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## Walters v. National Association of Radiation Survivors: Disabled Veterans' Right to Counsel Denied, 19 J. Marshall L. Rev. 773 (1986)

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**WALTERS v. NATIONAL ASSOCIATION OF  
RADIATION SURVIVORS:\* DISABLED  
VETERANS' RIGHT TO COUNSEL DENIED**

Veterans of the armed forces have a statutory right<sup>1</sup> to hire an attorney to represent them in administrative proceedings to determine their entitlement to Veterans Administration (VA) service—connected death or disability benefits (SCDD benefits).<sup>2</sup> Federal statutes forbid the payment of more than ten dollars to any agent or attorney assisting with any single claim.<sup>3</sup> Moreover, federal

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\* 105 S. Ct. 3180 (1985).

1. See 38 U.S.C. § 3404(a) (1982) (administrator may recognize attorney to prepare, present, and prosecute claims under laws administered by Veterans Administration). See also 38 C.F.R. § 3.103(d) (1982) (SCDD claimant entitled to representation of his choice at every stage in prosecution of claim).

2. A veteran of the active military, naval or air service, or his surviving spouse, child or dependent parent, is entitled to compensation for disability due to personal injury suffered, or disease contracted in the line of duty during peace or war. 38 U.S.C. §§ 310, 321, 331, 341 (1982).

In an attempt to secure SCDD benefits, a claimant presents his or her claim to one of 58 regional Veterans Administration (VA) offices. The claimant must demonstrate both the occurrence of the death or disability and its connection to service in the line of duty. A rating panel consisting of a medical specialist, a legal specialist, and an occupational specialist determines whether to grant or deny the claim. Their rating of the veteran's claim is based on a complicated schedule involving detailed analysis of a variety of medical ailments. The rating board then notifies the claimant of its decision. If a claimant wishes to challenge that decision, he or she must file a Notice of Disagreement within one year, or else the decision is deemed final.

Based on the Notice of Disagreement, the VA may either reverse its decision, or prepare a Statement of the Case in which the issue for appeal is stated. After receipt of the Statement of the Case, the claimant must file a Substantive Appeal within 60 days. The appeal must allege specific errors of fact or law. Any exceptions not taken are presumed waived. Upon filing of the Substantive Appeal, the claim is transferred to the Board of Veteran Appeals (BVA) in Washington, D.C. The BVA reviews the entire record and is not formally required to defer to the regional VA office's decision. BVA decisions are final, but BVA may reconsider its decision based on allegations of error of fact or law, or upon discovery of new evidence. Judicial review of BVA decisions is precluded by 38 U.S.C. § 211(a) (1982). *National Ass'n of Relation Survivors v. Walters*, 589 F. Supp. 1302 (N.D. Cal. 1984), *rev'd*, 105 S. Ct. 3180 (1985).

3. 38 U.S.C. § 3404(c) (1982) [hereinafter referred to as section 3404(c)] provides:

The Administrator shall determine and pay fees to agents or attorneys under this section in allowed claims for monetary benefits under laws administered by the Veterans Administration. Such fees—

- (1) shall be determined and paid as prescribed by the Administrator;
- (2) shall not exceed \$10 with respect to any one claim; and
- (3) shall be deducted from monetary benefits claimed and allowed.

*Id.*

Congress first adopted the ten dollar fee limitation during the Civil War to

statutes impose criminal sanctions on anyone receiving compensation in excess of that fee limitation.<sup>4</sup> In *Walters v. National Association of Radiation Survivors*,<sup>5</sup> the United States Supreme Court reversed a district court decision to impose a nationwide preliminary injunction forbidding enforcement of these federal statutes.<sup>6</sup> The Court incorrectly weighed the competing private and governmental interests involved in analyzing plaintiff's due process arguments.<sup>7</sup> The *Walters* Court's holding preserves a system that deprives veterans of their rights to due process through the denial of meaningful access to counsel in securing their property interest in SCDD benefits. A veteran's access to counsel is crucial because SCDD benefits are the disabled veteran's sole remedy for service connected injuries.<sup>8</sup>

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protect the veteran/claimant from unscrupulous attorneys. Congress feared that lawyers might take advantage of claimants by taking an exorbitant share of the veteran's entitlement in return for very limited legal assistance in securing that benefit.

The War Risk Insurance Act of 1917, passed during World War I, continued this fee limitation for substantially the same reasons. When the Consolidation Act of 1930 established the Veterans Administration, the attorney fee limitation was preserved. Joint Appendix E at 62a-70a, *Walters v. National Ass'n of Radiation Survivors*, 105 S. Ct. 3180 (1985). See also S. REP. No. 466, 97th Cong., 2d Sess. 50 (1982) (statement of original purpose of attorney fee limitation). See generally Comment, *The Veteran's Right to Counsel: A Constitutional Challenge to 38 U.S.C. § 3404*, 4 U. SAN FERN. V. L. REV. 121 (1975) (discusses various statutory fee limitations enacted since Civil War and history of constitutional challenge to them).

4. 38 U.S.C. § 3405 (1982) imposes a penalty of a maximum \$500 fine and two years imprisonment at hard labor for anyone charging or receiving compensation in excess of the ten dollar fee limitation described in section 3404(c). This sanction was aimed at discouraging or punishing unscrupulous persons from charging veterans excessive fees in return for minimal assistance in preparing applications for relatively simple claims. Brief from Amicus Curiae for the American Veterans Committee, Inc., at 7-9, *Walters v. National Ass'n of Radiation Survivors*, 105 S. Ct. 3180 (1985).

5. 105 S. Ct. 3180 (1985).

6. *National Ass'n of Radiation Survivors v. Walters*, 589 F. Supp. 1302 (N.D. Cal. 1984), *rev'd*, 105 S. Ct. 3180 (1985).

