Due Process-First Amendment-Representation of Veterans Before the Veterans Administration (Walters, Administrator of Veteran's Affairs v. National Association of Radiation Survivors

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Due Process—First Amendment—Representation of Veterans Before the Veterans Administration—Walters, Administrator of Veterans’ Affairs v. National Association of Radiation Survivors,1 A tyranny sincerely exercised for the good of its victims may be the most oppressive.2

I. Introduction

Individual service in the armed forces was recognized by Congress from the inception of the United States as an act meriting compensation3 even after the completion of a term of service. Congress first provided pensions for veterans in 1789,4 and

2. “Of all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive.” Lewis, The Humanitarian Theory of Punishment, 6 Res Judicatae 224, 228 (1952) quoted in Duchesne v. Sugarman, 566 F.2d 817, 828 n.24 (2d Cir. 1977)(deprivation of the liberty interest in family privacy by municipal child welfare authorities was purportedly in the “best interests” of the children).
4. Legal protection for veterans’ rights is not a novel idea in Anglo-American history. See, e.g., Magna Carta:
   Article II: If any of our earls or barons or others holding of us in chief by knight service dies, and at his death his heir be of full age and owe relief he shall have his inheritance on payment of the old relief, namely the heir or heirs of an earl £100 for a whole earl’s barony, the heir or heirs of a baron £100 for a whole barony, the heir or heirs of a knight 100s, at most, for a whole knight’s fee; and he who owes less shall give less according to the ancient use of fiefs. . . .
   Article XVI: No one shall be compelled to do greater service for a knight’s fee or for any other free holding than is due from it. . . .
   Article LXI: Since, moreover, for God and the betterment of our kingdom and for the better allaying of the discord that has arisen between us and our barons we have granted all these things aforesaid, wishing them to enjoy the use of them unimpaired and unshaken for ever, we give and grant them the underwritten security, namely, the barons shall choose any twenty-five barons of the kingdom they wish, who must with all their might observe, hold and cause to be observed, the peace and liberties which we have granted and confirmed to them by this present charter of ours, so that if we, or our justiciar, or our bailiffs or
continued to provide some form of benefits after every subsequent conflict in national history. In 1792 Congress prohibited the "sale, transfer, or mortgage" of a veteran's pension. In the words of Abraham Lincoln, Congress has "provided for him who has borne the battle, and his widow and his orphan."

The Veterans Administration (VA), created by Congress in 1930, is empowered to disburse veterans benefits. Veterans are allowed to make claims to the VA for all service related injuries and disabilities. As long as the veteran (or veteran's widow, or estate) can establish a relationship between the injury, disability or death, and time served in the armed forces, the VA will determine the benefit, under the statutes and regulations, to which the claimant is entitled. In applying for benefits, and invoking the congressional machinery for determining whether award of benefits is justified, a claimant may hire an agent, representative, or attorney for assistance. Under the present statutes, however, a claimant for veterans' benefits may pay that representative a maximum of only ten dollars. The fee-limita-

any one of our servants offend in any way against anyone or transgress any of the articles of the peace or the security and the offense be notified to four of the aforesaid twenty-five barons, those four barons shall come to us, or to our justiciar if we are out of the kingdom, and, laying bare the transgression before us, shall petition us to have that transgression corrected without delay.

7 ENCYCLOPEDIA BRIT. 674-76 (1985).
5. Id. See 38 U.S.C.A. v ("Explanation"), XXXI (Table 2: America's Wars) for a list of numbers of participants, deaths, and living veterans and dependents on pension rolls (e.g., the last veteran of the Civil War died on August 2, 1956 at the age of 109).
7. 105 S. Ct. at 3183.
9. This case arose because the VA found no relationship between plaintiffs' claimed injuries and service in the armed forces.
(a) The Administrator may recognize any individual as an agent or attorney for the preparation, presentation and prosecution of claims under the laws administered by the Veterans' Administration, and ...
(c) The Administrator shall determine and pay fees to agents or attorneys ... such fees (2) shall not exceed $10.00 with respect to any one claim; and (3) shall be deducted from monetary benefits claimed and allowed.
See also 38 U.S.C.A. § 3401 (West 1979) (requiring recognition by the Administrator to act as an attorney or agent) and 38 C.F.R. § 14.634 (1986).
11. 38 U.S.C.A. § 3404(c). National Ass'n of Radiation Survivors v. Walters, 589 F. Supp. 1302, 1323 n.20 (N.D. Cal. 1984). The original fee was $5.00 in 1862, but was subsequently raised to $10.00 in 1864 and has since remained unchanged. It was enacted "to
tion imposed upon the claimant is backed by criminal sanctions, and is directed against the agent, representative, or attorney who accepts more than the statutorily limited fee. This has been the law since 1864. Veterans' organizations presently exist to assist the claimant pro bono but they receive no remuneration from a claimant by law.

protect veterans from extortionate fees," Smith v. United States, 83 F.2d 631, 640 (8th Cir. 1936); Calhoun v. Massie, 253 U.S. 170, 173 (1920). Justice Stevens's dissent in Walters finds this concern unconvincing today: "I find the fee-limitation unwise and an insult to the legal profession." Walters, 105 S. Ct. at 3213. "As a profession lawyers are skilled communicators dedicated to the service of their clients." Id. at 3212.

12. Whoever (1) directly or indirectly solicits, contracts for, charges, or receives, or attempts to solicit, contract for, charge, or receive, any fee or compensation except as provided in sections 3404 or 784 of this title, or (2) wrongfully withholds from any claimant or beneficiary any part of a benefit or claim allowed and due him, shall be fined not more than $500 or imprisoned at hard labor for not more than two years or both.


13. Section 6. And be it further enacted, that the fees of agents and attorneys for making out and causing to be executed the papers necessary to establish a claim for a pension, bounty, and other allowance, before the Pension Office under this act, shall not exceed the following rates: For making out and causing to be duly executed a declaration by the applicant, with the necessary affidavits, and forwarding the same to the Pension Office, with the requisite correspondence, five dollars. In cases where additional testimony is required... for each affidavit so required and executed and forwarded... one dollar and fifty cents.

Section 7. And be it further enacted, that any agent or attorney who shall, directly or indirectly, demand or receive any greater compensation for his services under this act than as prescribed in the preceding section of this act, or who shall contract or agree... on the condition that he shall receive a per centum... shall be deemed guilty of a high misdemeanor, and upon conviction thereof shall, for every such offense, be fined not exceeding three hundred dollars, or imprisoned at hard labor not exceeding two years, or both.

Act of July 14, 1862, 12 Stat. 568.

Section 12. And be it further enacted, that the fees of agents and attorneys for making out and causing to be executed the papers necessary to establish a claim for a pension, bounty, and other allowance before the Pension Office under this act, shall not exceed... ten dollars; which sum shall be received by such agent or attorney in full for all services.


14. 38 U.S.C.A. § 3402 (West 1976). Various veterans' organizations exist to assist claimants, e.g., Veterans of Foreign Wars, American Legion, Vietnam Veterans of America, American G.I. Forum, American Veterans Committee, and National Association of Atomic Veterans. Disabled American Veterans (DAV) was the sole organization which assists veterans with VA claims to file an amicus brief for the appellants.

