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THE TEN DOLLAR FEE LIMIT FOR ATTORNEYS WHO REPRESENT VETERANS IN VETERANS’ BENEFITS PROCEEDINGS—AN ANACHRONISM?

I. INTRODUCTION

Throughout history, the United States government has had a special concern for helping those who are disabled as a result of military service. The government has given federal assistance with the goal of doing everything possible to help the disabled veteran readjust to civilian life. Despite this concern, veterans are being deprived of an effective means of challenging the denial of veterans’ service-connected death and disability benefits (hereinafter “SCDD”) because of an outdated statute, 38 U.S.C. § 3404(c)(2). This statute states that fees paid to attorneys who represent veterans in veterans’ benefits proceedings (up to the point at which the Board of Veterans’ Appeals issues a decision) shall not exceed ten dollars. Because of this cap on fees, most attorneys are unwilling to handle veterans’ benefits cases. The fee limit is outdated because it no longer equals four percent of the soldier’s salary as it did in 1864 when the law was first enacted. Furthermore, the process has become much more complicated, requiring more than filling out one simple form.2

This legislation stands despite its similarity to the Federal Employment Compensation Act (hereinafter “FECA”) and social security proceedings which allow for representation by counsel with no fee limit. The benefits in those cases are not based on need, as in welfare hearings where the claimants are indigents who cannot afford legal assistance, but on disability, as in veterans’ hearings. The

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only limit on attorneys' fees in FECA and social security proceedings is a determination by the agency that the fees are reasonable. Given the similarities among the statutes and the common policy of aiding the disabled, the only limit on attorneys' fees in veterans' benefits hearings should be reasonableness.

Section 3404(c)(2) has been held constitutional under the fifth amendment of the United States Constitution by the United States Supreme Court in Walters v. National Association of Radiation Survivors because it meets the Mathews v. Eldridge test for due process. That test is whether the cost, or government interest (fiscal or administrative cost of added or substitute procedure), outweighs the benefit. The benefit includes: 1) the private interest that will be affected by the official action and 2) the reduction in the risk of erroneous deprivation of such interest through the added or substitute procedure. The government interest in section 3404(c)(2), according to the Supreme Court in Walters, included: 1) the desire to prevent lawyers from receiving large portions of veterans' awards, 2) the goal of preventing adversarial proceedings which might slow the process and make it more difficult for veterans to receive awards, and 3) the prevention of the added administrative cost of allowing attorneys, which would eventually deplete the amount of money available for

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3. In Federal Employment Compensation Act proceedings, claimants may be represented by any person they choose. 5 U.S.C. § 8127(a) (1970); 20 C.F.R. §§ 10.142-143 (1976). An applicant for benefits receives the following notice: "Does an employee need an attorney or other representative in order to file a claim for compensation? This is not necessary. If desired, however, the employee may obtain the services of an attorney or other person for representation." EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEP'T OF LABOR, FEDERAL INJURY COMPENSATION 9 (rev. ed. 1980). A representative may not collect a fee unless it is approved by the agency. 5 U.S.C. § 8127(b) (1970).

In Social Security proceedings claimants may be represented by anyone. 42 U.S.C. § 406(a) (1970). If a claimant asks about representation, he is given a form suggesting that it may not be necessary: "You have the right to be represented by a person of your choice. . . . This does not mean that you will need a representative. Most people handle their social security affairs themselves with the help of the people in the social security office . . . ." SOCIAL SECURITY ADMINISTRATION DEP'T. OF HEW. Form SSI-75, Social Security and Your Right to Representation (Sept. 1970). A representative may not collect a fee, however, unless the agency determines that it is reasonable. 42 U.S.C. § 406(a) (1970). The agency will help an attorney collect a reasonable fee by paying him directly up to 25% of a past-due award. Id. This is not a ceiling on the amount of the fee. However, there is a ceiling of 25% of past-due benefits for representation in court. Id. § 406(b)(1).

4. The fifth amendment provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.


7. Id. at 334-35.
veterans' benefits. The government interest outweighed the benefit because, according to the Supreme Court, the Veterans' Administration (VA) proceedings provided adequate due process to veterans, and the private interest in having an attorney was not that substantial because the VA process was not adversarial, and there were adequate representatives in the VA to help the veteran.

However, recent developments show that the government interest does not include the prevention of adversarial proceedings because disinterested third parties may, without any barriers, pay attorneys to represent veterans. The government interest is also weakened because of recent VA actions which resulted in an order that compelled the VA to pay attorneys' fees and costs and $15,000 to the court for wasting its time. The award was based on a finding that the VA had frustrated discovery on the issue of whether the VA provides due process in complex cases for veterans' benefits. The VA's behavior weakens the government interest because it defeats the goal of lowering administrative cost by not allowing attorney representation. In other words, if the VA can afford to pay damage awards, it can afford to allow attorneys into its proceedings.

In addition, a VA staff attorney's analysis concluded that there are constitutional inadequacies in the SCDD process which increase the risk of erroneous deprivation in VA proceedings. This would also show an increase in the private interest in having an attorney, since it follows from this finding that the VA provides inadequate representation to veterans.

These developments weaken the Supreme Court's reasoning in finding section 3404(c)(2) to be constitutional and at the same time support the lower court's opinion in Walters that 3404(c)(2) is unconstitutional. In addition, these developments signal a need for Congress to amend section 3404(c)(2) by somehow raising the fee which an attorney can receive in SCDD proceedings.

