefits and come under 28 U.S.C. section 1491 which provides that "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department. . . ."[16] Although district courts are granted this identical jurisdiction up to $10,000,[17] they are at the same time expressly precluded from entertaining claims for "compensation for official services of officers or employees of the United States."[18] The latter has been construed to cover the financial incidents of military service, thereby leaving the Court of Claims with exclusive authority over such actions.[19] This jurisdictional arrangement compels a plaintiff with a monetary claim to file his case in the Court of Claims and at the same time limits him in that court to a money judgment. No other relief is available, since the grant to the Court of Claims of "jurisdiction to render judgment upon any claim against the United States" has been held to authorize only a judgment for money.[20]

12. See Friedman v. United States, 141 Ct. Cl. 239, 158 F. Supp. 364 (1958); Register v. United States, 131 Ct. Cl. 98, 128 F. Supp. 750 (1955).

13. *E.g.*, Harmon v. Brucker, 355 U.S. 579 (1958); Bland v. Connally, 293 F.2d 852 (D.C. Cir. 1961).

14. See Robertson v. Chambers, 341 U.S. 37 (1951); Almour v. Pace, 193 F.2d 699, 701 (D.C. Cir. 1951); *cf.* Farley v. United States *ex rel.* Welch, 92 F.2d 533 (D.C. Cir. 1937).

15. See, *e.g.*, Reed v. Franke, 297 F.2d 17 (4th Cir. 1961); Beard v. Stahr, 200 F. Supp. 766 (D.D.C. 1961), *vacated and remanded*, 370 U.S. 41 (1962).

16. 28 U.S.C. § 1491 (1958); Friedman v. United States, 310 F.2d 381, 399 (Ct. Cl. 1962); Patterson v. United States, 141 Ct. Cl. 435, 437-38 (1958). *But see* Laramore, *The United States Court of Claims*, 30 OHIO BAR J. 854, 858 (1957), commenting that Shapiro v. United States, 107 Ct. Cl. 650, 69 F. Supp. 205 (1947), a suit for active duty pay, was an action on a contract of employment.

17. 28 U.S.C. § 1346(a)(2) (1958).

18. 28 U.S.C. § 1346(d) (1958).

19. Hanes v. Pace, 203 F.2d 225, 228 (D.C. Cir. 1953); Almour v. Pace, 193 F.2d 699, 702 (D.C. Cir. 1951). Although 28 U.S.C. § 1501 (1958) provides that "The Court of Claims shall not have jurisdiction of any claim for a pension," this has been construed not to bar a suit for military retired pay. Lemly v. United States, 109 Ct. Cl. 760, 75 F. Supp. 248 (1948).

20. United States v. Jones, 131 U.S. 1 (1889); United States v. Alire, 73 U.S. (6 Wall.) 573 (1867).

If a plaintiff desires other judicial relief from adverse military status action, he must file suit in a federal district court against an individual official. Because sovereign immunity has not been waived for such actions, he cannot sue the United States.[21] But the salutary fiction that suits against officials are not against the government permits relief from governmentally inflicted harm.[22] Thus by selecting an appropriate officer—frequently but not necessarily the Secretary of one of the three armed services—a plaintiff may seek the remedy of declaratory judgment, injunction or mandamus.[23] Even so, he might be unsuccessful, for the case may not be entirely free of the sovereign immunity question or other remedial complexities.[24]

A plaintiff's problems in the district court have been eased by two 1962 amendments to Title 28. One is a broadening of the federal venue statutes to allow suit against any officer of the United States to be brought, among other places, in the district of the plaintiff's residence; this is accompanied by a provision for nationwide service of process.[25] The other amendment in effect abandons the anachronistic rule which deprived federal trial courts outside the District of Columbia of original mandamus jurisdiction. Now, under the new section 1361, all federal district courts are empowered "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."[26] Together with the venue and service of process amendment this promises to decentralize district court litigation against federal officials, military and otherwise. The semi-monopoly of the District of Columbia courts is now broken, and every federal judge no matter how remote from the capital

21. 28 U.S.C. § 1346 (1958); Updegraff v. Talbott, 221 F.2d 342 (4th Cir. 1955); Hanes v. Pace, 203 F.2d 225 (D.C. Cir. 1953); Almour v. Pace, 193 F.2d 699 (D.C. Cir. 1951).

22. See Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. CHI. L. REV. 435 (1962).

23. See, *e.g.*, Harmon v. Brucker, 355 U.S. 579 (1958); Robertson v. Chambers, 341 U.S. 37 (1951); Miguel v. McCarl, 291 U.S. 442 (1934); Ogden v. Zuckert, 298 F.2d 312 (D.C. Cir. 1961); Reed v. Franke, 297 F.2d 17 (4th Cir. 1961); Davis v. Stahr, 293 F.2d 860 (D.C. Cir. 1961); Bland v. Connally, 293 F.2d 852 (D.C. Cir. 1961); Almour v. Pace, 193 F.2d 699 (D.C. Cir. 1951).

24. See, *e.g.*, Denby v. Berry, 263 U.S. 29 (1923); United States *ex rel.* French v. Weeks, 259 U.S. 326 (1922); Updegraff v. Talbott, 221 F.2d 342 (4th Cir. 1955); Hanes v. Pace, 203 F.2d 225 (D.C. Cir. 1953); *Developments in the Law—Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 846-64 (1957); Davis, *Mandatory Relief from Administrative Action in the Federal Courts*, 22 U. CHI. L. REV. 585 (1955). These complexities will be left largely unexplored by this paper, though it might be said that sovereign immunity does not seem to bar mandamus.

25. 28 U.S.C. § 1391(e) (Supp. 1962).

26. 28 U.S.C. § 1361 (Supp. 1962). The term "mandamus" is not used in the statute, but the legislative history indicates that this is what is intended. The statute could be construed as authorizing mandatory injunctions, thereby avoiding the quagmire of mandamus law. See generally Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1503-16 (1962).

may have to grapple with such cases hereafter. Although access to the district court will be subject to the jurisdictional amount in some cases,[27] a plaintiff with a claim involving military status can now stay at home and sue the appropriate official for whatever non-monetary relief he could formerly obtain by suing in the District of Columbia.[28] This of course still leaves a money judgment outside district court authority. It also leaves unaffected the knotty problems of sovereign immunity and scope of review which have troubled the District of Columbia courts.

The upshot of the present statutory allocation of jurisdiction between the Court of Claims and the district courts is that a person aggrieved by allegedly unlawful administrative action of the armed service cannot get a complete remedy in any one forum. In the Court of Claims he can recover his lost monetary benefits but that is all. In the district court he may get a declaratory judgment, mandamus or injunction, but he can recover no money. Although the 1962 amendments afford a plaintiff some choice among district courts and allow him to sue at home, he is still compelled to go to Washington to obtain monetary redress. In short, complete relief requires two suits in two different courts.[29]

There is more to the picture, however, than this distribution of judicial authority reveals on the surface. Like a number of the other problems in military status litigation, the present bifurcation of remedy can be assessed intelligently only after a closer look at precisely what goes on in these cases and by considering the consequences of the decisions in light of the rules of collateral estoppel. For this purpose the cases will be classified into two general types: those which turn on an allegedly invalid termination-of-status action, such as an outright discharge from the service or simply a release from active duty, and those involving retirement from the service, where the focus is on the creation of a new status rather than the termination of an existing one.

27. The new grant of jurisdiction, 28 U.S.C. § 1361 (1962), carries no jurisdictional amount. However, if plaintiff sought a declaratory judgment or injunction, § 1331, granting jurisdiction to district courts over cases arising under federal law, appears to be the only provision on which jurisdiction could be based, and it requires that more than $10,000 be in controversy. This may be an insurmountable barrier to litigating a military status question in a district court other than by mandamus. See Byse, note 26 *supra* at 1516-17; Jones, *Jurisdiction of the Federal Courts to Review the Character of Military Administrative Discharges*, 57 COLUM. L. REV. 917, 937 (1957); Comment, *Judicial Review of Army Discharge Procedures*, 9 STAN. L. REV. 170, 179 n.48 (1956). There is, however, a curious absence of judicial concern about the point. See, *e.g.*, Reed v. Franke, 297 F.2d 17 (4th Cir. 1961).

28. The reasons behind the amendments and what they are intended to accomplish are given in S. REP. No. 1992, 87th Cong., 2d Sess. (1962), set out in 1962 U.S. CODE CONG. & AD. NEWS and in Byse, note 26 *supra*. There will no longer be any difficulty over an indispensable superior officer who could not be served with process outside of Washington, as he can now be reached with process from any district.

29. Although a case can be transferred between a district court and the Court of Claims, either way, this procedure could not be utilized here because it is authorized only where the transferee court has exclusive jurisdiction. 28 U.S.C. §§ 1406(c), 1506 (Supp. III, 1962). Generally, neither court's jurisdiction is exclusive in this situation.

## II. Invalid Separation Cases

Military status in both its broad and narrow sense may be terminated in several ways, but most often this is accomplished by a discharge or other appropriate order issued by the officials of the armed service.[30] Though formally carried out, such action may still be legally inoperative to terminate the particular status. This has been recognized by courts in varying contexts at least since the 1871 case of *In re Bird*,[31] where a dishonorable discharge issued pursuant to a court-martial sentence was nullified because the court martial was without jurisdiction. Other theories of invalidity have developed more recently. If, for example, in the procedure leading up to a separation order an individual's constitutional rights were violated, the resulting discharge will be void.[32] The action will likewise be inoperative if in violation of procedures prescribed by statute or by the service's own regulations.[33] This will also be true if the substantive basis relied on by the military was one not authorized by law as a basis for the particular type of discharge.[34] Claims based on these grounds have been asserted both in the district courts and the Court of Claims.

Considering first the Court of Claims, the theory of the typical suit is that plaintiff, in legal contemplation, was never removed from active duty because the discharge or order of release which he was issued was a legal nullity; it follows that he is entitled to the active duty pay he would have received but for the abortive action. In defense, the United States normally asserts that the discharge was lawful and therefore effectively removed plaintiff from his active duty status. This presents the court with the necessity of adjudicating the validity or invalidity of plaintiff's discharge in order to dispose of the case. If the court sustains the claim of invalidity it will enter judgment for the plaintiff for the appropriate amount of pay from the date of the purported discharge to the date of judgment. In this way, and only in this way, the Court of Claims exercises judicial review over military separation action and decides a question of military status. The decision comes simply as a necessary step to rendering judgment in a suit for pay. Even though spoken of as "incidental," it is nonetheless a square decision on the question.