7. The balancing of competing private and governmental interests is the accepted method of fifth amendment due process analysis in Supreme Court decisions. The Court's decisions have established that due process is a flexible concept which will vary depending upon the weights given to the competing public and private interests involved and the circumstances of the alleged deprivation. See *Mathews v. Eldridge*, 424 U.S. 319 (1976) (balancing test used to hold that social security disability benefit termination procedures did not violate due process). See also *Schweiker v. McClure*, 456 U.S. 188 (1982) (balancing test used to hold Part B Medicare benefit hearing procedures did not violate due process); *Parham v. J.R.*, 442 U.S. 584 (1979) (balancing test used to hold state statutory procedure for voluntary commitment of children to state mental hospital did not violate due process); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (balancing test used to hold parolee entitled to certain minimal due process in revocation of parole); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (balancing test used to hold procedural due process applicable to termination of welfare benefits).

8. The preservation of the ten dollar fee limitation completes the denial of due process to the veteran. In addition to depriving the veteran of meaningful access to legal representation before the VA, federal law prohibits judicial review of any BVA decision. Moreover, the veteran is precluded from suing the federal government for

In *Walters*, the plaintiffs were individual recipients of and applicants for SCDD benefits whose awards were reduced or denied,<sup>9</sup> and veteran's organizations whose members were recipients of benefits or who had claims pending before the VA.<sup>10</sup> The defendants were the Veterans Administration, its National Director, and one of its regional directors.<sup>11</sup> In an action in the United States District Court for the Northern District of California, plaintiffs requested a preliminary injunction to prevent enforcement of the ten dollar fee limitation. The plaintiffs asserted that the fee limitation prevented them from securing adequate legal assistance in pursuit of their claims.<sup>12</sup>

The plaintiffs argued that the fee limitation deprived them of their SCDD benefit entitlement without due process of law.<sup>13</sup> In addition, the plaintiffs contended that the fee limitation violated their first amendment rights to petition for redress of grievances<sup>14</sup>

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service-related injuries. See *Johnson v. Robinson*, 415 U.S. 361 (1974) (38 U.S.C. § 211(a) (1982) prohibits review of decisions of law or fact in the administration of veterans' benefit program); *Feres v. United States*, 340 U.S. 135 (1950) (federal government is not liable under Federal Tort Claims Act for injuries to servicemen where injuries are service-connected).

9. The individual plaintiffs included Albert Maxwell, whose application for an increase in his SCDD disability benefits was denied. Maxwell was a survivor of the Bataan Death March and the sinking of a Japanese prison ship. He was ordered to clear debris from Hiroshima shortly after the atomic bombing of that city. After developing a rare bone cancer associated with radiation exposure, Maxwell applied for an increase in SCDD benefits, but the VA denied his application. Reason Warehime was also a plaintiff and a recipient of SCDD benefits whose claim for radiation related benefits was denied. Warehime was a member of a group detailed to clean up Nagasaki in August, 1945. He was also subjected to radiation during his participation in atomic bomb testing in 1953. Plaintiff Doris Wilson's husband, a Navy veteran of atomic bomb testing during 1945-57, died of pancreatic cancer in 1980. Mrs. Wilson's application for SCDD benefits was denied. Brief from Amicus Curiae for the National Association of Atomic Veterans at 2-5, *Walters v. National Ass'n of Radiation Survivors*, 105 S. Ct. 3180 (1985).

10. Plaintiff, National Association of Radiation Survivors, is a veterans' organization whose members participated in atomic bomb testing. Many of those members have claims pending before the VA. Plaintiff Swords to Plowshares Veterans Rights Organization is a veterans' organization devoted to the needs of Vietnam veterans. Many of these members have pending SCDD claims based on complex causes such as Agent Orange exposure and post-traumatic stress syndrome. *Walters*, 105 S. Ct. at 3183.

11. *National Ass'n of Radiation Survivors v. Walters*, 589 F. Supp. at 1306 (1984).

12. *Id.* at 1305.

13. The fifth amendment to the United States Constitution provides: "No person shall be . . . deprived of life, liberty or property without due process of law." U.S. CONST. amend. V. Plaintiffs argued that application of the ten dollar attorney fee limitation was unconstitutional on the ground that it deprived them of meaningful access to legal representation in SCDD claims procedures. They contended that this attorney fee limitation deprived them of their right to procedural due process under the fifth amendment. *National Ass'n of Radiation Survivors v. Walters*, 589 F. Supp. at 1306.

14. The first amendment provides: "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a

and to associate freely with their chosen counsel. The district court enjoined enforcement of the fee limitation on a nationwide basis.<sup>15</sup> The district court granted injunctive<sup>16</sup> relief on the grounds that the plaintiffs had demonstrated a high probability of success on their fifth<sup>17</sup> and first amendment claims.<sup>18</sup> The defendants appealed the

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redress of grievances." U.S. CONST. amend. I. Plaintiffs contended that the ten dollar attorney fee limitation prevented them from effectively petitioning the government for compensation for service-related injuries. Plaintiffs argued that they could not adequately assert their claims without the opportunity to retain counsel. *National Ass'n of Radiation Survivors v. Walters*, 589 F. Supp. at 1306.

15. The district court, pending a trial on the merits of the action, granted plaintiffs' motion for preliminary injunctive relief. The district court granted nationwide relief, ordering defendants to refrain from enforcing the fee limitation and the associated criminal sanctions. *Id.* at 1329.

16. The district court set out the Ninth Circuit's standard for granting preliminary injunctive relief: a strong showing of probable success on the merits and the possibility of irreparable injury. The district court also noted that a movant might secure preliminary injunctive relief on a showing that serious questions were raised and that the balance of hardship was sharply in its favor. The district court chose, however, not to use this alternate standard due to its uncertain acceptability in light of recent Supreme Court holdings. *Id.* at 1307.

17. In issuing its preliminary injunction, the district court first determined that plaintiffs, both recipients of and applicants for SCDD benefits, had a statutorily created property interest protected under the due process clause of the fifth amendment. This property interest was grounded in plaintiffs' legitimate claims to a statutory entitlement in SCDD benefits. Next, the district court used the three element test from *Mathews v. Eldridge*, 424 U.S. 319 (1976), to determine what procedural process was due plaintiffs in protecting their property interest. *Walters*, 589 F. Supp. at 1312.