15. Id. at § 3402(b)(1). Most of the service organization representatives are not attorneys. The representatives receive no payment from the claimants, and claimants who utilize service representatives are precluded from obtaining attorneys. See 38 C.F.R. § 14.626 (1985), infra note 70. Notwithstanding the services the organizational representa-
Plaintiffs' challenge to the fee-limitation statute as a deprivation of due process under the fifth amendment and as a violation of their first amendment rights was rejected by the Supreme Court. The Supreme Court applied a method of review, also enacted by Congress in the 1930s, to review directly the nationwide preliminary injunction ordered by Judge Patel of the United States District Court for the Northern District of California, which restrained enforcement of the fee-limitation.

Plaintiffs did not assert a right to have the VA assign them counsel, only the right to hire their own attorney, and to pay that attorney more than the statutorily prescribed ten dollar fee, especially in complex cases. The preliminary injunction issued by the district court was to remain in effect only until the completion of a trial on the merits. In deciding defendants' appeal of the district court order, the Supreme Court not only reversed the preliminary injunction, but also decided plaintiffs' case on the merits.

tives provide for simple cases, plaintiffs established to the district court's satisfaction the need for attorneys to present complex claims before the VA.


19. Id. at 1329.

20. 105 S. Ct. at 3188, 3199-209 (Brennan, J., concurring). It is unclear if in the future all injunctions against federal statutes, or federal action controlled by statutes, are appealable directly to the Supreme Court. Six justices agreed with the jurisdictional finding; four would vacate the injunction and remand for further findings; three found the fee-limitation unconstitutional, and four found it constitutional. One question remains: What kind of discovery is possible in a complex case for ten dollars? Previous cases attacking the fee-limitation statute involved attorneys trying to collect more than the legal fee, Hines v. Lowry, 305 U.S. 85 (1938); Margolin v. United States, 269 U.S. 93 (1925); Calhoun v. Massie, 253 U.S. 170 (1920), and were thus distinguishable from veterans asserting the right to pay more than the legal fee. A recent case challenging the fee-limitation on first amendment grounds was remanded twice by an appeals court vacating the district court's decision upholding the statute, and thus had no precedential value on the district court here. Staub v. Roudebush, 424 F. Supp. 1346 (D.D.C. 1976), vacated and remanded sub nom. Staub v. Johnson, 574 F. 2d 637 (D.C. Cir. 1978).
The plaintiffs were two veterans' organizations and several individual veterans. Each individual plaintiff presented claims before the VA, and each was unable to obtain representation because of the fee-limitation statute. The two veterans' organizations were the National Association of Radiation Survivors (NARS), and the Swords to Plowshares Veterans Rights Organization (Swords to Plowshares). NARS represents veterans who were involved in atomic bomb testing, and Swords to Plowshares concentrates on representing Vietnam War veterans.

Four individuals joined these organizations as plaintiffs. Albert Maxwell was discharged from the Army in 1947 with a fifty percent disability. Between 1948 and 1968 four of the five children born to his wife died in infancy from rare congenital diseases. Maxwell was diagnosed as suffering from multiple myeloma in 1981. In denying Maxwell an upgrade of his disability, the VA found no relation between his medical condition and his Army service. Maxwell was inducted into the Army in 1940, at the age of twenty-one. Stationed in the Philippines, he was one of only 5,000 soldiers (out of 22,000) to survive the Bataan death march. As a Prisoner of War (POW), he survived a Dostoevskian death sentence before a firing squad and was shipped to...

21. Plaintiffs included individuals making new claims or alleging a diminution of benefits, and organizations representing such individuals. The Court refused to make a distinction between the claimants in the present case. Walters, 105 S. Ct. at 3189 n.8.


24. Brief for the National Association of Atomic Veterans, as Amicus Curiae in Support of Appellees, at 2-4, Walters (No. 84-571).


27. Id.

28. In 1849, Dostoevsky was arrested for the act of reading publicly a letter which politically criticized Nikolai Gogol. This was a capital crime "according to the Legal Code of 1845, which strictly forbade any organized political discussion." F. Dostoevsky, The Village of Stepanchikovo 11 (I. Avsey trans. Angel, 1983). Dostoevsky was imprisoned and condemned to death by firing squad. The sentence was commuted at the last moment while he was in front of the firing squad. He was then exiled to Siberia. Id.
Japan with 1100 other POWs. Maxwell's boat was torpedoed leaving only 52 survivors. Imprisoned near Hiroshima, Maxwell and other POWs were utilized by their captors as laborers to clear debris after the atomic bomb was dropped. Maxwell worked in Hiroshima with his bare hands, drinking and eating contaminated food, and shortly thereafter developed cold welts, blisters and rashes.

Plaintiff Reason Warehime was assigned to Nagasaki clean-up duty. Wanting to make a career of the Army, he remained "in uniform" and was assigned to atomic bomb testing duty. In 1953 he was 2,000 to 3,000 yards from an Arizona test blast whereupon he was ordered to leave his position in a trench and march toward ground zero.

Plaintiff Doris Wilson's husband, and now-deceased plaintiff Dan Cordray, were aboard ships observing the testing of nuclear weapons in the South Pacific. Cordray was on the "highly contaminated" USS Fulton for three months. He died before this case was decided.

All plaintiffs, as individuals or as organizations, contend that their inability to retain adequate counsel of their choice ad-
versely affected the outcome of their claim.\textsuperscript{34}

Arguing that the fee-limitation statute was both an unconstitutional denial of procedural due process under the fifth amendment to the Constitution and a denial of first amendment rights to petition for redress of grievances,\textsuperscript{35} plaintiffs sought an injunction against the enforcement of the fee-limitation.\textsuperscript{36} Only constitutional challenges to the fee-limitation statute are allowed in federal courts.\textsuperscript{37} Unlike other administrative agencies, VA claim benefit decisions are final and unreviewable by any court.\textsuperscript{38}

Suit was initiated against the Administrator of the VA, the VA itself, the Director of the San Francisco regional VA office, and the United States of America. A nationwide preliminary injunction restraining the enforcement of the fee-limitation was issued by the district court, and defendants appealed directly to the Supreme Court.\textsuperscript{39}

III. THE DISTRICT COURT DECISION

Plaintiffs' application for preliminary injunctive relief was granted by the district court.\textsuperscript{40} Under the standards adopted in the ninth circuit, a plaintiff seeking injunctive relief must establish either "a combination of probable success and the possibility of irreparable injury, or that serious questions are raised and the balance of hardships tips sharply in [plaintiffs'] favor."\textsuperscript{41}