Compared to a federal district court, the authority of the Court of Claims is narrowly circumscribed. Yet its power to make this military status determina-

30. "Discharge" will be used for convenience here to refer generally to all formal separations from the service, including a release from active to inactive duty. The principles to be discussed apply basically to all terminations of status in both its broad and narrow meanings. A release from active to inactive duty, if valid, terminates active duty status, although it does not terminate military status in the broad sense; the individual might remain in a reserve and inactive status. A discharge, however, may terminate active duty status and simultaneously all military status.

31. 3 Fed. Cas. 425 (No. 1428) (D. Ore. 1871).

32. Clackum v. United States, 148 Ct. Cl. 404, 296 F.2d 226 (1960); Shapiro v. United States, 107 Ct. Cl. 650, 69 F. Supp. 205 (1947).

33. Ingalls v. Zuckert, 309 F.2d 659 (D.C. Cir. 1962); Meador, *Federal Courts and Army Regulations*, 11 Military L. Rev. 187 (1961).

34. Harmon v. Brucker, 355 U.S. 579 (1958); United States v. Perkins, 116 U.S. 483 (1886).

tion seems clearly within its jurisdiction which, like that of all federal courts, is spelled out by statute.[35] Congress has defined the court's authority by the type of case which it can adjudicate, namely, "any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department. . . ."[36] The only other relevant statutory provision on the court's power is in remedial terms—a restriction to the remedy of money judgment.[37] There is no limitation as to the *issues* the court can decide. This is the crucial point. For like all federal courts, the Court of Claims is necessarily empowered to decide all issues essential to the disposition of a case which falls within its authority, unless a statute expressly deprives it of that power.[38] Accordingly when a plaintiff files a complaint against the government demanding judgment for active duty pay under the Act of Congress providing for compensation of military personnel,[39] the court's jurisdiction attaches.[40] This jurisdiction carries with it authority to determine whether plaintiff had active duty status since that is the basis for the right to pay,[41] and no statute withdraws authority to make this determination. To make it, the court must decide whether the discharge issued plaintiff was a nullity. If the court holds for the plaintiff it does not "restore" him to active duty, nor "confer" a particular status. Active duty status had already been conferred on plaintiff by official action prior to the discharge. The court simply holds that it never terminated because of the legal inefficacy of the separation action.[42] Accordingly, he has a legal right to the pay incident to that status. As the court said in one of its earliest decisions invalidating a separation, the plaintiff, not having been discharged lawfully, "is still in office and is entitled to the pay attached to the same."[43]

It is disturbing to some that the Court of Claims in this manner might review a court-martial conviction which had become final and supposedly non-

35. Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922).

36. 28 U.S.C. § 1491 (1958). The court is granted other jurisdiction not relevant to the military status cases.

37. *Ibid.* See cases cited at note 20 *supra.*

38. See Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824).

39. 63 Stat. 804-09 (1949), 37 U.S.C. §§ 231-34 (1958).

40. *Cf.* Bell v. Hood, 327 U.S. 678 (1946).

41. "All members of the uniformed services when on the active list, when on active duty . . . shall be entitled to receive the basic pay of the pay grade to which assigned. . . ." 63 Stat. 805 (1949), 37 U.S.C. § 232(e) (1958). Military pay is fixed by statute and is said to be an incident of status, with a few qualifications not pertinent here. See Bell v. United States, 366 U.S. 393, 401-04 (1961); Fulton, *Uncertainties in the Pay and Allowance Laws,* 9 MILITARY L. REV. 151 (1960).

42. ". . . if the orders accomplishing that release [from active duty] are in some manner invalid, the person as a matter of law continues in an active duty status." Egan v. United States, 123 Ct. Cl. 460, 158 F. Supp. 377, 386 (1958).

43. United States v. Perkins, 116 U.S. 483, 485 (1886).

In a similar case involving a discharged civilian employee, the court said: "This is not an action for damages but an action by the holder of the office for the salary attaching thereto." Borak v. United States, 78 F. Supp. 123, 124 (Ct. Cl. 1948).

reviewable by a federal court, except on habeas corpus.[44] The court actually did this in *Shapiro v. United States*[45] and held void the sentence of dismissal from the service. Such review is legitimate, it is submitted, on the theory outlined above in any suit for active duty pay or other monetary benefits[46] where it is necessary because the purported separation rests on a court-martial conviction. But jurisdictional power to review is one thing; the proper scope of review is another question, and here the scope is quite narrow. Presumably the sentence and resulting discharge would be voided, as on habeas corpus,[47] only if the court-martial was without jurisdiction or proceeded in violation of the accused's constitutional rights.

If the Court of Claims were denied this authority, it would be forced to respect a court-martial conviction which was a nullity. In a case like *Shapiro* where the plaintiff's constitutional right to counsel had been violated the court would be shut off from deciding a pivotal constitutional issue in a case over which it had jurisdiction. Although Congress has provided that a court-martial-imposed discharge shall be binding on all federal courts,[48] it is not clear that by this provision Congress intended to compel the courts to give effect to a void sentence and to deprive them of access to the Constitution.[49] Since the Court of Claims has now been held to be a constitutional court exercising judicial power under article III of the Constitution,[50] such a limitation would raise a serious constitutional question.[51] A partial withdrawal of jurisdiction from dis-

44. See Philos, *Suits in the Court of Claims Involving Status—A Dilemma*, 16 FED. B.J. 103, 110-19 (1956).

45. 107 Ct. Cl. 650, 69 F. Supp. 205 (1947); 33 VA. L. REV. 505 (1947); 35 GEO. L.J. 558 (1947).

46. A person loses a multitude of monetary benefits when he is issued a punitive discharge. See Brown, *The Results of the Punitive Discharge*, 15 JAG J. 13 (1961). Presumably these could be recovered in the Court of Claims if the court can determine that the discharge is void.

47. See Burns v. Wilson, 346 U.S. 137 (1953).

48. 10 U.S.C. § 876 (1958): "[A]ll dismissals and discharges carried into execution under sentences by courts-martial . . . are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States. . . ." This statute is the basis for the opinion that the Court of Claims is without authority to review a court-martial. See Goldstein v. Johnson, 184 F.2d 342, 343 (D.C. Cir.), *cert. denied*, 340 U.S. 879 (1950); Philos, *supra* note 44.

49. 28 U.S.C. § 2513 (1958) provides for recovery of *damages* by a convicted person who has been pardoned or whose conviction has been set aside on the ground that he is not guilty. This statute has nothing to do with a suit for *pay* under § 1491 based on the theory that plaintiff was never lawfully discharged.

50. Glidden v. Zdanok, 370 U.S. 530 (1962). The Court of Claims is declared by Congress "to be a court established under article III of the Constitution. . . ." 28 U.S.C. § 171 (1958).

51. See Yakus v. United States, 321 U.S. 414, 468 (1944) (dissenting opinion): "It is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements or . . . without regard to them. . . . [W]henever the judicial power is called into play, it is responsible directly to the fundamental law and no other authority can intervene to force or

trict courts was sustained by a divided Supreme Court in *Yakus v. United States*,[52] but there the party who was precluded by statute from raising a constitutional point had been provided with a prior opportunity to do so before a constitutional forum. Where an individual dishonorably discharged pursuant to a court-martial conviction sues in the Court of Claims for his lost pay, there will have been no prior opportunity to attack his sentence in a constitutional court, except on habeas corpus. And habeas corpus would be available only if the accused were in custody.[53] He would not have that remedy if he had been released or if he had been sentenced to a dishonorable discharge without confinement. Here the Court of Claims might make a distinction, in an effort to follow the *Yakus* reasoning, and undertake review of a court martial sentence only where the party had no adequate prior opportunity to obtain habeas corpus. It seems preferable, however, for the validity of all court-martial sentences separating an individual from the service to be open for adjudication when the question arises in a Court of Claims suit, at least to the limited extent allowed on habeas corpus review, because this avoids the anomalous possibility of the court's having to give legal effect to a void conviction. There is ample precedent for this. Not only in *Shapiro* but also in some of the earliest Court of Claims suits for military pay, court-martial sentences were reviewed and held invalid.[54]

A Court of Claims holding that a military discharge, whether effected by court-martial or other means, is legally inoperative, is precisely the same holding that a United States District Court would make in rendering a declaratory judgment for the same plaintiff had he brought suit there for a declaration instead of suing for money.[55] The Supreme Court's decision in *Harmon v. Brucker*[56] was a major breakthrough in establishing the authority of district courts to review the legality of a discharge. In that case, the Supreme Court held that the district court had jurisdiction to determine whether the Secretary of the Army had exceeded his statutory authority in issuing less than "honorable" discharge certificates to two soldiers. If any of the presently recognized theories of invalidity is established, the court at least can declare that the separation was a legal nullity.[57] It is sometimes said that in cases like *Harmon*

authorize the judicial body to disregard it." See also Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1373 (1953).

52. 321 U.S. 414 (1944). *Yakus* was a criminal prosecution where the defendant was prevented from raising a constitutional issue in his defense because a statute deprived the district court of jurisdiction to consider the issue. In a Court of Claims suit for pay, however, it is the plaintiff in a civil action who would be deprived of access to the Constitution if the court were denied all authority to review the conviction. This may make a difference. See Hart, note 51 *supra*.

53. 28 U.S.C. § 2241(c)(3) (1958).

54. United States v. Brown, 206 U.S. 240 (1907); Runkle v. United States, 122 U.S. 543 (1887).

55. *E.g.*, *compare* Murray v. United States, No. 237-57, Ct. Cl., June 7, 1961, *with* Bland v. Connally, 293 F.2d 852 (D.C. Cir. 1961).

56. 355 U.S. 579 (1958).

57. Bland v. Connally, note 55 *supra* at 852, 860; Davis v. Stahr, 293 F.2d 860 (D.C. Cir. 1961); Beard v. Stahr, 370 U.S. 41, 44 (1962) (dissenting opinion); *accord*, Vitarelli

the plaintiff is complaining of the "character" of his discharge and not the "fact" of discharge. That is, he does not object to being put out of the military service; he only objects to his separation being characterized derogatorily as something less than honorable. While this may be the plaintiff's subjective position—indeed there will rarely be any complaint about an honorable discharge —the courts have not made the distinction in deciding cases. The "fact" and the "character" are treated as inseparable; the discharge as issued is either valid or invalid. No theory has yet been developed judicially which allows the characterization of a discharge to be successfully attacked but which at the same time leaves the discharge operative to terminate military status.[58] It may be, however, that under its equity power a district court could compel simply a recharacterization.[59] This might have the advantage of being a lesser judicial interference into executive affairs than a decree voiding the discharge, since it would not disturb the termination of status.

As in the Court of Claims, there is some cloudiness about the authority of a district court to review a discharge issued pursuant to a court-martial sentence. There is support for the proposition that a federal court can review a court-martial only on habeas corpus.[60] That may be sound if the person is in confine-

v. Seaton, 359 U.S. 535 (1959); Peters v. Hobby, 349 U.S. 331 (1955). *But see* Marshall v. Crotty, 185 F.2d 622, 627-28 (1st Cir. 1950), and the text at notes 171-74 *infra*.