This comment discusses the congressional, administrative, and judicial history behind section 3404(c)(2) in sections II.A., II.B., and II.C., respectively. Section II.D. discusses a recent analysis of SCDD proceedings done by a VA staff attorney. The comment then analyzes the historical aspects of 3404(c)(2) and the VA staff attorney's

9. Id. at 326-31.
10. See infra note 33 and accompanying text.
11. See infra note 90 and accompanying text.
12. See infra note 90 and accompanying text.
13. See infra note 93 and accompanying text.
analysis in Section III. Finally, this comment proposes section 3404(c)(2) amendments, which respond to history and recent developments, in Section IV.

II. BACKGROUND

A. Congressional History

Section 3404(c)(2) of Title 38, which now prevents veterans from spending more than ten dollars to hire an attorney, was first written to protect disabled war veterans. Congress adopted this fee limit during the Civil War to protect claimants from greedy lawyers who might take advantage of veterans by taking a large percentage of their benefits as legal fees. In addition, section 3405 imposes criminal penalties on anyone receiving remuneration above the fee limit.

In 1982, the Senate Committee on Veterans' Affairs reviewed the ten dollar fee limitation. The Committee recognized that the limit was imposed to protect veterans from unscrupulous lawyers. They went on, however, to state that whatever the basis might have been for the original limit, and despite numerous court cases affirming the validity of the limit against challenges to its constitutionality, it was the Committee's position that such a view of today's bar,


The Administrator shall determine and pay fees to agents or attorneys recognized 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.

15. The War Risk Act of 1917 passed during World War I continued this limit. In 1918, an amendment was proposed to the War Risk Act to limit the fee to three dollars in response to complaints that unscrupulous claims agents and attorneys were canvassing WWI veterans, fabricating claims, and harassing families of veterans into initiating claims under the new act. 56 CONG. REC., 5216, 5220-22 (Apr. 17, 1918). However, when codified, the limit remained at ten dollars and the Consolidation Act of 1930, which created the Veterans' Administration, preserved the ten dollar limit. S. REP. No. 466, 97th Cong., 2d Sess. 50 (1982) (stating the purpose of the original fee limit).

16. 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 section(s) 3404 . . . 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.


especially with its network of state and local bar associations that now police attorneys' practices, was no longer valid.10

The Committee felt the current limit was an undue restriction on the rights of veterans and other claimants to hire legal assistance of their choice in VA proceedings.18 An individual, for instance, might desire an attorney because of concern that the claim might be denied a second time by the Board of Veterans' Appeals [hereinafter "BVA"]. In addition, the claimant might feel that any development in the record in a complex case would be of extreme importance while still before the agency and that, therefore, an attorney would be more able to develop the record than the individual working with a service representative provided by the VA.20

In light of this view and legislative history which showed that the fee limit was intended to apply only to payment for simple clerical tasks,19 the Senate proposed amendments to Title 38 section 3404(c)(2) which would have lifted the ten dollar fee limit after an adverse decision by the BVA. The amendment would have allowed the Administrator to approve a reasonable fee not in excess of $500 or if a contingent fee agreement existed, not greater than twenty-five percent of the benefits awarded.21 The formula proposed by the Senate amendments for determining the fee is similar to section 406(a) of the Social Security Act,22 with the only difference being that in

18. Id.
19. Id.
20. Id. In order to secure benefits, a claimant presents a claim to one of 58 regional Veterans' Administration (VA) offices. The claimant must show both the occurrence of death or disability and its connection to service in the line of duty. A rating panel of medical, legal, and occupational specialists determines whether to grant or deny the claim. The rating is based on a complex schedule involving analysis of a variety of medical ailments. After a claimant is notified of the decision, he or she may challenge it by filing a Notice of Disagreement within one year or the decision will be final.

Based on the Notice of Disagreement, the VA either reverses its decision or prepares a statement of the case (Statement) in which the issue for appeal is stated. After receiving the Statement, the claimant must file a Substantive Appeal within 60 days. The appeal must allege specific errors of fact or law and any exceptions not taken are considered waived.

After filing the Substantive Appeal, the claim is turned over to the Board of Veterans' Appeals (BVA) in Washington, D.C. The BVA reviews the entire record and is not formally required to defer to the regional VA holding. BVA decisions are final, but may be reconsidered if 1) there are allegations of error in fact or law or 2) upon discovery of new evidence. There is no judicial review of BVA decisions. 38 U.S.C. § 211(a) (1982). Note, Walters v. National Association of Radiation Survivors: Disabled Veterans' Right to Counsel Denied, 19 J. Mar- shall L. Rev. 773, 773 n.2 (1986).