\begin{itemize}
\item \textsuperscript{34} The difficulty in establishing a complex claim can be seen in Orville Kelly's case. Kelly, a founder of the National Association of Atomic Veterans, finally received VA benefits for service related radiation exposure after seven years of wrangling. Seven months later he died. \textit{Amicus Curiae} Brief, \textit{supra} note 24 at 1. Of 2,067 radiation-related veterans' claims in 1983, all but 14 were denied. \textit{Id.} at 14.
\item \textsuperscript{35} \textit{Walters}, 105 S. Ct. at 3183.
\item \textsuperscript{36} \textit{Id.} See \textit{Complaint For Declarative and Injunctive Relief}, Appendix at 18, \textit{Walters} (No. 84-571).
\item \textsuperscript{37} Johnson v. Robison, 415 U.S. 361 (1974)(district courts have jurisdiction to hear constitutional attacks on the VA under 38 U.S.C. § 211(a), but no jurisdiction to review administrative decisions of the VA in administering statutory benefits, \textit{Id.} at 366-74).
\item \textsuperscript{38} See 38 U.S.C.A. § 211(a) providing that decisions of the VA on any question of fact or law are final. No court has jurisdiction to review such decisions. Devine v. Cleland, 616 F.2d 1080 (9th Cir. 1980); United States v. Rowin, 550 F. Supp. 643 (W.D.N.Y. 1982)(the purpose of § 211(a) is to prevent claims from crowding the federal courts and to insure equal nationwide application of VA benefits).
\item \textsuperscript{39} 28 U.S.C.A. § 1252 (West 1984), in/ra note 101.
\item \textsuperscript{40} \textit{Walters}, 589 F. Supp. 1302 (1984).
\item \textsuperscript{41} \textit{Id.} at 1307 (quoting \textit{William Inglis & Sons Baking Co. v. ITT Cont. Baking Co.},
\end{itemize}
The traditional standard applied by the district court required that the court examine the VA claims procedures and the findings of the VA regarding the denial of benefits to plaintiffs. Whether the VA denial of benefits was constitutional depended upon the claimants' protected interest, if any, in the benefits. A denial of a protected interest must meet procedural due process standards.

A. The VA Claims Procedure

Service Connected Death and Disability (SCDD) claims are the sole method of redress for veterans against the military and the government for injuries and disabilities received during service in the armed forces and which continue to affect and color their civilian lives after discharge. The Federal Tort Claims Act does not allow suits by members of the armed forces.

Inc., 526 F. 2d 86, 88 (9th Cir. 1976) and Charlie’s Girls, Inc. v. Revlon, Inc., 483 F. 2d 953, 954 (2d Cir. 1973)).

42. The standard of balancing hardships was considered uncertain by the Court in light of City of Los Angeles v. Lyons, 461 U.S. 95 (1983), and Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982). In Lyons an injunction did not issue because there was no real and immediate injury. The use of choke-holds, sought to be enjoined, could not be established as a future injury to petitioner. In Romero the Court looked to whether the Federal Water Pollution Control Act allowed for equitable remedies. The reasoning of these cases might be used to disallow such equitable remedies for plaintiffs in district court unless such a remedy is specifically authorized by statute, which it is not.

43. See Goldberg v. Kelly, 397 U.S. 254 (1970), and Mathews v. Eldridge, 424 U.S. 319 (1976). The Court in Goldberg upheld the right of a welfare recipient to a hearing before welfare benefits were terminated. The Court later, in Mathews, used a balancing test in determining that when the benefit decision is amenable to determination on written medical reports, and where the benefit is not the sole source of livelihood (as with welfare payments), it is not wrong for a court to consider the possibility that benefit awards might be threatened by increased administrative costs. The Court was similarly influenced by the use of written medical reports in Parham v. J.R., 442 U.S. 584 (1979). See also supra notes 116 and 122.


For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is the result of the veteran’s own willful misconduct.

Id. at § 310.

45. 28 U.S.C.A §§ 2671-80. The exemption claimed in § 2680(j) bars “[a]ny claim
forces,\textsuperscript{46} and discharged veterans are prohibited from appealing VA claims decisions in federal courts.\textsuperscript{47}

Claimants must "submit evidence sufficient to justify a belief in a fair and impartial mind that [the] claim is well grounded."\textsuperscript{48} The existence of the disability must be proved,\textsuperscript{49} and the disability must be "service-related."\textsuperscript{50}

There exist fifty-eight regional VA offices where SCDD claims may be made. A VA rating panel\textsuperscript{61} determines initially if a claim is valid, then applies a "schedule"\textsuperscript{52} of benefits, and issues a Notification of Decision (ND).\textsuperscript{53} Claimants may challenge an adverse ND by filing a Notice of Disagreement (NOD) within one year\textsuperscript{54} with the VA. The VA may reverse its original ND or proceed to prepare a Statement of the Case (SOC).\textsuperscript{55} Claimants arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."

47. 38 U.S.C.A § 211(a) provides that the Veterans Administrator's decision:

on any question of law or fact under any law administered by the VA providing benefits . . . shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

See also Durant v. United States, 749 F. 2d 1554 (11th Cir. 1985)(alleged denial of a property interest by VA claims procedure was insufficient to circumvent 38 U.S.C.A. § 211(a)).
49. Under the wartime disability compensation scheme, there is a presumption of a veteran's sound condition, 38 U.S.C.A. § 311 (West 1979) (Certain other presumptions relate to certain diseases and disabilities, id. at § 312), which is rebuttable. Id. at § 313. See also 38 C.F.R. § 3102 (1985).
53. 38 C.F.R. § 3.103(e)(1985). "The most common ND is a very brief computer notice" denying a claim. Walters, 589 F. Supp. at 1318.
55. 38 C.F.R. § 19.120(1985). An SOC contains summaries of: (1) the evidence, (2) the law, and (3) a determination by the agency of original jurisdiction of each issue and the reasons behind the determinations.
must then file a Substantive Appeal within sixty days of the SOC, or within the remaining one year time period from the ND. Claimants are “presumed to be in agreement with any statement of fact contained in the Statement of the Case to which no exception is taken.” The Board of Veterans Appeals (BVA) in Washington, D.C., next reviews the regional board’s decision. Decisions by the BVA are final and cannot be reviewed by any court.

In the present case, the individual veterans and service organizations argued that attorney representation was necessary for claimants from the very beginning of the claims procedure process. They contend that the right to retain counsel would increase the fairness of the administrative procedure, reduce the possibility of an erroneous denial of benefits, and more closely follow the congressional purpose in establishing benefits for veterans. The effectiveness of a veteran’s presentation of a complex case before a VA hearing board is limited when, as usually happens, a veteran does not utilize the right to a personal hearing from the very beginning of the claims process. This right is underutilized in simple and complex cases. Further, what assis-

56. 38 C.F.R. § 19.129(b) and Rule 45 § 19.145 (1985).
59. 38 C.F.R. § 19.104 (1985). Allegations of error of law or fact or the submission of new evidence will reopen a claim.
60. 38 U.S.C.A. § 211(a) claims procedures before the VA are different from other administrative agency procedures, e.g., claimants for social security benefits “may obtain a review of such [administrative decision] by a civil action . . . in the district court of the United States for the judicial district in which the plaintiff resides.” 42 U.S.C.A. § 405 (g). Exhausting administrative remedies is the only path for veterans claiming benefits unless a constitutional challenge is made against the VA decision.
61. Appellees’ Motion to Affirm, Walters (No. 84-571). “Actual adjudicative policies and practices often markedly diverge from C.F.R. requirements.” Id. at 11. “Over 800 V.A. staff attorneys decide claims, prepare ratings and SOCs, draft B.V.A. opinions, and perform a host of other functions in the adjudicative process.” Id. at 16.
64. Justice Rehnquist found that the district court never expressly defined what it
tance a veteran receives from service representatives is limited because many of these representatives are greatly overworked. This reduction in the effectiveness of a veteran's presentation is encountered in all hearings, be it a local hearing or an appeal to the national office of Veterans Appeals.