58. Inferential support for the inseparability of the "fact" and the "character" may be found in Vitarelli v. Seaton, note 57 *supra* at 546 n.8. In addition to Harmon v. Brucker, note 56 *supra*, see Bland v. Connally, note 55 *supra* and Davis v. Stahr, note 57, *supra*, where the unfavorable character of discharge was apparently the complaint but the court in holding for plaintiff said that "he is entitled to have the discharge he has been given declared to be void." Bland v. Connally, note 55 *supra* at 860. The possibility of relief directed to characterization alone was not mentioned by the court. But the Army appears to have responded to the *Davis* decision as though that had been the decree. By direction of the Secretary, the Adjutant General "effected a change in the type of discharge issued . . . from General, under honorable conditions, to Honorable. . . ." Letter from Office of the Adjutant General, Dept. of the Army, to the author, Dec. 13, 1962. Conceptually, this administrative action seems inconsistent with the judicial holding that the discharge was *void*. Whether the recharacterized discharge was considered to be effective at the date of recharacterization or at the date of the original, now invalidated, separation action is not indicated. For discussion of retroactive termination of status see text at notes 101-10 *infra*. In Olenick v. Brucker, 173 F. Supp. 493 (D.D.C. 1959), *remanded*, 273 F.2d 819 (D.C. Cir. 1959), plaintiff sought both a declaration that an undesirable discharge was "null and void" and an order compelling the Secretary to issue an honorable discharge; but no relief is reported.

59. The two dissenting Justices in Beard v. Stahr, 370 U.S. 41, 44 (1962), said that "the Court's opinion may be read as indicating that a collateral proceeding to set aside one discharge and to direct that an honorable one be granted may lie. . . ." This relief would not be possible in the Court of Claims because of its remedial limitation. That court is confined to (1) holding the discharge void and giving judgment for the plaintiff or (2) holding the discharge valid and rendering judgment for the government.

60. Goldstein v. Johnson, 184 F.2d 342 (D.C. Cir.), *cert. denied*, 340 U.S. 879 (1950). In passing on the legality of confinement by habeas corpus, the district court could make the same kind of determination the Court of Claims made in *Shapiro* and thus nullify the discharge. See Beets v. Hunter, 75 F. Supp. 825 (D. Kan. 1948), *rev'd on other grounds*, 180 F.2d 101 (10th Cir. 1950).

ment under the sentence and can thus obtain the Great Writ. But if it is unavailable because he is not in custody, the individual would be left without any judicial remedy for a void discharge unless he were allowed a declaratory judgment [61] or unless he had lost monetary benefits for which he could sue in the Court of Claims. Even in the latter case, the individual for good reasons might be more interested in having his dishonorable discharge invalidated by a district court action at home than by filing suit in Washington for money. The policy behind the recent amendments to Title 28 of making relief more readily available for "citizens who seek no more than lawful treatment from their government"[62] likewise supports district court jurisdiction to review a court-martial-ordered separation by declaratory action, at least where habeas corpus is unavailable.

There are, then, only two differences between a Court of Claims and a district court adjudication that a separation from the service is legally inoperative: (1) in the Court of Claims the decision is made as an incident to rendering a money judgment, while in the district courts it is in the form of a direct declaration; (2) in the Court of Claims the defendant is the United States, while in the district courts the defendants are officials of the United States. Despite these differences the binding effect of the judgments of both courts on the government and its officers should be the same under our notions of collateral estoppel, with one possible qualification as to a district court judgment, traceable to the nature of the parties defendant.

Putting aside for the moment this distinction as to parties, the ruling by either court that a discharge is invalid meets the traditional requirements of collateral estoppel. The issue of discharge has been actually litigated and decided and its determination is essential to the judgment.[63] This is not merely an evidentiary matter or a "mediate datum";[64] it is the ultimate point on which the declaration or judgment for pay rests. Even if the validity or invalidity of a discharge be called a question of law and not of fact the rules of estoppel normally foreclose relitigation as far as the same historical transaction—the issuance of

61. In Jones v. Cunningham, 371 U.S. 236 (1963), a state prisoner argued that a federal court could render a declaratory judgment as to the unconstitutionality of his sentence if habeas corpus were unavailable for want of custody. Brief for Petitioner, pp. 38-45. But it was unnecessary for the Supreme Court to reach the question since it held that petitioner was in custody.

62. S. REP. No. 1992, 87th Cong., 2d Sess. (1962), set out in 1962 U.S. CODE CONG. & AD. NEWS 2784, 2785; Byse, note 26 *supra* at 1494-96.

63. See RESTATEMENT, JUDGMENTS § 68 (1942); Cromwell v. County of Sac, 94 U.S. 351, 353 (1876); Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1 (1942); *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 840-50 (1952). The Court of Claims has said: "The only distinction between the jurisdiction of the district court and of our court in suits by Government employees complaining of their discharge is the nature of the relief which can be granted. . . . The nature of the relief sought in the first action never controls the application of the rule of estoppel by judgment." Edgar v. United States, 145 Ct. Cl. 9, 14, 16, 171 F. Supp. 243, 246, 248 (1959).

64. See The Evergreens v. Nunan, 141 F.2d 927 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944); RESTATEMENT, JUDGMENTS § 68, Comment *p* (Supp. 1948).

the particular discharge—is concerned.[65] In the Court of Claims, however, this controlling determination is sometimes referred to as "incidental." There is a view that where a determination is "incidental" and the court is without jurisdiction to determine it "directly," estoppel effect will be denied.[66] Aside from the question whether this applies at all to this type of Court of Claims litigation, there is authority to the contrary. For example, a state court determination in a contract action that a patent is invalid has been held binding in a federal court even though the state court is without jurisdiction over a suit brought directly to invalidate a patent.[67] The rules of estoppel reflect a policy against repetitious litigation: A party is entitled to his day in court, but once he has had a fair hearing he is not entitled to another, at least not against the same opponent and those in privity with him. Nothing in this policy requires that binding effect be denied a Court of Claims holding—when essential to the judgment—that a discharge is invalid. The government is afforded full opportunity to litigate the issue in a constitutional forum of at least equal dignity with a district court. It can reasonably foresee that the issue may arise later in other contexts though it will always involve the same basic transaction—the official separation action.[68] There is no substantial countervailing reason for allowing the government and its officers [69] to disregard the determination, thereby burdening the plaintiff with relitigating the identical claim in the district court, if he needs further relief from the void discharge.

In previous years it might have been contended that giving such finality to a Court of Claims decision on the legality of a termination of status would undercut congressional policy. The point would have been that Congress set up district courts as article III tribunals to exercise general federal question jurisdiction, with the Court of Claims as a specialized forum chiefly to relieve Congress of the private relief bill problem. But this argument has now lost much of its force because of the recent recognition that the Court of Claims, like a district court, is established under article III and is exercising the judicial power defined there.[70] No unfairness is done the military establishment by requiring

65. See United States v. Moser, 266 U.S. 236 (1924); RESTATEMENT, JUDGMENTS § 70 (1942).

66. RESTATEMENT, JUDGMENTS § 71 (1942): "Where a court has incidentally determined a matter which it would have had no jurisdiction to determine in an action brought directly to determine it, the judgment is not conclusive in a subsequent action brought to determine the matter directly." See *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 848-50 (1952).

67. Becher v. Contoure Laboratories, Inc., 279 U.S. 388 (1929); Pratt v. Paris Gas Light & Coke Co., 168 U.S. 255 (1897); Vanderveer v. Erie Malleable Iron Co., 238 F.2d 510 (3d Cir. 1956). See also, with respect to RESTATEMENT, JUDGMENTS § 71 (1942), Edgar v. United States, *supra* note 63.

68. *Cf.* The Evergreens v. Nunan, *supra* note 64; *Developments in the Law—Res Judicata*, *supra* note 66 at 843.

69. "Where a suit binds the United States, it binds its subordinate officials." Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 403 (1940). Assuming, therefore, that the traditional requirements for collateral estoppel are satisfied, as it is submitted they are here, a Court of Claims judgment holding a discharge void is conclusive on all federal officers.

70. Glidden Co. v. Zdanok, 370 U.S. 530 (1962).

it to litigate the validity of its separation actions in one of these constitutional courts rather than the other, or in allowing the plaintiff to choose between two such forums. Either way the government ultimately may obtain Supreme Court review if it loses. In the district court the findings of fact and conclusions of law will be made by a single judge, with immediate review of right in a court of appeals. On the other hand, in the Court of Claims several judges sit and the only review is discretionary in the Supreme Court. These differences, however, hardly justify giving a different effect to the results.

The military authorities agree they will be bound by a district court declaration that a discharge is void.[71] Of course only the named defendants will be bound. But all officials who would be concerned in any way with the plaintiff's military status and the consequences of an invalid discharge could probably be joined in the action. The only estoppel problem would arise if plaintiff sought thereafter to recover his back pay in the Court of Claims, relying on the declaratory judgment to establish the invalidity of the discharge. This stems from the necessary difference in defendants before the different forums. In *Borak v. United States*[72] a civilian employee did sue the United States for back pay after he obtained a declaratory judgment against the Attorney General that his dismissal from the Justice Department was illegal.[73] Although the Court of Claims did not expressly discuss estoppel, it said that "the only question before us" is the amount of the recovery;[74] thus, it appeared to accept the illegality of the discharge. On the other hand, there is dictum in the First Circuit that the United States will not be bound in the Court of Claims by a prior declaration against one of its officials.[75] And Supreme Court opinions indicate the same thing where the official sued is not authorized to represent the interests of the United States in the district court litigation.[76] How this should be applied to military status litigation is debatable. In the present state of the law a plaintiff who has obtained an adjudication that his discharge is void, in an action against a Secretary of an armed service, has no assurance that he can rely on that adjudication if he later sues for his pay in the Court of Claims. He may be compelled to relitigate the issue. It would make much sense to hold the United States bound here; it would also not be radically out of line with traditional ideas of privity, because in reality the United States controls the litigation and has a direct interest in supporting the defendant officers.[77] They are actually represented by government counsel. There is nothing "personal" about the action. But the fiction employed to skirt the sovereign immunity objection is

71. Notes 86, 87 *infra*.

72. 110 Ct. Cl. 236, 78 F. Supp. 123 (1948).

73. 141 F.2d 278 (D.C. Cir. 1944).

74. Note 72 *supra* at 124. The Court of Appeals later said that "[F]ollowing the *Borak* case [*ibid.*], two Court of Claims Judgments were in fact obtained on the basis of the decision of this court." Almour v. Pace, 193 F.2d 699, 701 n.6 (D.C. Cir. 1951).