The district court determined that plaintiffs' private interests were substantial because many of them were totally or primarily dependent on SCDD benefits for support. *Id.* at 1314. The district court then noted that plaintiffs' undisputed factual evidence showed that SCDD procedures are extremely complex. SCDD procedures involve interaction between federal statutes, regulations, various VA procedural manuals, formal and informal adjudication memoranda, VA circulars and BVA decisions. The district court also noted that plaintiffs' own claims involved very complicated substantive medical and legal analyses. Such analyses included the degree of claimant's disability and the service-connection of the injury. *Id.* at 1319.

The district court reviewed existing methods of assisting SCDD claimants: VA personnel themselves and non-attorney service representatives from various veterans' organizations. The court found that due to burdensome caseloads, neither VA personnel nor the service representatives provided the degree of assistance that paid attorneys might offer. The court found that plaintiffs had demonstrated a high probability of success that current SCDD procedures caused a substantial risk of deprivation of their property rights. *Id.* at 1327.

Finally, the district court noted that the government had not asserted a strong interest in the fee limitation, nor had it shown that lifting it would cause harm to any legitimate government interest. Therefore, the district court concluded that the weight of the due process balancing factors was in favor of the plaintiffs. The court determined that plaintiffs had demonstrated probable success on the merits of their claims and the possibility of irreparable injury. *Id.* at 1323.

18. As a separate cause of action, plaintiffs alleged that the ten dollar attorney fee limitation violated their first amendment rights to petition the government for redress of grievances and to associate freely with their chosen counsel. The district court noted that, unlike a procedural due process claim, a first amendment argument requires no showing of prerequisite property or liberty interest. The court stated that a statute restricting first amendment rights can only survive if substantial

district court's order directly<sup>19</sup> to the United States Supreme Court.

The Supreme Court reversed the district court's decision.<sup>20</sup> The

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government interests are served, and if the statutory restriction is drawn narrowly in serving those substantial governmental interests. *Id.* at 1304.

The district court reviewed a number of Supreme Court decisions which held that meaningful access to the courts and administrative agencies is a fundamental right protected by the first amendment. *See California Motor Transp. Co. v. Trucking Ltd.*, 404 U.S. 508 (1972) (first amendment right to petition includes right to meaningful access to administrative agencies as well as courts); *United Transp. Union v. State Bar of Michigan*, 401 U.S. 576 (1971) (collective activity to obtain meaningful access to courts is fundamental aspect of first amendment right to petition); *United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217 (1967) (first amendment right to petition protects ability to obtain effective legal representation); *Brotherhood v. R.R. Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964) (first amendment protects union's rights to employ attorney to represent workers' compensation benefit claimants). *See generally* Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322 (1966) (history of right to legal representation in England and the United States). The district court reasoned that plaintiffs' right to petition effectively for redress was especially vital in SCDD cases. SCDD benefits are the sole remedy available to the disabled veteran, and the VA is his only available forum for redress. *See Johnson v. Robinson*, 415 U.S. 361 (1974) (38 U.S.C. § 211(a) prohibits judicial review of any decisions of law or fact arising from the administration of a veterans' benefits statute). Furthermore, veterans may not sue the federal government for service related injuries. *See Feres v. United States*, 340 U.S. 135 (1950) (federal government is not liable under Federal Tort Claims Act for injuries to members of armed forces incurred during active duty). For these reasons, the district court concluded that plaintiffs had demonstrated a high probability of success on their first amendment arguments. *National Ass'n of Radiation Survivors v. Walters*, 589 F. Supp. at 1327.

19. Although this casenote will not discuss the jurisdictional issue in *Walters*, the majority and several dissenters argued the propriety of direct appeal. The defendants appealed the district court's order directly to the Supreme Court pursuant to 28 U.S.C. § 1252. That statute grants the Court jurisdiction over an interlocutory or final order of any court of the United States which the United States, or any of its agencies, is a party. *Walters*, 105 S. Ct. at 3187.

The *Walters* majority determined that direct jurisdiction under 28 U.S.C. § 1252 was appropriate despite the fact that the district court had not held that the attorney fee limitation was unconstitutional. Although the district court merely granted preliminary injunctive relief pending a trial on the merits, the *Walters* majority reasoned that the lower court's decision was against the constitutionality of the fee limitation. The majority found this was sufficient to permit direct appeal to the Court under 28 U.S.C. § 1252. *Walters*, 105 S. Ct. at 3188.

Justice O'Connor agreed that direct appeal was appropriate because the district court's injunction effectively invalidated a federal statute on a nationwide basis. Therefore, the scope of the decision required the Court to affirm or reverse that restraint expeditiously. *Id.* at 3197 (O'Connor, J., concurring). Justice Brennan, however, noted that the Court had never before assumed jurisdiction over a district court's determination of likelihood of success on the merits. He argued that the propriety of an appeal to the Supreme Court pursuant to 28 U.S.C. § 1252 is based on the nature of the district court's holding and not on its national impact. *Id.* at 3198-3204 (Brennan, J., dissenting). Justice Brennan reasoned that Congress intended the courts of appeal to be the correct forum for determination of the propriety of a district court's grant of preliminary injunctive relief. He based his conclusion on the intent behind enactment of 28 U.S.C. § 1252: that courts of appeal should monitor the equitable injunctive process, while the Supreme Court should resolve the underlying substantive issues of the constitutional challenge. *Id.* at 3207 (Brennan, J., dissenting).

20. 105 S. Ct. at 3197.