The complexity of the VA procedures may handicap a claimant in obtaining benefits. Although a veteran may introduce any evidence and raise any argument, the hearings are non-adversarial and cross-examination of witnesses is prohibited. The VA's "obligation" is twofold: to assist the claimant in developing the case, and "to render a decision which grants [the claimant] every benefit that can be supported in law while protecting the interests of the government." Veterans organization by a "complex" case. Walters, 105 S. Ct. at 3186. The VA procedures for the majority of benefit claims were too abstractly analyzed to deserve to be described as "complex," id. at 3193, and radiation exposure claims are such a small percentage of total claims that they are not complex "by any fair definition of that term . . . [because] the medical examination reveals no disability". Id. at 3194. Justice O'Connor's concurrence also noted that complex cases were not defined adequately, but noted that if there is a distinct group of cases that differ "in important respects from the typical" benefit claim, a different claims process might be required. Id. at 3198.

65. Supra note 64 at 11 n.6.

66. The VA, through a "record purpose disallowance," may disallow a benefit claim if a claimant fails to submit, within a specified time limit, requested evidence necessary to complete his application. This is so whether or not the claimant has been furnished with notice of such time limit or the necessary forms and information for completion of the claim application. 38 C.F.R. § 3.109(1985). Additionally, if evidence requested in order to reopen a benefit claim is not furnished by the claimant within one year after the date of request, the claim will be considered abandoned. Under such circumstances, no further action will be taken by the VA until a new claim is received. 38 C.F.R. § 3.158(a) (1985).

The district court also found that the VA "discourages" applicants from pressing for hearings and "encourages" applicants to waive certain hearings. Walters, 589 F. Supp. at 1321.


Hearings conducted by and for the Board are ex parte in nature and non-adversarial. Parties to the hearing will be permitted to ask questions of all witnesses but cross-examination will not be permitted. Proceedings will not be limited by legal rules of evidence, but reasonable bounds of relevancy and materiality will be maintained.

69. 38 C.F.R. § 3.103a (1985) (emphasis added). The VA argued that the government's interest was to keep administrative proceedings non-adversarial, thereby reducing administrative costs, and to insure that veterans received the benefits, not unscrupulous attorneys. Claimants argued that allowing the payment of reasonable attorney's fees would not conflict with any government interest. Save for the "obligation" of the government, the regulation does not state what the government interest is.
tions may provide representation for claimants, but once utilized for presenting a claim such representation precludes, by statute, representation by an attorney. Veterans, therefore, have the option of presenting claims with the assistance of unpaid service representatives, the assistance of an attorney who cannot charge more than ten dollars, or with no help, representing themselves pro se.

**B. The Due Process Right**

The right to procedural due process under the fifth amendment applies to all protected property interests of an individual. The district court found inherent in 38 U.S.C. § 310 and § 312 an absolute right to benefits to qualified individuals. Not only do present recipients of veterans benefits have a property interest in the continued receipt of benefits, but first-time veteran applicants likewise have a protected property interest in receiving benefits. The Supreme Court has held that a protected property interest is created by statute for recipients of welfare, social security, and veterans educational benefits.

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70. Service organization representation is regulated under 38 C.F.R. § 14.626 (1985). The purpose of regulation of representatives is to assure that claimants have qualified representation in the preparation, presentation, and prosecution of claims for veterans' benefits. See also 38 C.F.R. § 14.634 (1985) which provides no fee for service organization representation of a veteran’s claim, while sections 14.626-29 do not require the representative to be an attorney (in fact most are not attorneys).

71. 38 C.F.R. § 14.631(c) (1985). Only one organization, agent, or representative will be recognized at one time in the prosecution of a claim for one specific benefit.


73. 38 U.S.C. § 310 and § 321:
   For disability resulting from personal injury suffered or disease contracted in the line of duty . . . the United States will pay to any veteran . . . compensation as provided in this subchapter. The surviving spouse, child or children and dependent parent or parents . . . shall be entitled to receive compensation.

74. Walters, 589 F. Supp. at 1312.

75. The district court reasoned that previous cases on the fee-limitation, Gendron v. Saxbe, 389 F. Supp. 1303 (C.D. Cal. 1975), aff'd per curiam sub nom., Gendron v. Levi, 423 U.S. 802 (1975) and Demarest v. United States, 718 F.2d 964 (9th Cir. 1983), were not dispositive of the due process claim of a protected property interest, Gendron having a “sparse” set of facts and Demarest attacking the statute as “facially” unconstitutional on stipulated facts. Both cases are distinguished from the present case in which fuller discovery was anticipated at a trial on the merits.

while lower courts have also ruled that a protected property interest is created for applicants of rent subsidies, general relief, disabled child annuities under the Railway Retirement Act, social security, supplemental social security income, inmate claims for injuries while employed in prison, and applicants for admission to the bar.

The district court’s analysis focused on the statutorily created right to press SCDD claims before the VA, veterans continued expectation of congressional concern for veterans per se and the fact that claimants satisfying the VA requirements are entitled to benefits. The flexible elements of due process which the district court examined included: (1) the private interest affected by the VA action; (2) the probability of deprivation of that interest through error because of the process used; and (3) the government’s or VA’s interest involved, both fiscal and administrative.

Looking to other processes involving important individual interests and the ability of individuals to assert rights to benefits pro se, the district court concluded that plaintiffs “demonstrated a high probability of success” on the merits at trial and also demonstrated that the fee-limitation statute creates a serious risk of depriving claimants of their statutorily created pro-

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79. Ressler v. Pierce, 692 F.2d 1080 (9th Cir. 1982).
82. Wright v. Califano, 587 F.2d 945 (7th Cir. 1978).
86. Walters, 589 F. Supp. at 1313. The court recognized that the “property interest in a benefit must be grounded in ‘a legitimate claim of entitlement’ which is ‘more than an abstract need or desire for it’ or ‘a unilateral expectation of it.’” Id. at 1314 (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972)).
87. 589 F. Supp. at 1313.
88. Id. The test used must take into account all of the particular facts and circumstances, as the need for procedural safeguards varies with the situation. Goldberg v. Kelly, 397 U.S. at 263-71; Mathews v. Eldridge, 424 U.S. at 334-45.
89. Walters, 589 F. Supp. at 1316. Thus the Ninth Circuit has ruled that while welfare recipients require counsel when dealing with the state, non-tenured faculty do not. Toney v. Reagan, 467 F.2d 953, 958 (9th Cir. 1972).
tected property interest in SCDD benefits.\textsuperscript{91}

C. \textit{The First Amendment Claim}\textsuperscript{92}

The district court concluded that plaintiffs had also established a high probability of succeeding on their first amendment claims at a trial on the merits.\textsuperscript{93} Any statute that impairs or chills the first amendment rights of individuals and organizations can be constitutional only if it serves compelling government interests \textit{and} is narrowly drawn to protect those interests.\textsuperscript{94}

No substantial government interest or harm was threatened by protecting the individual's or organization's rights to petition\textsuperscript{95} the VA with freely retained counsel.\textsuperscript{96} Thus the VA's "paternalistic" argument\textsuperscript{97} defending the fee-limitation as protecting claimants' benefits from being wasted on attorneys' fees was rejected by the court as in conflict with the first amendment in that "people will perceive their own best interests if only they

\textsuperscript{91} The district court reasoned that as with federal prison employees injured on the job (see Davis v. United States, 415 F. Supp. 1086 (D. Kan. 1976)), the veterans have a claim authorized by statute and regulations for disabilities that may destroy their future earnings potential in society. The importance of this interest to the claimant and the continued belief that Congress will provide such compensation to disabled veterans establish the property interest at stake. As in Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare recipients have a statutory entitlement which is more than an expectation), the veterans' benefits statutes establish a legitimate claim of entitlement to benefits which, if the veteran meets the requirements, \textit{must} be given to the veteran. The procedural due process requirements of the hearing established that the personal interest was substantial, that the present VA procedures were complex and fraught with inadvertant claim denial, and that no government interest would be sacrificed by altering the hearing process to allow claimants to pay attorneys more than ten dollars.