22. Id. at 52.
addition to the contingent fee percentage, the bill incorporated a $500 maximum fee as an alternative.\textsuperscript{24}

In 1986, for the fourth consecutive term, the Senate passed a bill raising the ten dollar ceiling on attorneys’ fees and adopting the proposed amendments.\textsuperscript{25} The bill died in the House,\textsuperscript{26} but for the first time, Sonny Montgomery, Chairman of the House Veterans’ Affairs Committee and a strong opponent of the legislation, agreed to allow hearings and a vote on H.R. 585, a bill mirroring the bill that passed in the Senate.\textsuperscript{27} Although it had over 230 House co-sponsors, the Committee tabled the bill with a vote of twenty to twelve.\textsuperscript{28}

In October 1988, a compromise bill, S. 11, was passed by the Senate. For the first time in history, the bill gave veterans the right to appeal BVA decisions. The bill allows appeals to a “newly created, independent specialty court” in Washington, D.C. to be established on September 1, 1989.\textsuperscript{29} The United States court of Veteran’s Appeals would have between three and seven judges who could review all claims for benefits which met the proper standard of review. The standard of review set out in S. 11 states that appeals could be considered if BVA decisions were “clearly erroneous.”\textsuperscript{30}

S. 11 also states that on appeal to the new specialty court, the ten dollar fee limit would be lifted and “reasonable fees” allowed.\textsuperscript{31} Finally, S. 11 provides that veterans could appeal cases challenging laws and regulations, but not individual factual questions, to the United States Court of Appeals for the Federal Circuit. The United States Supreme Court could then review those decisions.\textsuperscript{32}

B. Recent Administrative Developments

Although the 1986 legislative challenge to the ten dollar fee limit failed and the 1989 changes leave the fee limit intact up to an

\textsuperscript{24} See supra text accompanying notes 22-23.
\textsuperscript{25} S. 367, 99th Cong., 2d Sess. (1986).
\textsuperscript{26} H.R. 585, 99th Cong., 2d Sess. (1986).
\textsuperscript{27} Snyder, Stichman, & Wildhaber, Developments in Veterans’ Law in 1986, 20 Clearinghouse Rev. 1208, 1209 (1987) [hereinafter Developments in 1986].
\textsuperscript{28} Id. at 1209.
\textsuperscript{29} Cowen, Veterans Gain Right to Seek Judicial Review, 46 Cong. Q. 3058, 3059 (1988).
\textsuperscript{30} Id. at 3058. The bill also provides that the BVA become more independent of the VA in order to produce more “consistently objective opinions.” This independence would be accomplished by requiring the BVA chairman to be appointed by the president and confirmed by the Senate. In addition, board members would receive nine-year appointments. Id. at 3058-59.
\textsuperscript{31} Id. at 3059.
\textsuperscript{32} Id.
appeal to the new specialty court, there was an administrative decision on January 28, 1986, which produced a different result. Assistant Attorney General Charles Cooper affirmed the validity of third parties subsidizing attorneys to represent veterans as not violating the ten dollar fee limit. The opinion was sought by the VA General Counsel, who challenged a program established by the Los Angeles Legal Assistance Foundation and a program established by the state of Oregon. Under the Legal Assistance Foundation program, there was a contract with a private attorney to pay $300 for veterans’ cases presented to the VA Regional Office. In Oregon, the legislature directed the state to create a program to pay attorneys to represent certain war veterans.

The VA’s position is that as long as independent third parties pay, there is no violation of the statute. However, a payment that directly or indirectly diminished the veteran’s benefits would be inconsistent with the purpose of protecting benefits recovered by a veteran and the goal of protecting veterans from unscrupulous lawyers.

This opinion settled any doubts about the legality of legal services offices using private bar funds to retain attorneys to represent veterans. According to the Assistant Attorney General, there are no requirements or limits on disinterested third parties hiring attorneys to represent veterans except that any retainer agreement between a third party and an attorney should recite the language of 38 U.S.C. § 3404 and § 3405 and include a declaration that no payments to the attorney will directly or indirectly decrease the veteran’s benefits. Also, a separate document showing the veteran’s acknowledgement of this latter statement should be obtained.

34. Id. at 73.
35. Id.
36. Id.
37. Id.
38. Id. at 86
39. Id.
40. Id.
C. Recent Judicial History

1. National Association of Radiation Survivors v. Walters

Apart from legislative history and recent administrative developments, the ten dollar fee limit’s recent judicial history is interesting. In 1984, in *National Association of Radiation Survivors v. Walters*, a district court in California imposed a preliminary injunction forbidding the enforcement of section 3404(c)(2) on the ground that it violated the due process clause of the fifth amendment. The court relied on *Cafeteria Workers v. McElroy* which said “‘due process,’ unlike some legal rules, [was] not a technical conception with a fixed content unrelated to time, place and circumstances.”

In other words, even though in previous years the cost may have outweighed the benefit, the balance had changed over time so that the district court felt the statute was no longer constitutional. Under the flexible due process test, the statute could not remain the same, but had to transform according to the social and economic advances of the times.

   a. The Private Interest Affected by the Ten Dollar Fee Limit

First, the district court looked at the private interest that was affected by the fee limit. It found the interest to be substantial because many of the plaintiffs were totally or primarily dependent on veterans’ SCDD benefits, and VA proceedings were the sole remedy against the government.