75. Marshall v. Crotty, 185 F.2d 622, 628 (1st Cir. 1950).

76. See United States v. Nunnally Investment Co., 316 U.S. 258 (1942); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 403 (1940).

77. See *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 856-57 (1952).

so deeply engrained in judicial review—where sovereign immunity has not been waived by statute—that it will probably continue to deflect application of the privity concept until a statutory waiver is effected.[78]

Even if the United States itself, in this special situation, is not bound by a district court judgment, the military authorities are. Indeed they are required to recognize the judicial nullification of a discharge, whether made by the Court of Claims or a district court because in either case it is the determination of a constitutional court, a determination which should therefore be final and not subject to revision by any other agencies of government.[79] Consequently, either a Court of Claims judgment for pay or a district court declaratory judgment can in legal effect "reinstate" a person in the military service or "restore" him to active duty. Actually this only appears to be a reinstatement, for the result of the holding is that a previously existing status was not terminated, though the military considered that it had been.[80] Therefore, unless the plaintiff's status has been altered subsequent to his abortive discharge by other action of the parties or by operation of law he continues to occupy his pre-discharge status following the judgment. If the military then desires to terminate the status, it must initiate fresh separation proceedings.

Military law has always viewed a void discharge as completely inoperative, leaving the pre-discharge status unaffected.[81] But this was where the military authorities themselves made the determination of voidness. Recently the military has also taken this view in some cases where the determination was judicially made. For example, after the 1960 Court of Claims ruling in *Clackum v. United States*[82] that a 1952 discharge was invalid, the Air Force, apparently acting on the above theory, issued a new discharge to the plaintiff effective in March 1961. It was thought that no administrative action "reinstating" the plaintiff was necessary because the judgment had that effect as a matter of law.[83] A like view by the Army, although not with reference to a Court of

78. See Byse, note 26 *supra* at 1523-31.

79. Glidden Co. v. Zdanok, 370 U.S. 530, 554-58 (1962); Chicago & So. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113-14 (1948); United States v. O'Grady, 89 U.S. (22 Wall.) 641, 648 (1874); Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792). A Court of Claims judgment was not open to revision by the executive department even in the period before the court had been declared a constitutional tribunal. See note 149 *infra*. Thus, the estoppel effect of its judgments is not dependent solely on the *Glidden Co.* decision, *supra*.

80. For judicial statements to this effect see, *e.g.*, United States v. Perkins, 116 U.S. 483, 485 (1886) (suit for pay); Clackum v. United States, 148 Ct. Cl. 404, 410, 296 F.2d 226, 229 (1960) (suit for pay); Boruski v. United States, 140 Ct. Cl. 1, 6, 155 F. Supp. 320, 323 (1957) (suit for pay); Neary v. Greenough, 120 F. Supp. 833, 839 (D. Me. 1954) (habeas corpus); *In re* Bird, 3 Fed. Cas. 425, 427 (No. 1428) (D. Ore. 1871) (habeas corpus).

81. See, *e.g.*, Dig. Ops., JAG, 1912, pp. 459-60, 818; WINTHROP, MILITARY LAW AND PRECEDENTS 754 (2d ed. 1920).

82. *Supra* note 80.

83. Letter from Office of the Judge Advocate General, Department of the Air Force, to the author, Oct. 30, 1962. Clackum v. United States, No. 246-56 Ct. Cl. March 6, 1963. This was also done in a companion case. Garner v. United States, No. 23-58, Ct. Cl. March 6, 1963.

Claims case, was expressed even more explicitly during the pendency of *Beard v. Stahr*.[84] In response to an inquiry from the Supreme Court the Judge Advocate General's Office rendered an opinion that in the event the Court should hold the discharge void "the discharge would be regarded as a nullity [and] . . . the mentioned officer would be treated as having continued as a commissioned officer with all the rights and privileges incident to such status from the date of his purported discharge."[85] The Navy likewise appears to take this position.[86]

Judicial "restoration" to active duty in this indirect manner could have curious ramifications. For example, in *Clackum* and a companion case, *Garner v. United States*,[87] the discharges were invalidated nine years after their issuance; the court held that they "did not effect the plaintiff's separation from the Air Force."[88] Thus plaintiffs, both members of the WAF, were suddenly revealed to have been legally in an active duty military status during all that time and in theory still on active duty. Does it necessarily follow, as the Army indicated in *Beard*, that all incidents of active duty status attach? A multitude of questions can be imagined. Are the plaintiffs subject to court-martial trial for alleged offenses during that nine-year period?[89] If they had become disabled, would they have a right to disability retirement benefits for those on active duty?[90] Should the elapsed time be counted in determining retirement rights based on length of active duty?[91] If they had died in the nine-year interim, would the government be liable for funeral expenses or for the gratuity payable on the death of a serviceman on active duty?[92] Should the period be taken into account for computing veterans' benefits dependent on length of active service or on when active service terminated or on when a disability occurred?[93] Reasoning from the theory discussed above, the answer to all these questions would

84. 200 F. Supp. 766 (D.D.C. 1961), *vacated and remanded*, 370 U.S. 41 (1962).

85. JAGA 1962/3830, 30 April 1962. The quoted language is from the draft of a letter accompanying this JAG opinion, prepared for the signature of the Secretary of the Army and addressed to the Solicitor General. The Army apparently does not so view a Court of Claims determination that a discharge is invalid. See the discussion of Shapiro v. United States, in the text accompanying notes 101-08 *infra*.

86. JAG:II:1:CTC:rjw, 24 Aug. 1951; Letter from Office of the Judge Advocate General, Department of the Navy, to the author, Oct. 3, 1962; Letter from Bureau of Naval Personnel, Department of the Navy, to the author, Oct. 12, 1962. It is not clear whether the Navy treats Court of Claims judgments in the same manner as those of district courts.

87. No. 23-58, Ct. Cl., March 6, 1963.

88. Clackum v. United States, 148 Ct. Cl. 404, 410, 296 F.2d 226, 229 (1960).

89. All persons on active duty in the armed forces are subject to court-martial jurisdiction. Art. 2, UCMJ, 10 U.S.C. § 802 (1958).

90. See 10 U.S.C. § 1201 (1958).

91. See, *e.g.*, 10 U.S.C. §§ 1255, 1263, 1305 (1958).

92. See 10 U.S.C. § 1475(a)(1) (1958) (death gratuity paid to survivor of "a member of an armed force . . . who dies while on active duty"); 10 U.S.C. § 1482 (1958) (funeral expenses).

93. See 72 Stat. 1118-42, 1171, 1174-77, 1203, 1222-23 (1958), 38 U.S.C. §§ 301-612, 1501-02, 1601-13, 1801-02, 2101-02 (1958); Lerner, *Effect of Character of Discharge and Length of Service on Eligibility to Veterans' Benefits*, 13 MILITARY L. REV. 121 (1961).

appear to be "Yes." And perhaps this ought to be the answer. Arguably the government by its illegal separation action should not be allowed to deprive plaintiffs of these monetary incidents of active duty status any more than it can deprive them of the pay. On the other hand, to allow these benefits just as though plaintiffs actually had been performing active service over the nine-year period seems to give undue advantage to the individual. Had the judgment come earlier the government could have promptly carried out a lawful separation and thereby avoided any substantial liability.

There appears to be no way the military authorities can avoid altogether this collateral impact of the judgment, yet accord it the binding effect it deserves. Rarely will anything have happened to terminate plaintiff's status between the date of the abortive discharge and the date of judgment. The armed service would assume that it had already discharged the person, and thus would not be apt to take any additional separation action before the judgment. The expiration of the enlistment period in the interim would not terminate status, since military law holds that official action is necessary to accomplish this.[94] Nor would it be affected by plaintiff's *ex parte* activity.[95] There is a theory of "constructive discharge" which may be invoked to terminate status retrospectively in place of an invalid formal separation where the individual has accepted the discharge and the military has acquiesced.[96] The theory is not well-developed in military law, and in any event it is questionable whether it should apply where, as in these cases, the individual is actively contesting the validity of his separation.

In the *Clackum* case the Court of Claims met this problem by awarding pay from the date of the illegal discharge only through the remainder of the plaintiff's three-year enlistment period and not to the much later date when the Air Force issued a valid discharge.[97] This meant she recovered pay for twenty-one months instead of nine years. Perhaps the end of the enlistment period (for enlisted personnel) or term of duty (for officers) could be used in this manner as the cut-off point for all benefits and incidents stemming from active status. In cases like *Clackum* this could greatly narrow the range of governmental liability. It is contrary, however, to the well-settled military rule that status is not terminated by the expiration of a stated term of service; affirmative official action is required.[98] Furthermore, the court's holding in *Clackum* is also in conflict with the proposition that pay is an incident of status, though the holding accords with a possible exception to this, that where active duty is not being performed in fact the right to pay ends with the term of service.[99] If pay can be cut off on this basis, perhaps all other monetary benefits can be treated

94. JAGA 1952/8512, 21 Nov. 1952.

95. A soldier "cannot discharge himself." WINTHROP, MILITARY LAW AND PRECEDENTS 90 (2d ed. 1920).

96. See JAGA 1954/1547, 16 Feb. 1954.

97. Clackum v. United States, No. 246-56, Ct. Cl., 6 March 1963.

98. Notes 94-95 *supra; cf.* Vitarelli v. Seaton, 359 U.S. 535 (1959).

99. The existence and applicability of this exception are open to doubt. See Fulton, *Uncertainties in the Pay and Allowance Laws*, 9 MILITARY L. REV. 151 (1960); Bell v. United States, 366 U.S. 393, 401-04 (1961).

the same way. Unfortunately the court did not illuminate this unclear area of status litigation by any explanation.

Even if all benefits are held to end with the stated term of service, this, however, would only reduce and not extinguish the government's liability, for there may be several years remaining in that term after the date of the abortive discharge. Moreover, the rationale would not be available at all if the individual were on an indefinite tour of duty. This was true in the *Garner* case, and the court stated: "[T]here is no termination date for her active duty or enlistment contract that would otherwise have been operative but for the illegal discharge. . . ."[100] Accordingly, she was awarded pay up to the date of the new, valid discharge which had been issued by the Air Force, as in *Clackum*, after the court had nullified the earlier separation attempt.

Issuing a new but "back-dated" discharge is another possibility for avoiding the collateral impact of these judgments. This was in fact done after the Court of Claims held in *Shapiro v. United States*,[101] in 1947, that a dismissal in 1944 was of no legal effect because it was ordered pursuant to a void court-martial conviction. Thereafter, the Secretary of the Army changed the official records to show that plaintiff was honorably separated in 1944, on the date of the now invalidated dismissal.[102] Under this approach the government of course still pays the judgment for active duty pay, but for all other purposes military status is considered terminated when it was first intended to be. The anomaly here is that a court has expressly held that the original separation action was legally inoperative. Can the military breathe validity into it retroactively?