\textsuperscript{92} Walters, 589 F. Supp. at 1323.

\textsuperscript{93} \textit{Id.} at 1327. The first amendment claims of the plaintiffs include the right to petition for redress of grievances and the right to meaningfully exercise the right to petition. The complex procedures of the VA assure that plaintiff's right to press a claim is meaningless without expert legal assistance. Intertwined in this argument is the first amendment right to freedom of association.


\textsuperscript{95} Walters, 589 F. Supp. at 1326: "[T]he right to petition ensures meaningful access to administrative agencies, as well as to courts." The district court found it "particularly crucial" in VA hearings.

\textsuperscript{96} \textit{Id.} at 1325 (quoting California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972)).

\textsuperscript{97} \textit{Id.} at 1327, suggesting that methods should be found to protect \textit{both} property interests and first amendment rights.
are well enough informed." The court concluded that the VA SCDD claims procedures were complex and the inability of organizations or individuals adequately to press a claim established the plaintiffs' probability of ultimate success on the merits at trial. The district court issued a nationwide preliminary injunction, precluding enforcement of the fee-limitation statute against claimants or their attorneys.

IV. DIRECT APPEAL TO THE SUPREME COURT

A. Jurisdiction

The VA filed a direct appeal to the Supreme Court under 28 U.S.C. § 1252. Originally, § 1252 provided for a direct appeal to the Supreme Court when the decision is "against the constitutionality of any Act of Congress." In 1937 the statute was amended to require that the Supreme Court hear such a case or controversy, and to expedite the appeal of court rulings on New Deal legislation. Appeal is available if the United States, or an agency or officer, was a party to the lower court proceed-

98. Id. (quoting Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, 425 U.S. 748, 770 (1976)). The Court concluded in the Virginia case that keeping consumers in ignorance of lawful prices was prohibited by the first amendment. The paternalistic approach of Virginia is analogous to the VA's position. In asserting that it will tell the VA claimant what he or she needs to know to protect the benefit claim, the VA is precluding the use of a better system: let the claimant pursue the information needed.


100. Id. at 1329.

101. Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States . . . holding any Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies . . . or Officer . . . is a party.


103. Sen. Hugo L. Black, sponsor of the bill, stated:

I see no reason why . . . we should not say to the Supreme Court, "...[t]his is not for you to determine whether you will take the case or not. Those who are charged primarily with enforcing the law in this country are bound to be in close contact with the necessity for a speedy decision than you are in your court room, and they have determined that this is a case of such great national moment and importance that it must be decided at once."


104. Heckler, 465 U.S. at 881 n.15.
The policy behind § 1252 appeals is to allow quick Supreme Court review of lower court determinations on the unconstitutionality of any act of Congress. The Court was divided as to the finality of the preliminary injunction and as to the proper standard of review.

The opinion of the Court, written by Justice Rehnquist, perceived § 1252 to be an “exception to the policy . . . of minimizing the mandatory docket” of the Court. He characterized as “semantic” the distinction between a lower court holding a statute unconstitutional, and ordering a preliminary injunction enjoining enforcement of a statute based on the probability of likely success in establishing the statute’s unconstitutionality at a trial on the merits. “This Court’s appellate jurisdiction does not turn on such semantic niceties.” Calling the problem raised by such distinctions a “red herring,” the Court found that the nationwide preliminary injunction issued by the district court frustrated the will of Congress embodied in the fee-limitation statute, and thus invoked the congressional purpose behind § 1252 mandating that the Supreme Court hear a direct appeal to speed the final determination of the restraint placed on the government.

The preliminary injunction issued by the district court envisioned fuller development of the facts through extensive discovery. Justice Rehnquist found the precedential effect of *McLucas v. Champlain* to be dispositive, and interpreted § 1252 as applying to interlocutory judgments and final judgments, not just

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106. *Id.* The codification in 1948 of § 1252 took place without comment. The opinion of the Court is that such a change does not therefore alter the scope of § 1252 Supreme Court appellate jurisdiction. Justice Brennan’s dissent strongly urged that the nationwide “scope” of the district court’s preliminary injunction is immaterial and that § 1252 appellate jurisdiction depends upon the nature of the lower court determination which must be that the statute is in fact unconstitutional. *Walters*, 105 S. Ct. at 3188, 3204 (Brennan, J., dissenting).
107. *Id.* at 3187.
to interlocutory final judgments and other final judgments. Therefore, even without the contemplated discovery, an appeal under § 1252 "brings before us not only the constitutional question, but the whole case."\textsuperscript{111}

Justice Brennan's dissent "strongly" disagreed with this analysis of § 1252. "We have never in the 48 year history of § 1252 assumed jurisdiction where the District Court had done no more than simply determine that there was a 'likelihood' of unconstitutionality sufficient to support temporary relief pending a final decision on the merits."\textsuperscript{112} The difference between a preliminary injunction and a final determination on the merits, the dissent stated, is not a semantic difference.\textsuperscript{113}

In a concurring opinion, Justice O'Connor upheld the § 1252 appellate jurisdiction for a review of the district court's possible abuse of discretion in granting the injunction. Finding abuse of discretion, the concurrence states that "the fee-limitation must pose a risk of erroneous deprivation of rights to the generality of cases reached" by the injunction.\textsuperscript{114} If there exists a "discrete class of complex cases", however, it might be possible to "[carve] out a subclass of complex claims that by their nature require

\begin{footnotesize}
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\item \textsuperscript{111} Mclucas, 421 U.S. at 32. In Mclucas, Justice Powell cited United States v. Raines, 362 U.S. 17 (1960), a Brennan decision on a § 1252 appeal from a Georgia federal district court. In Raines the federal government charged the Terrel County Board of Registrars with racial discrimination in registering black voters. The Georgia district court denied the government an injunction against the Board, and before hearing the case ruled the law under which the action was brought (Civil Rights Act of 1957) unconstitutional. Brennan's majority opinion that "the basis of the decision below in fact was that the act of congress was unconstitutional" Raines, 362 U.S. at 20, and Frankfurter's concurring opinion that "the weighty presumptive validity with which the [Act of Congress]. . . comes here is not overborne by any claim urged against it", id. at 28, is echoed in this Court's decision, although the jurisdictional appeal question in Raines was postponed by the Supreme Court until a hearing on the constitutional merits before the Court. United States v. Raines, 360 U.S. 926 (1959).
\item Walters, 105 S. Ct. at 3203.
\item The mischaracterization of the district court decision on preliminary relief as a holding that the fee-limitation is unconstitutional will have many revolutionary repercussions according to Brennan's dissent. Because § 1252 could apply to "any court of the United States," would every and any court decision on a motion that is "against the constitutionality of a federal statute" be appealable directly to the Supreme Court? How is this to further the purpose of § 1252 which the dissent understands to require a fully developed record in the court below, or a fully developed record before the Supreme Court, as in Raines, to allow a determination of the constitutionality of the challenged statute. \textit{Id.} at 3200-01. (Brennan, J., dissenting).
\item \textit{Id.} at 3197.
\end{enumerate}
\end{footnotesize}
expert assistance . . . to assure the veterans a hearing appropriate to the nature of the case."\textsuperscript{115} On remand it then appears that the district court is free to decide if any cases meet the standards established in the opinion.\textsuperscript{116}