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42. Id.
44. Id. at 895.
46. Plaintiff Albert Maxwell was not able to hold a steady job since 1978 due to service-connected disability. He was forced to sell his home and declare bankruptcy. Maxwell and his wife are now dependent on the VA benefits for subsistence. In addition, at the time of the district court decision, plaintiff Reason Wareheime’s claim for radiation disability had been pending after five years of deliberations. During that time Wareheime and his wife relied exclusively on VA benefits for subsistence. Brief for the National Association of Atomic Veterans as Amicus Curiae in Support of Appellees at 4-5, *Walters v. National Ass’n of Radiation Survivors*, 473 U.S. 305 (1985) (No. 84-571).
b. The Likelihood that Attorneys Would Avoid the Risk of Erroneous Deprivation Generally and the Risk of Erroneous Deprivation of the Private Interest Through the Present Procedure

The district court then discussed the likelihood that the use of attorneys would avoid any risk of erroneous deprivation of the private interest involved. The court discussed many cases where attorneys were praised and considered a vital support of due process. For example, in Goldberg v. Kelly, the United States Supreme Court required that all welfare recipients be permitted to retain counsel prior to having benefits terminated in a hearing before the agency because "[c]ounsel [could] help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient." Other circuits, noted the district court, had also required that persons be allowed to retain counsel in agency hearings. For instance, in reviewing denials of social security disability claims, courts had stressed the importance of representation of counsel by considering the lack of representation by counsel as a reason for reversing or remanding the Secretary's decision.

The district court in Walters noted that, in contrast to other hearings where the claimant could retain counsel in post-termination hearings or judicial proceedings, the veteran had no opportunity to retain counsel because 38 U.S.C. § 211(a) allowed no judicial review, and the fee limit applied to pre- and post-termination proceedings. Even in Mathews v. Eldridge, the claimant for social security disability benefits had a right to a full evidentiary post-termination review with the assistance of counsel at both the agency and court proceedings.

Adequate representation by counsel was also needed, according to the district court, because claims for service connected benefits turned on difficult medical analyses which determined the degree of disability, and proof of service connection might raise causation is-

decisions. This has changed since S. 11 now provides judicial review of BVA decisions by the newly created specialty court. Cowen, supra note 29, at 3059.

49. Id. at 270-71.
50. See, e.g., Deblois v. Secretary of HHS, 686 F.2d 76, 80-81 (1st Cir. 1982); Echevarria v. Secretary of HHS, 685 F.2d 751, 755 (2d Cir. 1982); Smith v. Secretary of HEW, 587 F.2d 857, 860 (7th Cir. 1978); Webb v. Finch, 431 F.2d 1179 (6th Cir. 1970).
sues which required both medically and legally complex analyses.\(^{53}\) In addition to this complicated substantive analysis, the district court found that the undisputed factual evidence showed claimants faced complex procedural requirements including statutes and regulations which if not followed would result in denial of their claims.\(^{54}\)

In order to wade through the procedural and substantive complexities, the VA regulations contemplated representation by a recommended service organization, attorney, agent, or other authorized person.\(^{55}\) The regulations expressly stated that “[i]t [w]as the obligation of the Veterans’ Administration to assist a claimant in developing the facts pertinent to his [or her] claim and to render a decision which grant[ed] him [or her] every benefit that [could] be supported in law while protecting the interests of the Government.”\(^{56}\) However, the district court found that claims examiners were allowed only 2.84 hours to develop the facts underlying each claim, and their performance was measured in part by the speed with which they processed claims.\(^{57}\)

The VA’s inability to devote time and resources to each claim was apparent to the district court in the factual development done on each case. The VA rarely went beyond accumulating medical and service records of veterans involved, and the court noted that the VA rarely subpoenaed documents to support a claimant’s claim pursuant to 38 U.S.C. § 3311. In fact since 1979, only five subpoenas were issued and some were used to disprove rather than support the claim.\(^{58}\)

In addition, the court found that the VA undercut the procedural right to request a hearing until after an initial determination had been made, even though this precluded claimants from having

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53. *Walters*, 589 F. Supp. at 1319. This is particularly evident in cases where claimants seek to obtain benefits for death or disability arising from such causes as exposure to atomic radiation or Agent Orange, or from Post Traumatic Stress Syndrome (“PTSS”). Such claims often require “more legal and procedural complexities than do many judicially litigated matters . . . .” *Id.* at 1320.

54. *Id.* at 1319. A claimant must follow regulations published in many sources including the Code of Federal Regulations, the Procedural Manual M-21-1, the BVA Manual, the Program Guide, the Filed Appellate Procedure Manual M1-1, adjudication memoranda, VA circulars, informal memoranda, and BVA decisions.

55. *Walters*, 589 F. Supp. at 1320.


57. *Id.* at 1320. Similarly, the district court found that regional offices would receive higher ratings if they were able to move claims along quickly. *Id.*

58. *Id.* at 1320-21.
input into the most critical step of adjudicating their claims. The VA’s statistics over a three year period showed hearings were crucial, since when a personal hearing was held before the BVA, the claim was almost twice as likely to succeed. However, “in the interests of practicality and conserving limited government resources,” it appeared that the VA often encouraged applicants to waive the pre-determination hearing. By contrast, the court stated, “a claimant’s paid attorney might well advise the claimant not to waive such a right.”

c. Conclusion: Risk of Deprivation of Private Interest and Likelihood that Attorneys Could Avoid Risk of Deprivation Plus the Private Interest Greater than the Government Interest

The district court in Walters then concluded that no right to judicial review, the complexity of substance and procedure, the lack of adequate and fair representation by VA authorized persons, and the importance of the interest at stake gave “rise to a need for representation which [was] as great or greater than that of the welfare recipients of Goldberg v. Kelly.” The court also stated that the government’s interest was little or nonexistent because it had failed to demonstrate that the repeal of the fee limit would harm the government in any way “except as paternalistic protector of the claimant’s best interests.” This was supported by the Senate Committee on Veterans’ Affairs determination that modifications of the ten dollar fee limit would not cause added administrative burdens for the VA. To this extent, the court stated that there were less drastic means available to assure attorneys’ fees would not deplete a veteran’s benefits.