Court resolved the issue of whether the fee limitation deprived SCDD benefit claimants of due process<sup>21</sup> of law in favor of the defendants. It held that the district court abused its discretion in issuing its nationwide preliminary injunction.<sup>22</sup> The Court concluded that the ten dollar attorney fee limitation was consistent with due process because the government interest in preserving the fee limitation outweighed the private interest in securing SCDD benefits.<sup>23</sup>

In reversing the district court's decision, the Court applied the due process balancing test it had set out in *Mathews v. Eldridge*.<sup>24</sup> *Mathews* emphasized the flexible nature of due process and established a three element test for determining what process is due an individual in any given situation.<sup>25</sup> The *Mathews* test balances the private interest involved, the risk of erroneous deprivation of that interest under existing procedures and the probable value of additional safeguards against the government's interest, including the administrative and financial burdens of additional safeguards.<sup>26</sup>

The Court began its analysis with an evaluation of the

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21. *Id.* at 3188-96. The *Walters* Court confined its analysis largely to plaintiffs' fifth amendment claims. The Court dismissed plaintiffs' first amendment arguments as "inseparable" from their fifth amendment arguments. In doing so, the Court ignored the district court's distinction between the fifth amendment due process issue and the issue of the right to petition effectively for redress of grievances guaranteed under the first amendment. Despite the different analytical methods applicable in determining whether the distinct constitutional guarantees had been violated, the Court chose to characterize plaintiffs' first amendment claims as being without independent significance. *Id.* at 3197.

22. *Id.* at 3196.

23. *Id.* at 3192.

24. 424 U.S. 319 (1976).

25. The *Mathews* case involved a challenge to the constitutional validity of certain administrative procedures of the Department of Health, Education and Welfare. Plaintiff, Eldridge, contended that due process required that a hearing be held prior to termination of his social security disability benefits. The Court described due process as a flexible concept requiring a balancing analysis of the private and governmental interests involved. The *Mathews* Court held that due process did not require the holding of pre-termination hearings since the benefit recipient could hire an attorney and could seek judicial review of the benefit termination. The *Walters* Court, however, preserved a system in which both these due process measures are denied to the disabled veteran. *Id.*

26. *Mathews*, 424 U.S. at 319. The three *Mathews* factors have subsequently been employed in due process analysis in a number of Supreme Court cases. See *Schweiker v. McClure*, 456 U.S. 188 (1982) (*Mathews* factors used to hold Part B Medicare benefit hearing procedures did not violate due process requirements); *Parham v. J.R.*, 442 U.S. 584 (1979) (factors used to hold state statutory procedures for voluntary commitment of children to state mental hospitals were consistent with due process). See generally Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976-77) [hereinafter cited as *Due Process Calculus in Mathews*] (criticizes *Mathews* test as focusing on questions of balancing technique rather than concentrating on questions of value).

government's interest in the ten dollar fee limitation.<sup>27</sup> The *Walters* Court characterized the government interest<sup>28</sup> as twofold: first, maintenance of an informal, non-adversarial SCDD claims process; and second, avoidance of the need for veterans to hire lawyers who would share the claimant's benefit award. The Court asserted that invalidation of the ten dollar fee limitation would change SCDD claims processes from informal procedures to complicated adversarial hearings.<sup>29</sup> As a result, administrative costs would increase, causing an ultimate reduction in benefit awards to claimants.<sup>30</sup> Also, lawyers would increasingly share in veteran's

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27. *Walters*, 105 S. Ct. at 3190. In its due process balancing analysis, the *Walters* majority placed great weight on this alleged long-term congressional interest in maintenance of the attorney fee limitation. For a detailed account of the legislative history of 38 U.S.C. § 3404(c) and its statutory predecessors, see Brief from Amicus Curiae, American Veterans Committee, Inc. at 5-11, *Walters v. National Ass'n of Radiation Survivors*, 105 S. Ct. 3180 (1985); Appellees' Motion to Affirm, *Walters*, 105 S. Ct. 318, Appendix E at 62a-70a (1985). See also *The Veteran's Right to Counsel: A Constitutional Challenge to 38 U.S.C. § 3404*, 4 U. SAN FERN V. L. REV. 121 (1975) (history of various statutory fee limitations enacted since the Civil War and the record of constitutional challenges to them).

28. *Walters*, 105 S. Ct. at 3191. The *Walters* Court saw the invalidation of the ten dollar attorney fee limitation as harmful to the congressional plan for administration of SCDD benefit procedures. The Court pictured congressional interest as a consistent desire to maintain this limitation since it was first enacted in 1864. At that time, the fee limitation was aimed at preventing unscrupulous lawyers from victimizing veterans by retaining an unearned portion of the veteran's entitlement in return for very limited legal assistance. However, the *Walters* Court ignored the current position of the Senate Committee on Veterans' Affairs. That Committee has expressly stated that whatever the merits of Congress' view of unscrupulous attorneys at the time of enactment of the fee limitation, such a view of today's bar is no longer applicable. In addition, the Committee has expressed that view despite a number of court decisions upholding the validity of the statutory limitation in the face of unconstitutional challenges. See S. REP. NO. 466, 97th Cong., 2d Sess. 50 (1982).

29. *Walters*, 105 S. Ct. at 3192. The *Walters* Court chose to view the ability of SCDD claimants to hire attorneys as a development that would result in benefits procedures becoming more adversarial. While the Court acknowledged that counsel could perform some useful functions such as factual development, the Court perceived these potential benefits as being greatly outweighed by the tendency of lawyers to prolong and obstruct rather than facilitate dispute resolution. The Court noted Congress' strong intention that lawyers should not share in veterans' awards. *Id.*

30. *Id.* at 3192. The Court predicted that if SCDD benefit claimants were allowed to employ lawyers freely, the claims process would evolve toward requiring legal assistance. This would then result in claimants with factually simple claims feeling compelled to hire an attorney. This increased participation by attorneys would cause the SCDD system to become more adversarial and more complex through the mere presence of lawyers in the process. The *Walters* Court anticipated that this additional complexity would result in higher administrative costs. These higher costs, in turn, would cause the VA to award smaller SCDD benefits. *Id.* Again, the *Walters* Court professed to give great deference to congressional aims in these matters. *Id.*

Unfortunately, the Court ignored the Senate Committee on Veterans' Affairs determination that modifications to the current fee limitation would not result in additional administrative burdens for the VA. See S. REP. NO. 130, 98th Cong., 1st Sess. 32 (committee did not anticipate that changes to attorney fee limitation would cause significant management problems for the VA).

awards due to the payment of their fees.