To the dissenting justices the concurrence of Justice O'Connor was better than the interpretation of § 1252 by Justice Rehnquist, but was still in error. The abuse of discretion standard is for the courts of appeal, not for the Supreme Court under § 1252. Justice Brennan would vacate the lower court decision and remand the case for the filing of a new district court decision, permitting the VA to appeal to the Court of Appeals for the Ninth Circuit, under the abuse of discretion standard.\textsuperscript{117}

Before hearing oral argument, the Supreme Court stayed the district court injunction.\textsuperscript{118} In granting the stay, Justice Rehnquist called the presumption of constitutionality not "merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of the government in balancing hardships."\textsuperscript{119} Having the case before it, the Court then proceeded to determine whether the fee-limitation statute was in fact unconstitutional.

\textbf{B. Due Process and the Fee-Limitation}

The Supreme Court was unconvinced by the district court’s analysis of the standard to be applied in due process challenges to congressional statutes.\textsuperscript{120} Deferring to congressional judgment,\textsuperscript{121} and requiring that the due process risk of erroneous

\textsuperscript{115} Id. at 3198. Justice O'Connor found it difficult to evaluate the claims in the present posture of the case, based on a record developed only at a preliminary injunction stage. Id.

\textsuperscript{116} Id. at 3198 (quoting Parham v. J.R., 442 U.S. 584, 615-16 (1979)).

\textsuperscript{117} Id. at 3209.


\textsuperscript{119} Id. at 1324.

\textsuperscript{120} See Mathews v. Eldridge, 424 U.S. 319 (1976). The standard to be applied to procedural due process cases enunciated in Matheus was only "purported[ly]" followed by the lower court. The standard is (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of that interest through the procedures used considering the value of a different procedure; and (3) the government's interest in a different procedure. The due process requirement is for an opportunity to be heard in a meaningful manner and at a meaningful time.

\textsuperscript{121} Walters, 105 S. Ct. at 3189-90. The court cites McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401-02 (1819), and Mathews, 424 U.S. at 349, in finding congressional
outcome be applied to the generality of cases, the Court rejected precedents relied upon in the lower court opinion while giving "great weight" to the government's interest in preserving the fee-limitation statute.

The congressional purpose in enacting the fee-limitation statute was to protect the full-value of a claimant's benefit award. As the VA SCDD claim procedures were designed by Congress to be non-adversarial and to obligate the VA to read all the evidence in a light most favorable to the claimant before awarding a benefit, "legislatures are to be allowed considerable leeway to formulate such processes without being forced to conform to a rigid constitutional code of procedural necessities." The district court's assertion of the government's "pa-

commitment to the fee-limitation. The fee-limitation law is 122 years old and in January 1985, before oral argument was heard, there remained two bills proposed in Congress to alter the fee-structure which had not been acted upon.

122. 105 S. Ct. at 3189 n.1. See Mathews, 424 U.S. at 344, and Parham v. J.R., 442 U.S. 584, 612-13 (1979). The application of the Mathews test, see supra note 120, to the medical claims of veterans was influenced by the Court's Parham decision. In Parham, a three judge federal district court had ruled unconstitutional a Georgia law allowing parents to voluntarily admit minor children to mental hospitals without a hearing with guardians ad litem. The Court reversed and remanded, stating that "illusory protection of an adversarial proceeding" would intrude into the parent-child relationship. Because the questions concerning commitment were medical, the Court only emphasized that a neutral fact finder should determine the minor's need for commitment and the fact finder should utilize all the traditional information such doctors rely on. "That there may be risks of error in the process affords no rational predicate for holding unconstitutional an entire statutory and administrative scheme that is generally followed in thirty states." 442 U.S. at 612.

123. 105 S. Ct. at 3195. "[T]hese precedents are of only tangential relevance."

124. Id. at 3192. "[U]nder the Mathews v. Eldridge analysis great weight must be accorded to the government interest at stake here."

125. The asserted government interest was in preserving a non-adversarial proceeding with low administrative costs which when combined with the fee-limitation law ensures the protection of veterans and their benefits. In Parham, the Court recognized Georgia's interest in not imposing procedural obstacles that might discourage the mentally ill minors' families from seeking the child's commitment, or from requiring a time consuming preadmission procedure that would disrupt the work of the institution. Parham, 442 U.S. at 605-06.

126. Walters, 105 S. Ct. at 3190.

127. 38 C.F.R. § 3.102 (1985)

128. Id. "When after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability or any other point, such doubt will be resolved in favor of the claimant."

129. Walters, 105 S. Ct. at 3192. In the context of a procedural due process attack, the Mathews test convinced the Court that a flexible approach to alternative dispute resolutions was not defeated by the statistical results of whether or not a veteran had an
ternalistic" role was deemed to be out of date. The claims processed through the informal procedures of the VA rarely turn on a question of law. Admittance to the VA proceedings of a paid advocate, while not only frustrating congressional intent in safeguarding a veteran's total benefit award, would also eventually frustrate the informal and non-adversarial nature of the VA procedures. Analogizing from rulings on probation and prison disciplinary procedures, the Court feared an alteration of the very fabric of the present VA claim hearing:

It is scarcely open to doubt that if claimants were permitted to retain compensated attorneys the day might come when it could be said that an attorney might indeed be necessary to present a claim properly in a system rendered more adversary and more complex by the very presence of lawyer representation.

The statistics (despite their unfinished and tentative nature) presented by plaintiff claimants in the lower court convinced the Court that the presence of attorneys made no difference to the actual outcome of a veteran's claim. Chastising the lower court's analysis, the Court doubted that a pro bono attorney to press a claim. Id. at 3196. To defeat the fee-limitation the Court wanted an "extraordinary strong showing of probability of error" with the present system. Id. at 3192. Of course, by ruling that the fee-limitation was constitutional as applied, the ability to present contradicting evidence in any court is problematical. The tentative nature of the statistics in the district court convinced that court to look at other military-type attorney representation statistics. See id. at 3192-93.

130. See 589 F. Supp. at 1323. But see Walters, 105 S. Ct. at 3190 (citing Lochner v. New York, 198 U.S. 45 (1905) as an example of a by-passed era when "rational paternalism" was condemned).

131. See supra note 68.


134. Walters, 105 S. Ct at 3192. See also Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267 (1975). "Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client's cause by any ethical means." Id. at 1288.