2. Walters v. National Association of Radiation Survivors

The United States Supreme Court did not agree with the district court for two reasons. First, it stated that invalidation of the fee limitation would frustrate Congress’ goals of 1) the veteran receiving the entirety of the benefits award without dividing it with an attor-

59. Id. at 1321.
60. Id.
61. Id.
63. Walters, 589 F. Supp. at 1323.
ney and 2) the veterans' benefits process remaining as informal and non-adversarial as possible. Second, the Supreme Court found that the risk of erroneous deprivation of SCDD benefits in the VA's proceedings and the probability that attorneys would diminish that risk was not shown to warrant holding that the fee limit denied due process.

a. The Government Interest in Retaining the Ten Dollar Fee Limit

The Court began its discussion of the merits by stating that the Court must always pay great deference to the acts of Congress. The veterans' benefits statute, it felt, deserved more deference because it had been on the books for over 120 years.

The Supreme Court then stated that the government interest in retaining the ten dollar fee limit was twofold: first, the system for administering benefits should be managed in such an informal and non-adversarial way that there would be no need for an attorney and second, that no attorney represent the claimant so the claimant could receive the entirety of his or her award without having to divide it with a lawyer. The Court quoted the Senate Committee report of 1982, "that any changes relating to attorneys' fees be made carefully . . . not to induce unnecessary retention of attorneys . . . [Any change should not] disrupt . . . the very effective network of nonattorney resources that has evolved in the absence of significant attorney involvement in VA claims matters." To support its position, the Court also noted that the proposed bill retained the fee limitation for all VA proceedings up to and including the first denial of a claim by the BVA "in order to 'protect claimants' benefits' from being unnecessarily diverted to lawyers."

The admittance of lawyers into VA proceedings was seen as contrary to maintaining the informal and non-adversarial process. The Supreme Court in Walters cited Gagnon v. Scarpelli, where

67. Id. at 321-26.
68. Id. at 327-34.
69. Id. at 319.
70. Id. at 321-23.
71. Id. at 323.
72. Id.
73. S. REP. No. 466, 97th Cong., 2d Sess. 49 (1982).
74. Walters, 473 U.S. at 321 n.10 (quoting S. REP. No. 466, 97th Cong., 2d Sess. 50 (1982)).
75. Id. at 323-26.
the Court stated:

[T]he introduction of counsel into a revocation proceeding will alter . . . the proceeding . . . [L]awyers . . . are . . . bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence . . . [the] decision-making process will be prolonged, and the financial cost to the State—for appointed counsel, . . . a longer record, and the possibility of judicial review—will not be insubstantial. 77

The Court finally stated that if lawyers were allowed into VA proceedings, soon a claimant with a factually simple and obvious claim might feel compelled to retain an attorney simply because everyone else did. The end result would be that with the additional complexity leading to greater administrative cost, less government money would reach the intended beneficiaries. 78 Thus the Court gave great weight to the government interest.

b. Need of Strong Showing of Risk of Erroneous Deprivation of SCDD Benefits Under the Present System and Likelihood that an Attorney Would Avoid that Risk to Find the Fee Limit Denies Due Process

The Court printed the chart referred to by the district court79 and said the statistics were helpful in showing that success rates by lawyers were not much higher than other forms of representation. 80 It rejected the district court's claim that since lawyers rarely represented clients in VA proceedings their success rates were not as good as if they represented them regularly.

Also, the procedural and substantive factors were not considered

77. However, this case required that a lawyer be appointed because the probationer or parolee might have difficulty in presenting his version of a disputed set of facts, where the presentation required the examining or cross-examining of witnesses or offering or dissecting of complex documentary evidence. Id. at 786-88.

78. Walters, 473 U.S. at 326.

79. Ultimate Success Rates Before the Board of Veterans' Appeals by Mode of Representation:
   American Legion 16.2%
   American Red Cross 16.8%
   Disabled American Veterans 16.6%
   Veterans of Foreign Wars 16.7%
   Other Non-attorney 15.8%
   No Representation 15.2%
   Attorney/Agent 18.3%

Id. at 327.

80. Id. at 331.
burdensome by the Supreme Court in Walters because one year was ample time for a claimant to respond to a denial of his or her claim. In addition, the VA was required to read submissions in the light most favorable to the claimant, and there were various service representatives to see that procedure was complied with.\textsuperscript{81} However, the Court admitted that, as the district court had concluded, the service representatives could not provide all the services that a lawyer could.\textsuperscript{82} But "[n]either the difference in success rate nor the existence of complexity in some cases is sufficient to warrant a conclusion that the right to retain and compensate an attorney in VA cases is a necessary element of procedural fairness under the Fifth Amendment."\textsuperscript{83}

c. The Private Interest

Finally, the Court compared the benefits at stake in VA proceedings, which were not granted on the basis of need, to the social security benefits of Mathews.\textsuperscript{84} Since this factor was dispositive in Mathews in determining that no evidentiary hearing was required prior to the temporary deprivation of benefits, the Court found the same reasoning determinative of the right to employ counsel.\textsuperscript{85} The Court distinguished Goldberg v. Kelly,\textsuperscript{86} cited by the district court, stating that there was no policy in New York against permitting an applicant to divide up his or her welfare award with his or her representative attorney, and the Court in Goldberg relied on agency regulations allowing recipients to retain counsel under some circumstances.\textsuperscript{87} The Court distinguished Walters from prior cases by stating that attorneys were required in those cases because of adversary, trial-type proceedings, but in VA claims where there was no adversary, the claimant was provided with substitute safeguards such as a competent representative, a decision-maker whose duty it was to aid the claimant, and significant concessions with respect to the claimant's burden of proof. Therefore, the need for counsel was considerably decreased.\textsuperscript{88}