The *Walters* Court described the private interest at stake as a property right<sup>31</sup> granted in a non-adversarial, administrative proceeding.<sup>32</sup> The Court contrasted SCDD benefits, awarded on the basis of service-connection, with welfare benefits,<sup>33</sup> which are awarded on the basis of need. Because welfare benefits are intended to provide recipients with their only means of daily subsistence, the Court reasoned that the private interest in those entitlements was greater than that of SCDD claimants.<sup>34</sup> The Court found this distinction crucial in justifying the apparent inconsistency in recognizing the due process right of welfare recipients to employ counsel while preserving the attorney fee limitation in the case of SCDD claimants.<sup>35</sup> Finally, the *Walters* Court analyzed the

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31. *Walters*, 105 S. Ct. at 3189. The *Walters* Court, in light of its holding that the ten dollar fee limitation was consistent with due process, opted not to determine the property rights of recipients of SCDD benefits versus those of applicants for such benefits. *Id.* at 3189 n.8. The district court had determined that applicants, as well as recipients of SCDD benefits, had shown a high probability of success on their claim to a protected property interest. *National Ass'n of Radiation Survivors v. Walters*, 589 F. Supp. at 1313. *Cf. Ressler v. Pierce*, 692 F.2d 1212, 1215-16 (1982) (applicants for federal rent subsidies have constitutionally protected property interest due to their membership in a class of individuals whom the statutory program was intended to benefit).

32. *Walters*, 105 S. Ct. at 3195. The Court characterized SCDD benefits as a property interest awarded and ended in a non-adversarial setting. The Court did so in order to distinguish the property interest at stake in *Walters* from the liberty interest involved in a more adversarial proceeding such as a criminal trial. The *Walters* Court reasoned that while a criminal defendant is entitled to legal representation, this analogy did not extend to a non-adversarial administrative proceeding such as SCDD procedures. *See Friendly, Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975) (explores what process is due before an individual is deprived of property interests). *See also The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322 (1966) (compares due process requirement for counsel in civil litigation with constitutional right to counsel in criminal setting).

33. *Walters*, 105 S. Ct. at 3195. The *Walters* plaintiffs relied on a previous case in which the Court held that a welfare recipient was entitled to legal representation at benefit termination hearings. *See Goldberg v. Kelly*, 397 U.S. 254 (1970).

34. *Walters*, 105 S. Ct. at 3195. The *Walters* Court reasoned that the private interest at stake in SCDD procedures was not as substantial as the private interest in retaining welfare benefits. The Court's analysis was grounded in the difference in the basis of the benefit award in each case. SCDD benefits are conferred on the basis of service-connection, while welfare benefits are conferred on the basis of need. *Id.*

35. *Id.* at 3195-96. The Court reasoned that SCDD benefits are akin to the social security disability benefits at stake in *Mathews v. Eldridge*, 424 U.S. 319 (1976). In *Mathews*, the Court held that due process did not require a hearing prior to termination of disability benefits. *Id.* at 349. However, the Court noted that other vital due process protections were available to the disability recipient, including the right to legal assistance and complete judicial review of benefit termination. *Id.* at 339-49. It is ironic that the *Walters* Court saw SCDD benefits as similar to social security benefits, yet reached opposite conclusions on what process is due the recipients of those benefits. 105 S. Ct. at 3195-95 (1985). *See also Popkin, The Effect of Representation in Nonadversary Proceedings—A Study of Three Disability Programs*, 62 CORNELL L. REV. 989 (1977) [hereinafter cited as *Effect of Representation in Disability Programs*] (comparison of procedural and substantive

remaining *Mathews* factor: the risk of erroneous deprivation of plaintiff's rights under current SCDD procedures and the probable value of allowing claimants to hire lawyers to reduce that risk.<sup>36</sup> The Court chided the district court for its "ill-founded analysis" concerning the complexity of both plaintiffs' own cases<sup>37</sup> and the SCDD procedures themselves.<sup>38</sup> The Court was highly critical of the district court's characterization of the plaintiffs' agent orange and radiation-related claims, stating that these allegedly "complex" cases had been neither defined nor quantified sufficiently. The Court discounted the risk of loss of plaintiffs' rights on the grounds that even if VA procedures are complex, they are also informal and non-adversarial.<sup>39</sup>

The *Walters* Court determined that the non-attorney representatives provided by various service organizations<sup>40</sup> furnish

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aspects of social security, FECA and veterans' disability benefit programs).

36. *Walters*, 105 S. Ct. at 3192-96.

37. *Id.* at 3193. The *Walters* Court's criticism of the district court's definition and quantification of complex cases was inaccurate. The district court first noted that SCDD benefit awards often depend on complicated medical analysis and proof of service-connection. In order to present a convincing case, claimants often have to collect large quantities of information concerning the medical nature of the disability and the service-connected circumstances which caused that disability. To reach its conclusion, the district court had evaluated a considerable number of affidavits, VA reports and plaintiff depositions. In light of that accumulation of undisputed evidence, the *Walters* Court's comments were overly harsh. *Id.* See *National Ass'n of Radiation Survivors v. Walters*, 589 F. Supp. at 1319-20. It is ironic that the *Walters* Court demanded complete definition and quantification of complex SCDD claims. In an earlier decision, the Court recognized that the right to counsel depends not on the nature of the procedures alone, but from the particular facts of each case. See *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (right to counsel at parole revocation hearing depends on particular facts of each case). Thus, the *Gagnon* Court recognized that complexity depends on the facts of each individual case. Therefore, the need for counsel derives from the peculiarities of each case. The *Walters* Court, however, sought complete definition and quantification of "complexity" before recognizing a right to legal representation in SCDD procedures. *Walters*, 105 S. Ct. at 3193.

38. *Id.* The *Walters* Court criticized the district court for its holding that VA procedures are complex. The Court stated that the district court based its complexity conclusion on an abstract analysis of SCDD procedures. This is contradicted by the district court record. The lower court not only examined VA procedures in the abstract, but weighed undisputed factual evidence in the form of exhibits and depositions from SCDD claimants and VA employees. *National Ass'n of Radiation Survivors v. Walters*, 589 F. Supp. at 1319. It is ironic that in an earlier opinion, the Supreme Court itself characterized VA policies and procedures as technical and complex. See *Johnson v. Robison*, 415 U.S. at 370 (1950).