Judged by its response to *Clackum*, the Air Force appears to think not, for after judgment it issued another discharge effective at that time.[103] This of course is contrary to the Army's action after *Shapiro*. Indeed, a memorandum prepared in the Judge Advocate General's Office states that the court's *Shapiro* decision "does not affect the sentence of the court-martial which, when confirmed and ordered executed, had all the finality of any other judgment."[104] In another case where an administrative determination was made that an executed Army discharge of one character was unauthorized, it was replaced later with a different character of discharge bearing the original date.[105] The Army's attitude on this point is not altogether clear, however, for with reference to a discharge considered void because it was issued in violation of regulations, it was said that it "cannot be subsequently validated."[106] This, along with the

100. Garner v. United States, No. 23-58, Ct. Cl., March 6, 1963.

101. 107 Ct. Cl. 650, 69 F. Supp. 205 (1947).

102. Letter from Office of the Adjutant General, Department of the Army, to the author, Dec. 13, 1962; JAGA 1963/3493, 1 Feb. 1963.

103. See note 83 *supra*.

104. JAGA 1963/3493, 1 Feb. 1963.

105. JAGA 1960/4587, 4 Oct. 1960.

106. JAGA 1947/1754, 11 Feb. 1947, 6 Bull. JAG 70 (1947). For a discussion of the special case of substitution of a back-dated administrative discharge for a punitive discharge, see Smith v. United States, 145 Ct. Cl. 104, 109, 170 F. Supp. 639, 641-42 (1959). However, that appears to have little bearing on the kind of judicially invalidated separation under discussion here.

unequivocal view of the Army Judge Advocate General in connection with *Beard v. Stahr*,[107] seems inconsistent with the back-dating action taken after *Shapiro*. Reconciliation, from the Army's standpoint, is possible only on the ground that in *Shapiro* the determination of invalidity was made by the Court of Claims and this is considered not binding. This puts the Army in the position of accepting as conclusive an adjudication of a district court, court of appeals or the Supreme Court, such as might have been made in *Beard v. Stahr*, but at the same time refusing such effect to the identical adjudication in the Court of Claims.[108] If that distinction is sound, no action of any kind by the military would be necessary to terminate status following a Court of Claims decision, and the back-dating problem need be of no concern. Logically, the military would be entitled to ignore the monetary judgment and continue to treat the original discharge as operative to remove plaintiff from the service. On the other hand, if this apparent Army view is not sound, as is here contended, then there appears to be no easy way to escape recognizing active duty status as continuing, at least where the individual was on an indefinite term of active duty, until a new, contemporaneously effective discharge is issued after the judgment.

The Supreme Court opinions in *Vitarelli v. Seaton*[109] seem to block the possibility of validating retroactively a separation which is otherwise inoperative. There the Court held that the dismissal of a Department of Interior employee was "illegal and of no effect" because of a failure to observe departmental regulations governing that type of dismissal. In 1956, while the case was pending but before it reached the Supreme Court, the Secretary had served a substitute notice of dismissal, dated to the time of original dismissal, on the employee. Though the Court divided over whether this was effective to terminate employment at the time it was served in 1956, all the Justices agreed that it did not legalize the purported 1954 dismissal which the Court had just adjudicated to be void. *Vitarelli* is parallel to the cases involving abortive separations from military service, and no reason appears why the Secretaries of the armed services should be allowed to retroactively validate a void discharge when the Secretary of Interior was denied such authority under the same circumstances, unless a distinction is to be made between civilian employees and members of the armed services. The necessarily more comprehensive executive control over servicemen, reflect in disciplinary powers and court-martial authority, might arguably support greater executive leeway in dealing with them generally. But executive free-

107. See note 85 *supra*. The JAG opinion on *Beard* states: "Should it be judicially determined that the Secretary of the Army acted contrary to or without authority of law in separating the Plaintiff, such separation would be a void act and the *Plaintiff would still be a member of the Army*. Under such circumstances, reappointment is not required. The remedy lies in the administrative correction of appropriate records to properly reflect *the continued status*. Accordingly, such correction could be accomplished administratively by the Secretary of the Army." JAGA 1961/5565, 20 Nov. 1961 (emphasis added).

108. The Supreme Court may review and affirm a Court of Claims decision. There is no indication how such a Supreme Court adjudication would be viewed.

109. 359 U.S. 535 (1959).

dom to terminate status retroactively is no more important to effective control of the defense establishment than it is to other departments. Moreover, as suggested below, preventing retroactive discharges actually has little practical impact on executive prerogative.

If the armed forces cannot retroactively validate a void discharge, a plaintiff's active duty status would presumably be given effect following a money judgment or declaratory decree, without any coercive remedy being employed. The military on its own motion would no doubt issue a fresh, currently dated discharge to terminate plaintiff's status. As a practical matter, most plaintiffs are probably satisfied with a recovery of pay or with a favorable recharacterization of the discharge even though back-dated. But it could be important to a person that his active duty status be recognized as continuing after the abortive termination. If the military should refuse to accord such recognition, the plaintiff might attempt to obtain a writ of mandamus or injunction.[110] He would be asking the court in effect to compel the Secretary to place him on active duty. And at this the judiciary has long balked.[111] Although a coercive order of this sort may appear to be an intrusion deep into the executive domain, a declaratory or money judgment invalidating a military discharge has precisely the same legal effect through its collateral impact. It seems but a short step to order affirmatively its formal recognition. No great harm can come to the armed service because the plaintiff can be redischarged immediately following the court order. Indeed a court order may be chiefly a means of inducing issuance of a valid, currently dated discharge. This was specifically noted in *Vitarelli v. Seaton*.[112] After ruling that the dismissal was legally ineffective, and that petitioner was entitled to reinstatement, the Court added, "subject, of course, to any lawful exercise of the Secretary's authority hereafter to dismiss him from employment. . . ."[113]

## III. Retirement Cases

The retirement cases present a different and more difficult kind of military status problem. Where a plaintiff successfully attacks a separation from the service and the court holds that military action intended to change status was legally inoperative to effect any such change, the consequence is that a prior status continues. In the typical retirement case, however, the armed service has refused to change the individual's status to that of retirement. That is, the in-

110. Of course, if the plaintiff successfully sued first in the Court of Claims, the rules of estoppel should permit him to obtain mandamus or injunction in a district court without relitigating the invalidity of his discharge.

111. United States *ex rel.* Creary v. Weeks, 259 U.S. 336 (1922); United States *ex rel.* French v. Weeks, 259 U.S. 326 (1922); Hanes v. Pace, 203 F.2d 225, 228 (D.C. Cir. 1953). "No court is vested with jurisdiction over the Army to the extent that it may . . . order one discharged restored to duty." Bernstein v. Herren, 141 F. Supp. 78, 80 (S.D. N.Y.), *aff'd*, 234 F.2d 434 (2d Cir.), *cert. denied*, 352 U.S. 840 (1956) (Quaere: To be accurate must this not be read to mean that the discharge was valid, *i.e.*, legally operative?). *But see* Borak v. Biddle, 141 F.2d 278 (D.C. Cir. 1944) (Justice Department employee); Farley v. United States *ex rel.* Welch, 92 F.2d 533 (D.C. Cir. 1937) (postal employee); text at note 113 *infra*.

112. 359 U.S. 535 (1959).

113. *Id.* at 546.

dividual claims that he is legally entitled to be retired but the military disagrees and refuses to recognize that status. If the matter then goes to litigation the court, in order to hold for plaintiff, cannot simply nullify a change-of-status action; the court must hold that plaintiff has a status which the military service has itself never conferred on him nor recognized as existing. This is exactly what is being done in the Court of Claims.

In explaining its authority to decide these cases the Court of Claims has said that "The right to retirement pay is statutory. . . . In determining whether or not the plaintiff was denied his statutory right to disability retired pay, the court is merely exercising its jurisdiction under 28 U.S.C. section 1491, to render judgment upon any claim against the United States founded upon an act of Congress."[114] To render such a judgment, the court has been forced to evolve an unusual two-step process. The first is to examine the action of the military service in denying retirement to determine whether it was arbitrary or without factual support.[115] The principle invoked is that "A public officer, in making decisions affecting the rights of citizens, is not free to act capriciously. . . ."[116] This is orthodox review of administrative action, and, apart from familiar arguments about scope of review, it presents no unique difficulty. But a finding of arbitrariness simply invalidates the administrative action refusing retirement. It will not support a judgment for pay because it is not equivalent to a holding that the plaintiff is retired. Thus the necessity of the second step—the determination whether plaintiff is entitled to be retired under the statute. As the court puts it: "On a finding of arbitrary or otherwise unlawful action by the retiring board and Secretary, it is our duty to act in the place of the retiring board and, on a finding of disability at the time of discharge, to hold an officer is entitled to retired pay from the date of his discharge."[117] In short, the court says that it must "render that decision which the board and the Secretary should have rendered."[118] This second step presents the difficult problem. The argument against it is that the court is actually conferring a status which plaintiff never had and which only the executive, not the judiciary, can confer.[119]

The Court of Claims denies that it does this and indeed disavows any power to do so.[120] In *Betts v. United States*[121] it met the point this way:

114. Patterson v. United States, 141 Ct. Cl. 435, 438 (1958).

115. See, *e.g.*, Betts v. United States, 145 Ct. Cl. 530, 172 F. Supp. 450 (1959); Furlong v. United States, 138 Ct. Cl. 843, 152 F. Supp. 238 (1957); Brown v. United States, 143 Ct. Cl. 605, 607 (1958); Girault v. United States, 133 Ct. Cl. 135, 135 F. Supp. 521 (1955). And see Brenner, *Judicial Review by Money Judgment in the Court of Claims*, 21 FED. B.J. 179, 196-200 (1961).

116. Betts v. United States, *supra* note 115 at 145, Ct. Cl. at 535, 172 F. Supp. at 453.

117. Furlong v. United States, 138 Ct. Cl. 843, 846, 152 F. Supp. 238, 241 (1957).

118. *Id.* at 846, 152 F. Supp. at 241; see cases cited in note 115 *supra*.

119. See Philos, *Suits in the Court of Claims Involving Status—A Dilemma*, 16 FED. B.J. 103, 108-10, 119-22, 127-30 (1956).

120. See Betts v. United States, 145 Ct. Cl. 530, 536, 172 F. Supp. 450, 453-54 (1959); Patterson v. United States, 141 Ct. Cl. 435, 438 (1958); Friedman v. United States, 141 Ct. Cl. 239, 258, 158 F. Supp. 364, 376 (1958); Millan v. United States, 140 Ct. Cl. 526, 527, 153 F. Supp. 370, 371 (1957).