135. Walters, 105 S. Ct. at 3183, 3192-3 and 589 F. Supp. 1302 at 1316-17. The district court found the statistics unhelpful because the success rates of unpaid attorneys take no account of the development of attorney expertise in a particular area of law.

136. Id. at 3193. The Court found the lower court's analysis "unconvincing" and quite lacking in the "deference which ought to be shown by any federal court in evaluating the constitutionality of an Act of Congress." Id. The Court states that "[i]t is not
torney presenting a claim before the VA did anything but his best to push the client's claim. The lower court had determined that the success rates of individuals in discharge review hearings before military boards\(^{138}\) were more reliable to show the effect of attorneys on the outcome of a hearing than the statistics available on attorneys representing claimants before the VA.\(^{139}\)

Thus, in the Court's opinion, the "substantial safeguards"\(^{140}\) of the VA procedures, the non-adversarial\(^{141}\) and simple nature of the hearing, and the obligation imposed on the VA by statute to be responsive to the claim, combine with a lack of substantial evidence showing any great disparity in representation with or without an attorney, to tip the balance in favor of the government's interest of excluding attorneys who are paid more than ten dollars for their services. Finding VA benefits more like social security benefits than welfare payments,\(^{142}\) in that the benefits are not granted on a basis of need, the non-adversarial process is "determinative of the right to employ counsel."\(^{143}\) As no hearing is required before social security benefits may be temporarily halted,\(^{144}\) so too no attorney is required to protect the claim of VA claimants.

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\(^{138}\) Ultimate success rates:
- Service organizations: 48.28%
- Compensated attorneys: 72.73%

\(^{139}\) F. Supp. at 1318.

\(^{140}\) Ultimate success rates:
- Service Organization representatives: 16.2-16.7%
- Non-attorney representatives: 15.8%
- No representation: 15.2%
- Attorney-agent: 18.3%

\(^{141}\) S. Ct. at 3193.

\(^{142}\) Walters, 105 S. Ct. at 3196.

\(^{143}\) Walters, 105 S. Ct. at 3196. The Court also states here that the district court abused its discretion in holding "otherwise," thereby confusing the proper nature of the Supreme Court jurisdictional review under 28 U.S.C. § 1252.

\(^{144}\) Walters, 105 S. Ct. at 3196.
C. The First Amendment Rights

The Court's decision made short shrift of the first amendment argument. The Court found "no independent significance" in this line of reasoning separate from due process arguments. The Court found "conceptual difficulty" with analogies made to cases where attorneys are already permitted in the forum.

Meaningful access to the VA hearing process is not denied and claimants are allowed to make a meaningful presentation. It is questionable whether there is a first amendment right to pay counsel, the Court reasoned, and the VA process is a "meaningful alternative" that would have to be absent to find such a right.\footnote{147}

Justice Stevens' powerful dissent\footnote{148} disagreed with the plurality analysis concerning a veteran's meaningful access to the VA claims procedure.\footnote{149} Justice Stevens found the interest involved not to be a property interest in a statutorily enacted right to benefits, but instead the exercise of the first amendment right to petition the government for redress of grievances.\footnote{150} The individual's liberty interest is of paramount importance, especially when the individual is confronting the government:

> The priceless heritage of our society is the unrestricted right of each citizen to think as he will . . . it is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into error.\footnote{151}

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145. Id. at 3197.
146. Id. at 3196.
147. Id. at 3197. The crux of the Court's denial of a procedural due process violation is that the property interest in veterans' benefits is protected by the procedures used, especially when combined with the statutory mandate to the VA to assist claimants. The Court sought to avoid destroying the non-adversarial nature of the process by allowing attorneys to assist claimants in any but the most idealistically pro bono way. Stevens's dissent asserts that admitting attorneys to the procedure would not be adding a new procedure, but establishing a better one. Id. at 3211 n.9.
148. Id. at 3209.
149. The dissent would disagree with the Court's decision in ignoring the possibility that even though the vast majority of cases may be decided correctly by the VA, the individuals in those cases that are incorrectly decided have had their liberty infringed.
150. U.S. CONST. amend. I
The age of the fee-limitation statute works against it, for lawyers, "as skilled communicators dedicated to the service of their clients," would not introduce new procedures to the claims process, but only use the existing procedures more effectively. "As conscientious able advocates of the claimant's rights, the costs of the VA claims procedure should not rise either." It is this liberty interest, upheld in other contexts and previously confirmed by the Court that inflames the dissent. Any of the federal government itself into the different branches and different states indicates the importance "in protecting individual liberty from the possible misuse of power by a transient unrestrained majority." Walters, 105 S. Ct. at 3215 n. 20. The dissent uses "paternalistic" five times to describe the government's interest in the present VA procedures. Id. at 3209, 3211, 3211 n.10, 3212 n.10, 3212, and 3215. This view of liberty is consistent with the Stevens' dissent in Meachum v. Fano, 427 U.S. 215, 230 (1976): "If man were a creature of the State, the [Court's] analysis would be correct. But neither the Bill of Rights nor the laws of sovereign States create the liberty which the Due Process Clause protects."

152. As in Brown v. Board of Education, 347 U.S. 483 (1954), and Baker v. Carr, 369 U.S. 186 (1962), where the duration of the condition complained of gave no support to any present justification of the condition, the fee-limitation statute is undermined by changing levels of pay through 122 years. The equivalent value of $10.00 in 1864, Stevens found, was $580.00 today. 105 S. Ct. at 3210.

153. Walters, 105 S. Ct. at 3212.

154. In Stevens's opinion "the bureaucratic interest in minimizing the cost of administration is nothing but a red-herring." Id. at 3211 (echoing Rehnquist's use of the phrase). Also, "[o]nly if it is assumed that the average lawyer is incompetent or unscrupulous can one rationally conclude that the efficiency of the agency's work would be undermined by allowing counsel to participate whenever a veteran is willing to pay for his services." Id. at 3212.


156. In discussing a lawyer's right to solicit business, the Court stated that the client's right to seek counsel is protected by the first amendment. In re Primus, 436 U.S. 412, 426 (1978). Also, the right to seek counsel to petition for redress of grievances is protected. California Transport v. Trucking Unlimited, 404 U.S. 508 (1972).

157. Stevens reaches back to the definition of liberty in the dissent of Munn v. Illinois, 94 U.S. 113 (1877); opens and closes his dissent with: "This Court does not appreciate the value of individual liberty." Walters, 105 S. Ct. at 3209, 3216; and quotes Dick in Shakespeare's King Henry VI, pt. II, Act IV, scene 2, line 72: "The first thing we do, let's kill all the lawyers," as an equivalent effective result of the Court's decision. Walters,
balancing of the government's administrative costs with the individual's "priceless" liberty, must tip toward protecting the individual. Stevens quotes Brandeis' dissent in Olmstead v. United States: "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent." The Court misses the principle.

Over strong dissents, the Court reversed the lower court's order issuing a nationwide injunction and found the fee-limitation statute constitutional.