39. *Walters*, 105 S. Ct. at 3184, 3191. The *Walters* Court noted that the SCDD claims process is designed to function informally and with a high degree of concern for the claimant. SCDD procedures do not contemplate a statute of limitations for the services-connected disability. Also, a denial of benefits has no *res judicata* effect if the claimant can present new facts. The Court also chose to view the one year time limit to challenge VA decisions as "quite liberal." *Id.* at 3184.

40. *Id.* The Court noted that various veterans' organizations provide service agents to assist SCDD claimants. These agents are provided at no charge and are recognized as an important element in the SCDD process. However, the *Walters* Court rejected the district court's finding that these service representations face

sufficient assistance to the claimant in protecting his or her property rights. The Court saw the attorney as being unable to provide any better measure<sup>41</sup> of assistance to the SCDD claimant. In fact, the Court chose to view the lawyer's role in SCDD procedures as more obstructive than helpful.<sup>42</sup> After analyzing the three *Mathews* factors, the *Walters* Court concluded that the veteran's private interest in receiving SCDD benefits failed to outweigh the government's interest in maintaining the ten dollar attorney fee limitation.<sup>43</sup>

The Court's reasoning in *Walters* is not persuasive. In its analysis of the due process issue, the Court inaccurately described the government's interest in maintaining the ten dollar fee limitation. At the same time, the Court mistakenly evaluated the substantial private interest involved. In addition, the Court incorrectly rejected the district court's analysis of the potential risks and benefits involved. These risks included erroneous deprivation of plaintiff's property rights and the probable value of legal assistance to the veteran in pursuing an SCDD benefit entitlement.

The *Walters* Court inaccurately described a strong congressional interest<sup>44</sup> in maintaining the ten dollar fee limitation. While Congress has remained committed to veterans' welfare, the Court was mistaken in its characterization of Congress' current position<sup>45</sup> on the statutory fee limitation. The Senate Committee on

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overwhelmingly large caseloads. As a result of this overburdening, these agents are unable to provide the complete assistance the SCDD claimant requires. See *National Ass'n of Radiation Survivors v. Walters*, 589 F. Supp. at 1321-22.

41. *Walters*, 105 S. Ct. at 3193. The Court compared success rates before the Board of Veteran Appeals (BVA). SCDD claimants with legal representation succeeded 18.3% of the time. Success rates with non-legal representation varied between 15.8% and 16.8%. *Id.*

42. *Id.* at 3191-92. While admitting that attorneys could perform useful functions, the *Walters* Court viewed their potential role in SCDD procedures as highly adversarial. The Court determined that the widespread introduction of legal representation into the SCDD procedures would hinder benefit awards rather than assisting the claimant to secure his entitlement. The Court viewed attorneys as causing delay and confusion in SCDD processes rather than efficiency and clarification. *Id.*

43. *Id.* at 3196.

44. *Id.* at 3189-90. The *Walters* Court portrayed congressional interest in the attorney fee limitation as consistent and absolute from the time the first fee limitation was enacted in 1862. However, legislative history of the fee limitation shows that it was intended to apply only to payment for simple clerical tasks in preparing the pension claim. See Joint Appendix E at 64a, *Walters v. National Ass'n of Radiation Survivors*, 105 S. Ct. 3180 (1985).

45. S. REP. NO. 466, 97th Cong., 2d Sess. 50 (1982). The Committee on Veterans' Affairs stated:

[T]he basis for congressional action, first after the Civil War and then after World War I, limiting the amount an attorney could receive for representing a claimant before the VA was grounded in a belief that lawyers of that day were unscrupulous and were taking unfair advantage of veterans by retaining an unwarranted portion of the veterans' statutory entitlement in return for very

Veteran's Affairs has expressly recognized<sup>46</sup> that the ten dollar fee limitation unduly hinders the SCDD claimant from exercising the right to legal representation in pursuing a VA claim. Legislation aimed at modifying the fee limitation has yet to pass either house of Congress. However the Senate Committee on Veterans' Affairs has twice unanimously<sup>47</sup> recommended legislation that would significantly increase the amount of the attorney fee limitation.<sup>48</sup>

The *Walters* Court's analysis of the government's interest ignores this congressional desire to replace the ten dollar fee limit with a more reasonable amount. Such a change would allow claimants to exercise their right to retain an attorney. At the same time, the Senate proposal would continue to meet the Congressional goal of maintaining an informal,<sup>49</sup> non-adversarial SCDD claims procedure. In view of these repeated congressional attempts to modify the ten dollar fee limitation, the *Walters* Court's attribution of great weight to the government's interest in the limitation was without merit. Moreover, the Court also characterized the plaintiff's private interest incorrectly.

The Court noted that SCDD benefits were awarded on the basis of service-connection, rather than on the basis of the claimant's

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limited legal assistance. Whatever the merits of such a view at the time the limitation was imposed, and despite numerous court opinions upholding the validity of the statutory limitation in the face of challenges to its constitutionality . . . , it is the Committee's position that such a view of today's organized bar . . . is no longer tenable.

*Id.* This policy statement clearly shows that the Senate Committee on Veterans' Affairs no longer considers valid the original reason for the enactment of the attorney fee limitation. The Committee has adopted this position despite a number of cases in which the courts have preserved the constitutionality of the fee limitation. Thus, the *Walters* Court's payment of great deference to congressional purpose in enacting and maintaining the fee limitation is ill-founded. *Id.*

46. S. REP. No. 466, 97th Cong., 2d Sess. 50-51 (1982). The Committee on Veterans' Affairs has expressly stated that the fee limitation is an undue hindrance on claimants to choose representatives to assist them in VA matters. The Committee believes that a claimant should not be restricted from hiring a lawyer, either for reasons of personal preference over other forms of representation or because of a concern that a claim is less likely to be denied. Again, the *Walters* Court ignores this clearly stated congressional position in its analysis of the government's interest. *Id.*

47. S. REP. No. 130, 98th Cong., 1st Sess. 51 (1983) (Committee on Veterans' Affairs unanimously recommended S. 636 to the Senate for passage); S. REP. No. 466, 97th Cong., 2d Sess. 50 (1982) (Committee on Veterans' Affairs unanimously recommended that the full Senate adopt passage of S. 349). Both of these Senate bills recommended modification of the attorney fee limitation.