121. 145 Ct. Cl. 530, 172 F. Supp. 450 (1959).

> The Government raises a question of the law of the Constitution. It says that a decision awarding the plaintiff the retired pay which the statutes grant to officers in his situation would be a decision appointing the plaintiff to a commissioned office in the Army, and that the authority to make such appointments is, by the Constitution, lodged exclusively in the Executive.
>
> This court has, of course, no authority to appoint persons to public office. It does have jurisdiction to award them money damages as compensation for violations of rights granted to them by statute or regulation. . . . What the Executive may or may not do by way of specific correction of errors or injustices which are embodied in its military records is not subject to review by this court.[122]

On another occasion it said: "While it is true that this court cannot confer the status of disability retirement on a member or former member of the armed forces . . . this court has jurisdiction to render judgment for the pay which was denied the claimant by the arbitrary or capricious actions of the administrative agency of the Government."[123]

The court is quite correct in indicating that it cannot directly order executive action. However, this is only a matter of remedial power: it lacks authority to issue writs of mandamus or injunction. And quite obviously it cannot confer military status in the same sense that executive officials can. Nor can the Court of Claims render a declaratory judgment as such. But it has never attempted to do any of these things. What it does do in these cases, however, is to decide that the plaintiff has a statutory right to retirement pay. This is tantamount to holding that he is in a retired status because the government's liability for pay would not arise except for the status. As the military lawyers say, pay is an incident of status.[124] The court's disavowals about conferring status tend to obscure this point. Since the Court of Claims cannot award recovery simply on "moral considerations,"[125] but only on the basis of a legal right, it cannot avoid holding that plaintiff is legally entitled to be retired when it enters a judgment for retired pay. Just as in awarding active duty pay the court must find that despite military action to the contrary plaintiff was in an active duty status, so the court, in awarding retired pay, must find that despite contrary military action the plaintiff was in a retired status. In both cases it is making a military status determination for the purpose of awarding the monetary benefits incident to that status. The material difference, as pointed out above, is that in the active duty pay cases the court need only nullify military action, thereby leaving the

122. *Id.* at 536, 172 F. Supp. at 453-54.

123. Millan v. United States, 140 Ct. Cl. 526, 527, 153 F. Supp. 370, 371 (1957).

124. See note 42 *supra.*

125. "Claims which can only be allowed on the basis of moral considerations or honorable dealings or upon the broad principles of equity and justice, are not within the jurisdiction of this court. . . ." Patton v. United States, 140 Ct. Cl. 195, 201, 75 F. Supp. 470, 473 (1948). The Court of Claims has jurisdiction "only to adjudicate legal claims based upon some right granted by the Constitution of the United States, a law of Congress or a contract express or implied with the Government." *Id.* at 200-01, 75 F. Supp. at 472.

plaintiff in his previous status. In the retirement cases, the court must take the additional step of affirmatively deciding that plaintiff has a status not previously occupied.

The court's authority to take this additional step has been challenged,[126] and it is legitimately debatable. It is hardly debatable, however, that the court has jurisdiction over the cases in which it makes these status decisions. On the postulate that jurisdiction is granted in terms of cases, not issues, a claim for statutory retirement pay, by invoking the Court of Claims' jurisdiction, empowers it to decide all issues necessary to a rendition of judgment, including the reach of judicial review, unless such power is denied by some other valid statute. If, as contended by others, the retirement statutes vest the military authorities with the final say on granting or withholding retirement, this could be construed as precluding the court from reviewing the question.[127] The resulting lack of authority in the court to make this affirmative status determination would not rest on the ground that such a decision is outside its basic jurisdiction under section 1491; the limitation would come from the retirement statutes making the armed services' determination final. There has been no definitive ruling on this matter by the Supreme Court. However, the Court of Claims itself holds that it has this authority, and its decisions awarding retired pay based on this kind of status determination are almost commonplace.[128]

The reformation of contracts in the Court of Claims may be analogous. The court has no general equity power and thus has no authority to enter a decree of reformation, but it is established that it may reform an agreement on equitable grounds and then enter a money judgment on the contract as reformed.[129]

126. See Philos, *supra* note 119.

127. There are a variety of retirement statutes in Title 10 of the U.S. Code. The following is representative of the type involved in this litigation: "*Upon a determination by the Secretary* concerned that a member of a regular component of the armed forces . . . or any other member of the armed forces . . . who has been called or ordered to active duty . . . is unfit to perform the duties of his office, grade, rank, or rating because of physical disability incurred while entitled to basic pay, *the Secretary may retire the member*, with retired pay computed under section 1401 of this title, *if the Secretary also determines* . . . [certain facts listed]." (Emphasis added.) 10 U.S.C. § 1201 (Supp. II, 1961). The italicized words are those relied on to support the argument that no court has authority affirmatively to grant retirement because this authority is vested exclusively in the executive. See also Philos, *supra* note 119.

128. See cases cited, *supra* notes 115, 120. See also Suter v. United States, 139 Ct. Cl. 466, 153 F. Supp. 367 (1957); Register v. United States, 131 Ct. Cl. 98, 128 F. Supp. 750 (1955); Proper v. United States, 139 Ct. Cl. 511, 154 F. Supp. 317 (1957); Capps v. United States, 133 Ct. Cl. 811, 137 F. Supp. 721 (1956). There have been actions for retired pay which turn on the construction of a statute as applied to undisputed facts. They do not appear to involve the kind of two-step problem under discussion here. See Miguel v. McCarl, 291 U.S. 442 (1934); Aflague v. United States, 309 F.2d 753 (Ct. Cl. 1962); Steimer v. United States, 309 F.2d 412 (Ct. Cl. 1962); Hornblass v. United States, 93 Ct. Cl. 148 (1941); Dene v. United States, 89 Ct. Cl. 502 (1939). The result of a judgment for plaintiff is the same, however; he is adjudicated to be within the statute and therefore entitled to retired pay.

129. United States v. Milliken Imprinting Co., 202 U.S. 168 (1906); Sutcliffe Storage & Warehouse Co. v. United States, 125 Ct. Cl. 297, 301, 112 F. Supp. 590, 593-94 (1953).

Like determinations of military status questions, the reformation is a necessary incident to rendition of judgment. And like a determination that plaintiff should be retired, it is an affirmative decision creating new legal relations.

The armed services do not appear to consider these retirement decisions of the Court of Claims binding. On some occasions following judgments for retired pay the Army has squarely refused to acknowledge that the plaintiff was retired.[130] In *Betts v. United States*,[131] for example, a former Army officer obtained a judgment for disability retired pay and sought thereafter, in reliance on the judgment, to have his name placed on the disability retired list.[132] The Office of the Judge Advocate General ruled that this was not compelled by the judgment, stating that since the court had "failed to resolve in definitive terms the rights which were denied Betts" and had "cautiously avoided rendering a decision on the plaintiff's status," the "holding in favor of Betts does not render the facts placed in issue, but not actually decided, susceptible to the rule of estoppel by judgment."[133] The opinion further said that a person could not be placed on the retired list unless first appointed an officer and that the Court of Claims, as evidenced by its own language,[134] had no authority to appoint a public officer.[135] A similar position was adopted by the Navy following *Register v. United States*[136] where the Court of Claims held, contrary to a Navy finding, that plaintiff's incapacity was an "incident of the service" and hence he should receive retired pay. The Navy Judge Advocate General's opinion supporting the refusal thereafter to put plaintiff on the retired list said the findings of the Court of Claims may be considered for their persuasive effect but they are not binding: "The effect of the Court of Claims' decision relates entirely to the monetary benefits which alone are within the jurisdiction of the Court. The Court of Claims recognized that it has no authority to order or to effect in any way the placement of the Petitioner on the Retired List of the Navy."[137] There

130. The Army refused to recognize retirement following the decisions in Furlong v. United States, 138 Ct. Cl. 843, 152 F. Supp. 238 (1957), and Betts v. United States, 145 Ct. Cl. 530, 172 F. Supp. 450 (1959). On the other hand, the Army did take action to retire the plaintiffs after the decisions in Patterson v. United States, 141 Ct. Cl. 435 (1958), and Brown v. United States, 143 Ct. Cl. 605 (1958). Letter from Office of the Adjutant General, Department of the Army, to the author, Dec. 13, 1962. It is evident, however, particularly in view of the Army's *Betts* opinion (note 133 *infra*), that in the latter two cases the Army did not feel compelled to recognize retirement because of the court judgment. The attitude was that plaintiffs would be put on the retired list only as a matter of official grace.

131. 145 Ct. Cl. 530, 172 F. Supp. 450 (1959).

132. Statutes require that the service Secretaries maintain various kinds of retired lists. See, *e.g.*, 10 U.S.C. §§ 1376, 3966 (1958). To say that a person is on a retired list is simply another way of saying that he is retired and that he is entitled to the accompanying benefits and incidents. Under present administrative practices an individual might receive monthly checks for retired pay but not be considered by the armed service to be on any retired list. See text at note 148 *infra*.

133. JAGA 1962/4310, 31 Aug. 1962.

134. See cases and text at notes 120-23 *supra*.

135. Note 133 *supra*.

136. 131 Ct. Cl. 98, 128 F. Supp. 750 (1955).

137. JAG:131.6:ems, 16 Jan. 1959; Letter from Office of the Judge Advocate General, Department of the Navy, to the author, 3 Oct. 1962.

is no formal Air Force opinion precisely in point, but probably the same position would be taken.[138]

The Comptroller General, an important figure insofar as the pay aspect of military status is concerned,[139] has manifested an ambivalent attitude toward Court of Claims decisions. In *Gordon v. United States*[140] the court held that plaintiff, admittedly a retired officer, was entitled to receive a different statutory rate of retired pay than that which the Marine Corps had considered appropriate. Thereafter the Comptroller General ruled that the officer's retired pay account should be adjusted for the future on the basis of the judicial determination, stating:

> The question of Gordon's right and the basis for computing his retired pay after April 3, 1956, [date of Court of Claims judgment], necessarily involve the identical issues which were considered and decided by the Court of Claims in its decision of April 3, 1956, in his case. In such circumstances, the rule of estoppel by judgment (collateral estoppel) has the effect of precluding the defendant (Government) and the plaintiff (Gordon) from any further litigation (against each other) of the issues which were actually litigated and determined by the court. . . .[141]

In speaking further of the "rule of estoppel by judgment" the opinion said that "there is grave doubt . . . that we would be justified, in the exercise of our duties and responsibilities as prescribed by law, to ignore such rule or to take action which in effect, would be inconsistent with the rule."[142]

In a similar case, *Frederick v. United States*,[143] the Court of Claims entered judgment for disability retired pay. The Comptroller General, however, refused to accord it the effect he gave the *Gordon* decision, stating that "The judgment did not, and could not, give him the status of an officer on the disability retired list. . . ."[144] Another case, *Smith v. United States*,[145] although not involving retirement, presented a similar estoppel problem. There the court found that plaintiff had been invalidly separated from the Navy, and judgment was entered for active duty pay to the time plaintiff's enlistment would have expired. The court held further that the invalid discharge "aborted the normal course of events whereby plaintiff would have been transferred, upon expiration of his enlistment, to the Fleet Reserve";[146] accordingly judgment was also entered for the retainer pay of a fleet reservist from the end of the enlistment to the date of judgment. Subsequently, the Comptroller General, expressing a view seemingly opposite to that taken on the *Gordon* judgment, said that future payment of retainer pay was not authorized by the judgment in *Smith*. Echoing

138. Letter from Office of the Judge Advocate General, Department of the Air Force, to the author, 30 Oct. 1962.

139. See 42 Stat. 23 (1921), 31 U.S.C. §§ 42, 71, 72 (1958).

140. 134 Ct. Cl. 840, 140 F. Supp. 263 (1956).