\textsuperscript{81} Id. at 329.
\textsuperscript{82} Id. at 329-30.
\textsuperscript{83} Id. at 331.
\textsuperscript{84} Id. at 332-33 (citing Mathews v. Eldridge, 424 U.S. 319, 342-43 (1976)).
\textsuperscript{85} Id. at 333-34.
\textsuperscript{86} 397 U.S. 254 (1970).
\textsuperscript{87} Walters, 473 U.S. at 333.
\textsuperscript{88} Id. at 333-34.
d. Conclusion: Government Interest Greater than Private Interest Plus Risk of Deprivation of Private Interest

The Supreme Court concluded, contrary to the district court, that precedent and congressional intent did not require attorney representation in VA proceedings. Also, the government interest in preventing adversary proceedings and allowing veterans to keep all their benefits far outweighed any risk of error and the probability that attorneys would substantially reduce the risk, particularly since the district court did not show that attorneys would increase success rates over representation already provided by various organizations.89

3. National Association of Radiation Survivors v. Walters on Remand

The Walters case was remanded to decide the issue of whether the ten dollar fee limit on attorneys' fees was valid for veterans with complicated claims relating to their exposure to radiation. However, the VA failed to produce documents required by the plaintiffs' attorneys to prove a high degree of erroneous decision-making at the VA.91 As a result of the VA's actions, Federal District Court Judge Marilyn Patel ordered the VA to pay 1) all the defendants' attorneys' fees and costs in connection with the destruction of documents, 2) all attorneys' fees and costs in determining what documents were destroyed and reconstructing them, if possible, and 3) $15,000 into the court for wasting its time.92

D. VA Analysis Examines the Validity of VA Proceedings

In addition to the district court order by Judge Patel, discovery in the litigation over the ten dollar fee limit in Walters resulted in an analysis of the lack of adequate due process in the way the VA handled claims.94 The analysis, in the form of a "white paper"95 pre-

89. Id. at 334.
91. VA Ordered to Pay for Destroying Relevant Records, 6 VETERANS RTS. NEWSL. 65, 67 (Jan./Feb. 1987).
92. Id. at 67. The total fines exceeded $100,000. In addition, the Justice Department has budgeted $1.25 million to respond to discovery to which the VA will contribute an equal amount. Coyle, Veterans Administration Under Fire, NAT'L L.J. 19 (1987).
94. See Developments in 1986, supra note 27, at 1209-10.
pared by a VA staff attorney, also discussed the failure of the VA to control the quality of decision-making.  

The white paper examined three major problem areas: 1) veterans’ failure to receive notice until after denial of an opportunity to have a hearing, 2) the VA’s failure to notify many applicants when their claims were denied, and 3) the VA’s capability of being manipulated to the benefit of VA managers who receive bonuses based on the number of cases processed. Reports from twenty of fifty-eight VA stations were examined as part of the analysis. Seventeen stations’ reports could not be confirmed or validated in at least one of the major problem areas and five stations failed to validate in half the areas examined. The analysis concluded that the figures reported by the local offices were not reliable and that all adjudication divisions seemed to have serious problems in their review procedures which needed to be “upgraded.”

The analysis also concluded that “managers [were] attempting to ‘overcome’ the current management evaluation system” and as a result were leaving certain areas “constitutionally vulnerable” such as the furnishing of award and disallowance letters. The VA staff attorney’s research uncovered “...not only a pattern of inadequate notification letters, but a pattern involving claims where there was no evidence that the claimant [had been] notified at all.”

Finally, the VA white paper found a pattern of claims being delayed, improperly developed, and prematurely denied, in part, to present a better statistical picture of local adjudication centers.

III. Analysis

According to recent developments and facts which the Supreme Court did not to consider, the private interest is actually greater than perceived by the Supreme Court in Walters. It contributes to tipping

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96. See supra note 93.
97. See supra note 93.
98. See supra note 93.
99. See supra note 93.
100. See supra note 93.
101. See supra note 93.
102. See supra note 93. In addition to the VA analysis, a settlement agreement is pending in an Illinois case that was filed to attack the VA's failure to provide predetermination notice to a pension recipient. Semenchuck v. Walters, 1 V.L.R. (Veterans Education Project) 3501 (N.D. Ill. 1987).
the due process "scale" the other way, along with the increase in the risk of erroneous deprivation and the likelihood that attorneys could prevent that risk, to outweigh the government interest which is now very minimal or nonexistent. The Supreme Court decision in Walters still stands even though the factors in the test for due process have changed in importance. The decision is an added barrier to abolishing the outdated ten dollar fee limit.