48. The two proposed Senate bills would retain the ten dollar limit for an attorney's services rendered prior to a final BVA denial. At that point, the VA Administrator could approve reasonable attorneys' fees not to exceed \$500 or 25% of any past-due benefit award. See S. REP. No. 130, 98th Cong., 1st Sess. 51 (1983); S. REP. No. 466, 97th Cong., 2d Sess. 50 (1982).

49. The Senate Committee on Veterans' Affairs has determined that its proposed modification to the fee limitation would generate little or no additional paperwork beyond that usually involved in SCDD claims processes. S. REP. No. 466, 97th Cong., 2d Sess. 63 (1982).

need.<sup>50</sup> On this ground, the Court concluded that the veteran's interest was somehow less deserving of due process protection than were the interests of others, such as welfare recipients.<sup>51</sup> This analysis ignores the reliance that veterans place on SCDD benefits for their subsistence,<sup>52</sup> without regard to the administrative basis for the award. Whether the criterion for award of SCDD benefits is service-connection or financial need, the private interest in obtaining and retaining those benefits is significantly more substantial than the *Walters* Court recognized.<sup>53</sup>

The *Walters* Court also failed to weigh the special consideration<sup>54</sup> that Congress intended to extend to disabled veterans for their sacrifices in behalf of the country. Historically, the federal government has shown special concern for disabled veterans.<sup>55</sup> Federal assistance to veterans is based on the national purpose of assisting them to readjust to civilian life.<sup>56</sup> The *Walters* Court, however, ignored this public policy and mistakenly compared veterans' interest in SCDD benefits with private interests in other entitlements such as welfare benefits.<sup>57</sup> In addition, the Court's

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50. For a discussion of this distinction, see *supra* note 34.

51. See *supra* note 33.

52. Plaintiff Albert Maxwell has been unable to work steadily since 1978 due to his service-connected disabilities. As a result, he was forced to sell his home and declare bankruptcy. Maxwell and his wife now depend on SCDD benefits for subsistence. At the time of the district court's decision, plaintiff Reason Warehime's SCDD claim for radiation-related disabilities remained pending after five years of VA deliberations. During this time, Warehime and his wife relied exclusively on his VA benefits for subsistence. Brief from Amicus Curiae for the National Association of Atomic Workers at 4-5, *Walters v. National Ass'n of Radiation Survivors*, 105 S. Ct. 3190 (1985).

53. See *Devine v. Cleland*, 616 F.2d 1080 (9th Cir. 1980). Plaintiffs' interest in SCDD benefits are at least as significant as the interest in veterans' educational benefits, which one federal court of appeals has characterized as a "necessity." Student veterans requested injunctive relief to prevent VA Administrator from terminating educational benefits without due process of law. The Ninth Circuit, upheld the district court's injunction. In doing so, the appellate court characterized the private interest in veterans' educational benefits as close to a necessity of modern life. *Id.* at 1087. If educational benefits are a necessity, then SCDD benefits upon which plaintiffs rely for subsistence must carry an even greater weight in due process balancing analysis.

54. *Walters*, 105 S. Ct. at 3183. The *Walters* Court failed to include Congress' longstanding concern for veterans' welfare in its analysis of the government's interest. Ironically, however, the majority noted that: "[c]ongress began providing veterans pensions in early 1789, and after every conflict in which the nation has been involved, Congress has, in the words of Abraham Lincoln, 'provided for him who has borne the battle, and his widow and his orphan.'" *Id.*

55. See S. REP. No. 746, 96th Cong., 2d Sess. (1980), reprinted in 1980 U.S. CODE CONG. & AD. NEWS 4555, 4564, quoted in National Ass'n of Radiation Survivors v. *Walters*, 589 F. Supp. at 1312.

56. *Id.*

57. In weighing the private interests at stake, the *Walters* Court ignored Congress' special concern for veterans' welfare. Instead, the Court compared plaintiffs' interests in SCDD benefits with other private interests in governmental programs. Thus, the court reasoned that welfare recipients and SCDD claimants were

analysis of the risk of deprivation of plaintiffs' rights associated with SCDD procedures and the potential value to plaintiffs of legal assistance in avoiding that risk was faulty.

The Court dismissed the risk of deprivation of plaintiffs' rights on the grounds that even though VA procedures might be complex, they are also informal and non-adversarial.<sup>58</sup> Such a description of SCDD procedures, however, does not mean that a claimant should be denied his right to hire a lawyer to assist him.<sup>59</sup> Other government benefit programs are informal and non-adversarial, yet claimants are permitted to employ counsel without such an unreasonable fee limitation.<sup>60</sup> Welfare benefit recipients, for example, must be allowed to retain an attorney<sup>61</sup> at pre-termination hearings. In such cases, an attorney can provide valuable assistance, especially where cases present complex issues concerning causation.

The district court recognized that the *Walters* plaintiffs' cases presented complex issues of medical analysis and service-connection.<sup>62</sup> The Supreme Court, on the other hand, suggested that non-attorney service representatives would provide the same quality of assistance in these complex cases as would a paid attorney.<sup>63</sup> This

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on an equal footing in the eyes of Congress. In light of Congress' stated public policy of "special concern" for disabled veterans' welfare, this reasoning is without merit. *Id.*

58. For a discussion of the Court's characterization of this risk, see *supra* note 39 and accompanying text.

59. The *Walters* Court suggested that permitting SCDD claimants to retain counsel would make the claims process more adversarial and protracted. This would result in higher administrative costs. These higher administrative costs would eventually cause the VA to reduce the amount of claimants' awards. *Walters*, 105 S. Ct. at 3192. See Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1288 (1975) (role of counsel in adversarial system may cause him to advance client's cause through delay and confusion). *Contra* Popkin, *The Effect of Representation in Nonadversary Proceedings—A Study of Three Disability Programs*, 62 CORNELL L. Rev. 989, 992-93 (1977) (study of three informal, non-adversary government benefit programs, including VA procedures, show that claimants benefit from legal representation).