141. 36 Comp. Gen. 501, 502 (1957).

142. *Ibid.*

143. 280 F.2d 844 (Ct. Cl. 1960).

144. Comp. Gen. B-127335, 21 Jan. 1963.

145. No. 28-60, Ct. Cl., 6 Dec. 1961.

146. *Ibid.*

similar opinions of the Judge Advocate Generals, the Comptroller General ruled that the decision "did not and could not bestow on Smith any status in the Regular Navy or in the Fleet Reserve, since the Court of Claims was simply awarding a judgment in the nature of money damages. . . . Retainer pay legally may be paid . . . only to members of the Fleet Reserve . . . and, since the record indicates that Smith is not a member . . . the payment to him of retainer pay [after the date of the judgment] is unauthorized and would be contrary to law."[147] The Navy Department has indicated that even had the Comptroller General ruled otherwise, Smith would not be treated as a member of the naval service, though he would be sent monthly retainer pay checks. It would be open to Smith, in the Navy's view, to apply for discretionary relief, but apparently the Court of Claims judgment would not be considered controlling.[148]

These views of the armed services and the Comptroller General reflect either a failure to understand or a disagreement with what the analysis here has sought to make clear—that in each of these cases the plaintiff's rights and status are necessarily decided by the judgment, however inexplicit the court's opinion may be, and that the decision is therefore conclusive under the estoppel rules. The judgment itself is the authority for the retirement. Even if the military is correct in saying that retirement determinations are beyond the Court of Claims' "jurisdiction," such determinations are nonetheless binding when embodied in a final judgment. The debate really is over the allowable scope of review. That is a question the Court of Claims has jurisdiction to decide along with all other questions in these cases. If it decides the question erroneously, as the military apparently thinks, the government's remedy is to seek reversal in the Supreme Court. Absent such a reversal, the decisions, though legally incorrect, cannot be revised or questioned independently or collaterally by the government and its officials.[149] Even a want of subject matter jurisdiction may be res judicata.[150] Accordingly, the only legitimate recourse for the government is to petition the Supreme Court for certiorari on the scope of review issue in every case where the Court of Claims makes an affirmative determination of retirement.[151] Al-

147. Comp. Gen. B-142023, 21, Dec. 1962.

148. Letter from Bureau of Naval Personnel, Department of the Navy, to the author, 12 Oct. 1962.

149. United States v. Eastport Steamship Corp., 255 F.2d 795, 803 (2d Cir. 1958). See cases cited in note 79 *supra*. In reviewing a Court of Claims decision long before it had been held to be an article III tribunal, the Supreme Court said:

> ". . . it is clear that when such a claim as that preferred by the claimants in the original petition passes into judgment in a court of competent jurisdiction it ceases to be open, under any existing act of Congress, to revision by any one of the executive departments or of all such departments combined . . . the judgment of the Court of Claims, from which no appeal is taken, is just as conclusive under existing laws as the judgment of the Supreme Court, until it is set aside on a motion for new trial."

United States v. O'Grady, 89 U.S. (22 Wall.) 641, 648 (1874).

150. Dowell v. Applegate, 152 U.S. 327, 339-40 (1894); see Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 403 (1940).

151. "Cases in the Court of Claims may be reviewed by the Supreme Court . . . : (1) By writ of certiorari granted on petition of the United States or the claimant. . . ." 28

though it has not been moved to do so, the Court of Claims itself could certify the question to the Supreme Court for instructions.[152] At any rate, the Supreme Court should resolve the controversial scope of review issue, which apparently has contributed to the tendency of federal officials at high levels, though no doubt in good faith, to ignore the determinations of a constitutional court. Part of the responsibility for this undesirable state of affairs, however, must rest with the Court of Claims because of its misleading statements that it cannot confer status and cannot control executive action.[153]

Whether a retired status exists may be important to the government and the individual for reasons other than money. At stake among other things may be subjection to court-martial jurisdiction,[154] post-exchange privileges,[155] government-furnished medical care,[156] and liability for recall to active duty.[157] The status carries both benefits and burdens. Thus it is conceivable that a person might want to establish his retired status to obtain some benefit besides pay. He might also want to litigate in a forum other than the Court of Claims. In either case, the alternative is a federal district court.

The possible role of the district courts in retirement cases is not clear. Few such suits are reported,[158] and so far, no plaintiff has prevailed.[159] Despite the lack of precedent, if an affirmative determination of plaintiff's retirement is proper in the Court of Claims there appears to be no reason why the same determination is not proper in a district court, given a proceeding over which it

U.S.C. § 1255(1) (1958). The government has petitioned for certiorari unsuccessfully at least once. Suter v. United States, 139 Ct. Cl. 466, 153 F. Supp. 367 (1957), *cert. denied*, 355 U.S. 926 (1958).

152. "Cases in the Court of Claims may be reviewed by the Supreme Court . . . : (2) By certification of any question of law by the Court of Claims in any case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions on such question." 28 U.S.C. § 1255(2) (1958).

153. See text and cases at notes 69-71 *supra*.

154. Persons subject to court-martial jurisdiction include: "(4) Retired members of a regular component of the armed forces who are entitled to pay. (5) Retired members of a reserve component who are receiving hospitalization from an armed force." UCMJ art. 2, 10 U.S.C. § 802 (1958).

155. AR 60-20/AFR 147-14, para. 52(a)(7).

156. "Under regulations to be prescribed, . . . a member or former member of a uniformed service who is entitled to retired or retainer pay . . . may, upon request, be given medical and dental care in any facility of any uniformed service. . . ." 10 U.S.C. § 1074(b) (1958).

157. 10 U.S.C. §§ 3504, 3914 (1958).

158. Robertson v. Chambers, 341 U.S. 37 (1951); Denby v. Berry, 263 U.S. 29 (1923); Ogden v. Zuckert, 298 F.2d 312 (D.C. Cir. 1961); Updegraff v. Talbott, 221 F.2d 342 (4th Cir. 1955); Hanes v. Pace, 203 F.2d 225 (D.C. Cir. 1953); Almour v. Pace, 193 F.2d 699 (D.C. Cir. 1951).

159. In Miguel v. McCarl, 291 U.S. 442, 452-53 (1934), the court did make a statutory determination that a person was entitled to be retired, but that involved only an interpretation of the statute, namely, that a member of the Philippine Scouts was "an enlisted man . . . in the Army." This did not require the court to make the kind of affirmative determination which is a prerequisite for retirement under the typical disability retirement law involved in these cases. See notes 127, 128 *supra*.

has jurisdiction. Just as in the case of an invalid discharge, either forum can exercise the same scope of review over the military's decision; there is no limitation in this regard applicable to one of these courts but not the other. The district court acquires subject matter jurisdiction upon the filing of an action against the Secretary of one of the armed services or other appropriate official [160] claiming that by statute the plaintiff is entitled to be retired but the officials have arbitrarily or illegally refused to recognize his retirement.[161] The court is thereby empowered to decide plaintiff's claim and to render a declaratory judgment or issue a writ of mandamus or injunction when any of these remedies is appropriate.[162] Of course, the question of their appropriateness is bound up with the scope of review problem, because only if an affirmative judicial determination of retirement is made can the district court render a declaratory judgment that plaintiff is entitled to retirement or issue a coercive order compelling retirement.

The Supreme Court's decision in *Denby v. Berry* [163] has long been an obstruction to the issuance of mandamus. That was an action to compel the Secretary of the Navy to send a serviceman before a retiring board, as allegedly required by statute. The Court denied the writ, stating that the right to retirement "is one dependent by statute on the judgment of the President and not on that of the courts."[164] If this view is still sound, then obviously neither mandamus nor an injunction nor a declaratory judgment is possible. For under *Denby* a military retirement determination is outside the judicial power. This means that the Court of Claims should stop allowing recovery of retired pay. And that is in general the military position. But this *Denby* rationale is rejected by the Court of Claims in the retirement cases. If the present Court of Claims view is to prevail, however, there must be theoretically no objection to these remedies. In short, the availability of district court remedies, as well as Court of Claims relief, must stand or fall together, and their availability hinges on the scope of review issue.[165]

These questions were posed in *Almour v. Pace* [166] where a former officer sought mandamus to compel retirement, asserting that retirement had been arbitrarily refused by the Secretary of the Army. Following a dismissal by the district court and the taking of an appeal, the plaintiff died. The Court of Appeals held that the action had abated, reasoning that the only relief which could

160. The Comptroller General may be an appropriate defendant under some circumstances. See Miguel v. McCarl, 291 U.S. 442 (1934); Note, *Compulsory Process to the Comptroller General*, 3 GEO. WASH. L. REV. 97 (1934).

161. See 28 U.S.C. § 1331 (1958); 28 U.S.C. § 1361 (1962); Bell v. Hood, 327 U.S. 678 (1946). This assumes that the required jurisdictional amount is in controversy if § 1331 is relied upon. See note 27 *supra*.

162. 28 U.S.C. § 2201 (1958) (declaratory judgment); 28 U.S.C. § 1361 (1962) (mandamus or mandatory injunction).

163. 263 U.S. 29 (1923).

164. *Id.* at 38. It is interesting, and perhaps significant, that the Court first concluded that the Secretary of the Navy had acted lawfully.