If the Supreme Court's decision in Walters is part of the problem, the district court's reasoning in Walters is part of the answer. New developments, including an analysis of the VA showing its constitutional vulnerability, the VA's actions which resulted in the order that required the VA to pay costs, fees, and money to the court for destruction of documents and wasting the court's time, and the Assistant Attorney General's ruling that third parties may hire attorneys to represent veterans, combine to strengthen the California district court's reasoning in Walters.

A. The Private Interest Affected by the Ten Dollar Fee Limit and the Effectiveness of Attorneys in Protecting that Interest

The district court in Walters considered the private interest to be substantial because many of the plaintiffs were totally or primarily dependent on SCDD benefits, and the VA proceedings were the only remedy against the government. As support for its belief that attorneys would avoid the risk of erroneous deprivation of SCDD benefits and help in procedural and substantive matters, the district court cited Goldberg v. Kelly which required welfare recipients to be permitted to retain counsel prior to termination of benefits because attorneys could delineate issues, present orderly factual contentions, conduct cross examination, and generally safeguard the recipient's interests.

This reasoning must be compared to the Supreme Court's reasons for finding the private interest to be minimal. First, the Supreme Court used Mathews v. Eldridge, which stated that because social security benefits were not based on need, an evidentiary hearing was not required prior to their temporary deprivation. This was used as support for finding no right to employ counsel in veterans' proceedings since SCDD benefits were not based on need. How-

103. See supra note 46.
104. Walters, 589 F. Supp. at 1314.
106. Walters, 473 U.S. at 333-34.
ever, the Supreme Court failed to mention that there was no prohibition against hiring an attorney in the social security hearing in Matthews. As mentioned in the introduction of this comment, both FECA and social security proceedings are not based on need, but on disability as in veterans' hearings. Both types of proceedings allow for representation by attorneys with the only fee limit being reasonableness. This is another point which the Supreme Court failed to discuss and explain.

Second, the Supreme Court distinguished Goldberg by stating that there was no policy in New York against permitting an applicant to divide a welfare award with his or her attorney. The Supreme Court completely ignored the language in Goldberg which was cited by the district court and described the importance of attorneys in protecting a claimant's interests. Third, the Supreme Court distinguished Walters from prior cases by saying that attorneys were required in those cases because of adversary, trial-type proceedings. This reasoning is not convincing since attorneys may represent claimants in other informal, non-adversarial government benefits proceedings such as the social security proceedings in Matthews and the welfare proceedings in Goldberg.

Finally, the Supreme Court stated that the claimant was provided with substitute safeguards in the VA to protect the claimant's interest. This reasoning is especially weak now that an analysis of the VA has revealed that there are patterns of inadequate notification to claimants, and that claims are often delayed or improperly developed in order to present a better statistical picture of local adjudication centers.

B. The Risk of Erroneous Deprivation of SCDD Benefits and the Likelihood that Attorneys Would Prevent that Risk

The incomplete reasoning of the Supreme Court produces a picture of a substantial private interest which is affected by the ten dollar fee limit and which can be effectively protected by attorneys. In

107. See supra note 3.
108. See supra note 3 and accompanying text.
110. Id.
111. Id. at 333-34.
112. See supra note 20, at 785.
113. Walters, 473 U.S. at 333-34.
114. See supra note 93.
115. See supra note 93.
addition, the district court's conclusion that there was a risk of erroneous deprivation of veterans' benefits and a likelihood that an attorney would avoid that risk was reasonable because it was based on factual representations that the VA proceedings were not constitutionally valid. The district court based its holding on the fact that the VA rarely subpoenaed documents (only five times since 1979) to support a claimant's claim. The conclusion was also based on the fact that the VA undercut the procedural right to a hearing until after initial determination had been made, even though this prevented the plaintiffs from having input into the most important step of adjudicating their claims, and during this stage the BVA was almost twice as likely to grant benefits.

Then, the district court adequately supported its conclusion that an attorney could prevent the risk of erroneous deprivation. The court first noted that, in contrast to other government benefits hearings, the claimant in SCDD proceedings had no right to judicial review under 38 U.S.C. § 211(a), and that the ten dollar fee limit applied to post-termination proceedings. Although veterans may now appeal BVA decisions to the new specialty court set out in S. 11, the standard for review may be difficult for veterans to meet. The court may only review BVA decisions if they are "clearly erroneous." The future will show whether the new court and standard of review provide effective judicial review for veterans and therefore lessen the need for lifting the ten dollar fee limit in the initial SCDD process. The future will also show whether the new court merely renames the BVA and cuts off veterans from further appeals, which would strengthen the need for lifting the ten dollar fee limit in the initial SCDD proceedings.

According to the district court, attorneys could help in developing complex substantive issues and in dealing with profuse procedural materials since VA examiners were allowed only 2.84 hours to develop the facts, and performance was measured in part by the speed with which they processed claims. This appears even more obvious now that a recent analysis of the VA procedures has found that the VA is capable of being manipulated to the benefit of VA managers who receive bonuses based on numbers of cases.

117. Id. at 1321.
118. Id. at 1317.
120. Walters, 589 F. Supp. at 1320.
This implies that the VA representatives are not particularly careful in representing veterans' claims since the number of claims processed is more important than quality development of those claims. The VA white paper also concluded that claims were inadequately processed to present a better picture of local adjudication, which supports the district court's belief that VA representatives may feel pressure to support the conflicting financial interests of the government and, as a result, fail to be adequate representatives of the veterans' claims.