60. See *Mathews v. Eldridge*, 424 U.S. at 339 (1976) (social security benefit recipient may be represented by counsel at non-adversary hearing); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare benefit recipient must be allowed to retain attorney at informal pre-termination hearing).

61. *Goldberg v. Kelly*, 397 U.S. at 270 (1970). The *Goldberg* Court recognized that counsel can help develop facts, clarify the issues and generally protect the benefit recipient's interests. The *Goldberg* Court also stated, "[w]e do not anticipate that this assistance will unduly prolong or otherwise encumber the hearing." *Id.* at 271. Thus, the *Goldberg* Court's recognition that counsel would aid proper resolution of a benefit case is sharply at odds with the *Walters* Court's impression.

62. *Walters*, 589 F. Supp. at 1319-20.

63. The *Walters* Court's suggestion that non-attorney service representatives would provide the same quality of assistance is at odds with the experience of many veterans and other SCDD claimants. One such claimant, Mrs. J.D. Reese, filed an application for SCDD benefits in 1979. During the next five years, the VA denied her claim five times. The VA denied her claim repeatedly due to inadequate proof of the service-connection of the cause of her husband's death. Neither the VA nor the representatives of the service organizations suggested using expert medical testimony

suggestion ignores the *Walters* plaintiffs', as well as other veterans', dissatisfaction with that type of representation in SCDD procedures. In fact, one major veterans' organization<sup>64</sup> has completely discontinued the use of such non-legal assistance. Attorneys or attorney-supervised law students are now the exclusive representatives of this organization's members in SCDD proceedings. The fact that the VA, itself, includes a legal specialist on each local rating board and employs hundreds of attorneys to review cases appealed to the VA evidences the need for legal representation in SCDD proceedings.<sup>65</sup> Thus, the *Walters* Court's satisfaction with the quality of available non-attorney assistance in SCDD procedure is at odds with the actual experience of both the *Walters* plaintiffs and major veteran's organizations.

The *Walters* Court should have followed one of its earlier decisions set forth in *Gagnon v. Scarpelli*.<sup>66</sup> In *Gagnon*, the Court faced the question of whether due process required that an indigent probationer or parolee be represented by counsel at a revocation hearing. The *Gagnon* Court found that due process did not require an inflexible rule regarding a requirement for legal representation. Rather, the Court stated that a requirement of legal representation must be established on a case-by-case basis, depending on the complexity of the issues involved.<sup>67</sup> The *Walters* Court should have established a similar case-by-case approach to the ten dollar fee limitation.<sup>68</sup>

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in order to establish the service-connection element. During her sixth appeal, Mrs. Reese was represented by an attorney on a *pro bono* basis. He collected the vital factual evidence and presented expert medical testimony. On that basis, Mrs. Reese's award was granted. Clearly, she won her SCDD claim only because she was represented by competent legal counsel. Brief from Amicus Curiae for American Veterans Committee, Inc., at 17-19, *Walters v. National Ass'n of Radiation Survivors*, 105 S. Ct. 3180 (1985).

64. The Vietnam Veterans of America (VVA) has rejected non-attorney representation for its members in VA procedures. Instead, VVA employs lawyers or lawyer-supervised law student to assist veterans in SCDD procedures. Brief from Amicus Curiae for Vietnam Veterans of America at 2-3, *Walters v. National Ass'n of Radiation Survivors*, 105 S. Ct. 3180 (1985).

65. *Id.* at 11-12. One member of each three-person VA rating board at the regional office level is a legal specialist. That person is usually an attorney. At the VA appellate level, the BVA employs 117 attorneys. The BVA's 16 three-member review panels also include two lawyers on each. Thus, while SCDD procedures may not be adversarial, they are certainly legally oriented. *Id.*

66. 411 U.S. 778 (1973).

67. *Id.* at 790.

68. The *Walters* Court cited *Gagnon* as support for its position that introduction of legal counsel into SCDD procedures would significantly alter those procedures. The Court saw SCDD procedures involving attorney participation as more protracted and adversarial. *Walters*, 105 S. Ct. at 3191. This reference to *Gagnon* is somewhat misleading. The *Gagnon* Court recognized that use of legal counsel in parole revocation hearings would prolong the decision making process. However, the *Gagnon* Court stated that "[i]n some cases these modifications . . . must be endured and the costs borne because . . . the parolee's version of a disputed issue

In conclusion, the *Walters* Court's preservation of the ten dollar fee limitation is based on an inaccurate analysis of the competing private and public interests involved. First, the claimants' interests are substantial, notwithstanding the fact that SCDD benefits are awarded on the bases of service-connection rather than need. Second, congressional interest in maintaining the fee limitation has eroded significantly during the past few sessions of Congress. Third, the *Walters* Court's acceptance of the VA's position that attorneys are not required is belied by the complexity of VA procedures and the corresponding risk of deprivation the SCDD claimant faces.

The *Walters* Court's broad holding ignores the fact that SCDD claims procedures are the only remedy available to the disabled veteran seeking compensation for service-connected injuries. The availability of meaningful legal assistance is vital to the SCDD claimant in securing this sole remedy. Unfortunately, the *Walters* Court incorrectly relied on a presumption of constitutionality in preserving a fee limitation that helps deprive the veteran of his or her exclusive remedy. Congress must now act to raise the fee limitation to a reasonable amount. Only through access to meaningful legal representation will the disabled veteran have the right to secure benefits earned through sacrifices on behalf of the country.

*Thomas P. Minnick*

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can be fairly represented only by a trained advocate." 411 U.S. at 788. The *Walters* Court should have noted this earlier reasoning and used it to permit SCDD claimants to hire attorneys in complex cases on a similar case-by-case basis.