165. See Byse, *supra* note 26 at 1509-10.

166. 193 F.2d 699 (D.C. Cir. 1951).

now be awarded the administratrix was the deceased officer's retirement pay which had accrued in the past and that only the Court of Claims had jurisdiction to grant such relief. The opinion avoids taking a position on whether any court could legitimately make an affirmative determination of retired status—the second step in the Court of Claims approach—although such would have been necessary to give any relief. All that is decided is that "the Court of Claims has exclusive jurisdiction, insofar as any court can now deal with it."[167] The court added:

> . . . an order vacating the Secretary's order denying retirement would be merely negative—it could not take the place of an affirmative determination that Captain Almour was entitled to retirement at a particular time or at a particular rate of pay. That determination, now that it involves nothing more than a claim for back pay, is within the exclusive jurisdiction of the Court of Claims, assuming it to be within the province of any court.[168]

The court did not reveal what it would do about this affirmative determination had the mandamus aspect not been mooted by death. It simply commented that whether the former officer "could have maintained such a suit in his lifetime, and, if so, what the scope of judicial review would have been, are questions we need not here decide."[169]

But why not a declaratory judgment holding that the deceased officer was entitled to be retired? The court had already acquired jurisdiction over the case, and the rules of procedure direct it to grant whatever relief is appropriate under the law and the facts, even though not demanded.[170] There was a continuing justiciable controversy since the legal right to accrued retired pay was still being disputed between the administratrix and the Secretary. Nevertheless the court said that since no future rights were involved and the case had been reduced to a monetary claim for back pay which only the Court of Claims could award, it would not give a declaration—if not because of lack of power, then as a matter of discretion.[171] This might be justified on the assumption that a declaration against an official could not be relied on as an estoppel against the government in the subsequent Court of Claims suit which plaintiff would have to bring for the pay; since the declaration would serve no other purpose its rendition would be meaningless.[172] The probabilities are, as previously discussed, that at present this assumption is accurate.[173] But even if the judgment were binding on the government the district court might still decline to act by reasoning that a district court decision that plaintiff was entitled to be retired, because of its conclusiveness, would undermine the Court of Claims' exclusive

167. *Id.* at 702. In light of this conclusion a similar case today might possibly be remanded to the district court and then transferred to the Court of Claims under 28 U.S.C. § 1406(c). See note 29 *supra.*

168. *Id.* at 702 n.10.

169. *Id.* at 701 n.7.

170. FED. R. CIV. P. 54(c).

171. See 193 F.2d at 702.

172. This was suggested in Marshall v. Crotty, 185 F.2d 622, 628 (1st Cir. 1950), as a reason for denying a declaratory judgment to a discharged civilian employee.

173. See text at notes 71-76 *supra.*

jurisdiction to award retired pay. The only function of the latter, subsequent to the declaratory judgment, would be to ascertain the amount of recovery.[174]

The *Almour* opinion indicated that district court relief might be granted on a retirement claim if some future interests were involved, even though plaintiff also had a claim for pay.[175] This seems a reasonable distinction to make in the interest of affording a complete remedy but at the same time conserving judicial effort and respecting the congressional allocation of jurisdiction. In short, if nothing turns on the outcome but back pay the case is for the Court of Claims, but where some other legal rights are at issue the district court at least can render a declaratory judgment on the legality of the military's retirement action,[176] just as it can on the legality of a derogatory discharge. This assumes —and this is the difficult problem being bypassed here—that an affirmative retirement determination is a proper exercise of judicial review.

On this same assumption an injunction or mandamus likewise seems available as long as the former serviceman is alive. Retirement has continuing incidents of importance, and the individual, in addition to recovering past pay, may want the Secretary to recognize his status for the future—in other words, to put him on the retired list. The Secretary and the Comptroller General, under the estoppel theory already elaborated, will be legally bound to recognize a retirement determination embodied in either a Court of Claims money judgment or a district court declaration to which they are parties. But people, even officials, do not always do what they are supposed to do. And the Secretary or Comptroller General may still fail to acknowledge the plaintiff's adjudicated status. That was the official response to the *Betts*, *Register*, and *Smith* decisions.[177] Thus to give the plaintiff his full legal rights it may be necessary to obtain a coercive order. The new section 1361 of Title 28 fits just this case, its purpose being "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." If a court can and does

174. In Borak v. Biddle, 141 F.2d 278 (D.C. Cir. 1944), discussed in text accompanying notes 72-74 *supra*, the dismissal of a Justice Department employee was held invalid, and a declaratory judgment was rendered. Thereafter, without relitigating the invalidity of the dismissal, the Court of Claims entered a judgment for back salary, although it did not expressly discuss the estoppel effect of the district court's declaration. Borak v. United States, 110 Ct. Cl. 236, 78 F. Supp. 123 (1948), explained in Almour v. Pace, 193 F.2d 699, 701 n.6 (D.C. Cir. 1951). See Edgar v. United States, 145 Ct. Cl. 9, 171 F. Supp. 243, 246 (1959).

175. Almour v. Pace, 193 F.2d 699, 701 n.6 (D.C. Cir. 1951).

176. In Miguel v. McCarl, 291 U.S. 442, 455 (1934), the Court rejected as without merit the "contention that the suit cannot be maintained because petitioner has a remedy at law in the court of claims for his retired pay." See also Farley v. United States, 92 F.2d 533 (D.C. Cir. 1937). Ogden v. Zuckert, 298 F.2d 312 (D.C. Cir. 1961), upheld district court jurisdiction to entertain an action for a declaration that plaintiff was entitled to be retained on the retired list. The only point expressly decided, however, was that administrative remedies had been sufficiently exhausted. Future interests will usually be at issue in every case except where, as in *Almour v. Pace*, the individual claiming retirement has died, because retirement has continuing incidents.

177. See text at notes 130-45 *supra*.

make the affirmative determination that plaintiff is entitled to be retired, the court in effect is holding that Congress has said that plaintiff, under the facts, is to be retired; therefore a duty rests on the officials to put him on the retired list and not frustrate the congressional mandate.[178] According to the committee report, section 1361 grants jurisdiction where "the relief desired can be obtained only by compelling a government official to perform an act which he is required to do by statute but which he has nevertheless failed to do."[179]

## IV. Conclusion

One commentator has suggested a positive good in allowing the Court of Claims to make decisions which are disregarded except for payment of the judgment: "If, apart from satisfying a money judgment, the executive wishes to ignore the basis of the Court's decision in particular cases, this is a small price for a rich country to pay for the opportunity to reconcile justice for the individual with the free exercise of sovereign discretion."[180] It is even argued that the Court of Claims has greater latitude in doing justice by giving monetary relief if its decisions will have no impact on executive action.[181]

While this might be justified as one of those illogical practical adjustments which the law sometimes tolerates, we should realize that it is nevertheless incompatible with our conceptions of government under law and the place of the federal judiciary in the constitutional system. Moreover, this compromise may not really protect the executive's discretion; whether it does depends principally on how the scope of review question is finally settled. If the Court of Claims type review over separation and refusals to retire is legitimate, then the disregarding of its judgments does nothing more than throw obstacles in the path of an individual seeking a complete remedy. He can still vindicate his rights by suing for pay repeatedly in the Court of Claims at successive periods in the future, and by bringing action in the district court for a declaratory judgment or coercive order. The lawful way to protect executive authority is to narrow the scope of judicial review, not to refuse effect to the judgment of a constitutional court.

The military authorities can eliminate the present anomaly by altering their traditional view. This can now be done gracefully and quite rationally on the basis of *Glidden Co. v. Zdanok*,[182] in which the Court of Claims' position as a constitutional court was established authoritatively for the first time. Although

178. In issuing mandamus to compel promotion of a postal employee the court said: "It is not the writ which commands petitioner's promotion to grade 5, but the Act of Congress, which neither the Postmaster General nor this Court is at liberty to ignore." Farley v. United States, 92 F.2d 533, 538 (D.C. Cir. 1937).

179. S. Rep. No. 1992, 87th Cong., 2d Sess. (1962), set out in 1962 U.S. Code Cong. & Ad. News 2784, 2785. See *Developments in the Law—Remedies Against the United States and Its Officials*, 70 Harv. L. Rev. 827, 846-50 (1957).

180. Brenner, *Judicial Review by Money Judgment in the Court of Claims*, 21 Fed. B.J. 179, 208 (1961).

181. *Id.* at 207.

182. 370 U.S. 530 (1962).

that decision is not essential to the argument advanced here, it does add strength to it. And it gives the lawyers advising the officials an occasion for rethinking their attitude. The military seems to have no hesitation in according binding effect to district court decisions. Now that the Court of Claims is on the same level constitutionally its judgments should be treated accordingly. If this is not done, however, corrective action can come from Congress or the Supreme Court.

The Supreme Court could treat the problem in several ways. It could hold that decisions on status questions such as the Court of Claims is making are proper exercises of judicial review and are therefore binding on the government and its officers for all purposes. On the other hand, it could adopt the general government view, criticized here, that although the court may decide status questions in granting monetary recovery, the decisions have no other effect. Finally, the Supreme Court could rule that judicial review was precluded altogether, thereby making the military decision final. If this issue is ever faced squarely, it is possible that review of the validity of separation action and review of a refusal to retire might be allowed, while an affirmative determination of retirement might be precluded for the reasons mentioned. Invalidating a refusal to retire, without more, would at least force a reconsideration of the question by the military service.

Congress can also act. If it is the legislative intent that the various military status questions not be passed on by the courts, then this should be made explicit. Congress could go a long way toward shutting off judicial review, thereby disposing of most of the problems discussed here. But such a deprivation of remedies for servicemen would be contrary to the trend brought about by the current pervasiveness of the military in American life, a trend toward widening remedial avenues in the courts. To facilitate that, Congress can redistribute jurisdiction. For example, the Court of Claims might be empowered to issue a coercive order, or the district courts might be given jurisdiction to render a money judgment against the government in military pay cases. Either would eliminate the necessity of two suits. The latter, with the 1962 amendments, would also allow a plaintiff to obtain complete relief in his home district. Apart from those jurisdictional changes, Congress could waive immunity and make suits against government officials binding on the government.[183] A district court adjudication on status would then be conclusive against the United States in the Court of Claims. Finally, Congress could take the monetary aspects of this business away from the judiciary altogether and establish a special agency, not a constitutional tribunal, to grant money awards on broad equitable considerations to servicemen whom it considered to have been wronged by the armed services. The recovery would not be for pay and would require no adjudication of any legal questions. All problems of estoppel would thus be obviated.

Whatever the approach—and there may be others more appropriate than those suggested—the problems in military status litigation deserve attention.

183. For an elaboration of such a suggestion see Byse, *supra* note 26 at 1523-31.

More is at stake than simply ironing out aberrations in the legal order. The interest in affording a means of redress to the large part of our population caught up in the cold war military establishment should be balanced anew against the problems raised by judicial interference in this broad area of executive authority. This should be undertaken with an awareness of the significant changes over the past few decades in the nature of the armed forces, the position of the Court of Claims, and in legal attitudes generally. A fresh evaluation may reveal that certain traditional legal notions received uncritically from the past are as inappropriate today as some of the pre-nuclear theories of warfare.