V. Conclusion

The Court's decision effectively limits veterans to service representation agents, or to acting pro se, when claiming benefits before the VA. Six justices, including Justice O'Connor and Justice Blackmun, are listed as concurring in the opinion written by Justice Rehnquist, though Justice O'Connor's concurring opinion, joined by Justice Blackmun, has a distinctly different effect on the claims asserted. If all six justices are in total agreement with the Rehnquist opinion, then the fee-limitation statute is constitutional and any new constitutional challenges to it must fail. But if Justices O'Connor and Blackmun only agree with the jurisdictional finding of the Rehnquist opinion, then as the opinion states: "Though the Court concludes that denial of expert representation is not 'per se unconstitutional'... on remand, the District Court is free to and should consider any individual claims that [the procedures] did not meet the standards we have described in this opinion."

105 S. Ct. at 3216 n.24.
159. 277 U.S. 438 (1928).
160. Id. at 479.
161. Walters, 105 S. Ct. at 3198. On May 7, 1986, the Federal District Court for the Northern District of California, relying on Justice O'Connor's concurrence, certified a class action on behalf of "Ionizing Radiation Claimants" under Fed. R. Civ. P. 23, National Ass'n of Radiation Survivors v. Walters, 111 F.R.D. 595 (N.D. Cal. 1986). "The class consists of all past, present and future ionizing radiation claimants who have, or will have, some form of 'active' claim relating to SCDD benefits before the VA." Id. at 598. Claimants may be able to establish that a radiation caused disability "is, to a constitutionally significant degree, more complex than establishing disability in other cases." Id. at 606. Evidence submitted with plaintiffs' motion for class certification included:
May an individual veteran properly mount a constitutional attack on the statute? To Justice Brennan, the answer would be yes, if the attack is by an individual claimant that the statute is unconstitutional as applied. Any veteran asserting such a claim would need the assistance of counsel. Where is the attorney to take on a complex constitutional challenge for a client who may, in the end, be precluded by law from paying counsel more than ten dollars?

Until Congress changes the law and establishes some form of reasonable attorneys fees, VA hearings will continue to be one-sided proceedings where individuals sacrifice their individual cases and needs in order for the majority of cases to be inexpensively decided. Continuing to battle, veterans now face the modern foe of fiscal retrenchment backed by a constitutional reading of congressional intent which contradicts itself and which in 122 years has been transformed into the opposite of what it was intended.

This Orwellian interpretation of congressional purpose is not new for the VA. Under different regulations the VA cut off benefits to a veteran’s widow, and argued that the court could not look at any administrative evidence in making its decision. Four years later, in a proceeding to recoup an educational assistance benefit, the VA asserted that the federal court only had jurisdiction to rule for the VA.

It is clear that, by statute, the VA must have the veteran’s best interests as heart, but it is not clear that this interest is

Rabinette, Jablon, Preston, Studies of Participants in Nuclear Tests, Final Report 1 Sept. 1978 - 31 Oct. 1984; MEDICAL FOLLOW-UP AGENCY, Nat’l RESOURCES COUNCIL at 7 (May 1985) 2101 Constitution Ave., N.W., Washington, D.C. (approximately 222,000 armed forces personnel involved in announced U.S. atmospheric nuclear tests from 1946-62); a document from the VA entitled Radiation Exposure Claims, Sept. 3, 1985 (of 5,194 radiation claims, only 79, or 1.5%, were allowed; of Atomic Veterans claims, 3,050 claims from peaceful A-tests plus 825 claims from Nagasaki and Hiroshima, only 15, or 0.4% were allowed. See Declaration of Dorothy Legarreta, National Ass’n of Radiation Survivors v. Alvarez, No. C 83-1861 MHP (N.D. Cal. April 28, 1986). Trial is set for September 1, 1987, on the class action challenge to the fee-limitation statute.

162. Id. at 3207 n.37.
164. de Magno v. United States, 636 F.2d 714 (D.C. Cir. 1980).
165. Id. at 717-20.
167. 38 C.F.R. § 19.157(c). The hearings before the B.V.A. are nonadversarial and not bound by legal rules of evidence, though ex parte in nature. In local hearings reasonable
acted upon or followed through, by the VA. They also serve who file claims and are denied benefits.

Possible challenges to the fee-limitation statute still exist. The government might not prosecute an attorney for receiving an eleven dollar fee for representing an attorney, and if not, where would the line be drawn? The penalty section of the statute might be unconstitutional. Without the criminal sanctions the fee-limitation is meaningless, but where is the attorney willing to risk a career for those who risked their lives?

The VA claims procedures appear to be ripe for the utilization of law students in law school clinics. Combined with a course on Administrative Law, the application of student interest with funding through an educational endeavor might be able to overcome the expenses involved in developing extensive medical reports, calling for hearings at every administrative level, and generally protecting the rights which many veterans do not know they have.

168. In January, 1987, Federal District Court Judge Marilyn Hall Patel "imposed about $115,000 in penalties" against the VA for willfully destroying documents; the documents are necessary for plaintiffs to continue the constitutional challenge to the applicability of the fee limitation in complex cases. N.Y. Times, Jan. 9, 1987 at A1, col. 1. The penalties imposed covered plaintiffs' legal fees "plus $15,000 that will be placed in a fund used to pay lawyer-interns at the Federal District Court" in San Francisco. Id. at A15, col. 1. Judge Patel ordered a special master to oversee the VA's effort to establish an internal procedure to assure the non-destruction of discovery material, Id. See also 38 C.F.R. § 1.17. Evaluation of studies relating to health effects of dioxin and radiation exposure (50 Fed. Reg. 34458, Aug. 26, 1985). One of the factors to be considered in evaluating scientific studies is "(4) Whether the study's findings are applicable to the veteran population of interest." Id.

169. Legal interns, law students and paralegals must be under the direct supervision of a recognized attorney . . . in order to prepare cases before the Board of Veterans Appeals. These individuals may present oral arguments at hearings, only if the recognized attorney is present. Otherwise, such individuals must qualify as agents or representatives under Rule 53 or 54 (§ 19.153 or 19.154).

38 C.F.R. § 19.156 (1986). See also 38 C.F.R. § 19.154 (1986): "Any competent person may be recognized as a representative for a particular claim, unless that person has been barred from practice before the Veterans Administration."
The congressional concern for, and protection of, federal benefits recipients may also be extended to other procedures and agencies. To protect social security disability income recipients, Congress might limit the amount an attorney can charge a claimant for representation to twenty-five dollars. Surely, this too could be backed by statutory mandates to have the claimant's best interests at heart. Any lower court decision "against" this magnanimous congressional purpose on constitutional grounds will instantly be reviewed by the Supreme Court.

The bitterness that veterans feel toward this type of process is reflected in the amicus briefs:

It is ironic and unfair that veterans (and their spouses and dependents), who staked their lives and health in fighting to preserve the Bill of Rights and its guarantee of legal counsel which it protects for virtually all others, are denied the right to choose and use legal counsel to help them obtain the statutory benefits Congress intended them to have. What was all the fighting about, anyway?

Michael J. Burns

170. Courts have interpreted dollar amounts in statutes in different ways. Recently, a local criminal court judge ruled that while the bright line for determining defendant's right to a jury trial is whether the maximum sentence is six months or $500.00 fine, the six months is fixed, while the $500.00 line is so old and low, that a crime with a maximum fine of $1,000.00 still does not imply that a defendant receives a jury trial. People v. Cruz, 129 Misc.2d 235, 492 N.Y.S.2d 872 (Bronx Crim. Ct. 1985).