The Supreme Court, on the other hand, found that the procedural and substantive factors were not burdensome because one year was ample time for a claimant to respond to a denial of a claim for benefits, the VA was required to read submissions in the light most favorable to the claimant, and there were service representatives to see that procedure was complied with. The Supreme Court did admit that the representatives could not provide all the services that a lawyer could, and this appears more evident in the recent analysis of the VA which concluded that it is "constitutionally vulnerable." One year is not ample time if, as the analysis found, a claimant is not given proper notification of the progress of his or her claim. It also appears from the VA analysis that the submissions are not read in the light most favorable to the veteran, and the service representatives are not adequate in supervising procedural requirements since representatives are given bonuses on the quantity rather than quality of claims they process and are more interested in presenting a favorable picture of their divisions' adjudication processes.

The Supreme Court noted that attorneys could not prevent any risk of erroneous deprivation, even if there was a risk of deprivation, by citing the district court's chart which cited attorneys as having only about a one percent higher success rate before the BVA than other means of representation. However, the district court's reasoning that this figure was not higher because there were fewer attorney represented proceedings before the BVA so that attorneys had not

121. See supra note 93.
122. See supra note 93.
123. Walters, 589 F. Supp. at 1320 n.17.
124. Walters, 473 U.S. at 329.
125. Id.
126. See supra note 93.
127. See supra note 93.
128. See supra note 93.
129. See supra note 79.
had enough practice to be more successful, lessens the strength of the Supreme Court's finding that attorneys were not an adequate means of protecting veterans' interests.

C. The Government Interest in Retaining the Ten Dollar Fee Limit

The present risk of erroneous deprivation of due process that could be prevented by attorney representation, plus the private interest, could only be outweighed by a strong government interest. The district court found no strong government interest in retaining the ten dollar fee limit because the government had failed to demonstrate that the repeal of the limit would harm the government except as paternalistic protector of the claimant's best interests. The Senate Committee on Veterans' Affairs' belief that the repeal of the limit would cause no significant administrative burdens to the VA supports the district court's finding. The district court noted that there were less drastic means available to assure attorneys' fees would not deplete veterans' benefits. This is supported by the FECA and social security proceedings which are non-adversarial, as are SCDD proceedings, and which provide that attorneys' fees are only limited by reasonableness.

The Supreme Court, on the other hand, found the government interest to be very strong because of 1) Congress' intent that the attorney not receive a large portion of the veteran's award, 2) Congress' goal of maintaining informal and non-adversarial VA proceedings, and 3) the government's desire to prevent higher administrative costs so that VA money would continue to reach the intended beneficiaries.

The Supreme Court's first line of reasoning behind the government interest, that attorneys would receive too much of the veteran's award, is outdated because it does not represent current social and economic conditions. The Senate Committee on Veterans' Affairs has stated that, in view of today's bar which polices attorneys' practices, the fee limit is no longer needed. The Senate has even proposed

131. *See supra* note 64 and accompanying text.
133. *See supra* note 3.
135. *Id.* at 323-24.
136. *Id.* at 326.
137. *See supra* note 64.
amendments to the limit which include a reasonable fee not in excess of $500. 138 These amendments reflect the original congressional intent behind the fee limit because they raise the fee to present economic standards 139 and provide adequate pay for attorney representation now that the proceedings are much more complicated both procedurally and substantively than in 1864, when the fee limit was first introduced. 140

The Supreme Court's second line of reasoning behind the government interest, maintaining informal, non-adversarial veterans' proceedings, is now weakened by the Assistant Attorney General's decision that disinterested third parties may hire attorneys without violation of the fee limitation. 141 If third parties may hire attorneys without causing unneeded formalities and adversarial proceedings, then this is no longer a problem and likewise no longer a government interest to be protected.

The Supreme Court viewed attorneys as causing delay and confusion in SCDD processes rather than efficiency and clarification, 142 citing Gagnon v. Scarpelli where the Supreme Court stated that counsel at a probation revocation proceeding would prolong the process, cause more financial cost to the state, and create a longer record. 143 However, the Assistant Attorney General's opinion does not mention these problems as limits on disinterested third parties paying attorneys to represent veterans. The decision only requires that there be a retainer agreement between the third party and the attorney which recites the language of sections 3404 and 3405 and includes a declaration that no payments to the attorney will directly or indirectly decrease the veteran's benefits. 144 The decision also says that there must be a separate document showing the veteran's acknowledgment of the latter statement. 145

Without the intent to protect veterans' benefits from unscrupulous attorneys and the attorneys' contribution to complexity in veterans' benefits proceedings, the government interest described by the Supreme Court in Walters is greatly weakened. However, the rea-

139. See supra note 2.
140. See supra note 25.
141. See supra note 33.
142. Walters, 473 U.S. at 323-25.
144. See U.S. Agrees Lawyers Can Be Paid Over $10 on VA Claims, supra note 33 at 86.
145. See U.S. Agrees Lawyers Can Be paid Over $10 on VA Claims, supra note 33 at 86.
soning that attorney representation would cause greater administrative cost so that less money would reach the intended beneficiaries is also relevant to the government interest. In *Walters* on remand, district court Judge Marilyn Patel ordered the VA to pay fees, costs, and $15,000 to the court as a result of its failure to produce documents for discovery on the issue of whether the ten dollar fee limit on attorney representation was valid for veterans with complicated claims relating to their exposure to radiation. The VA's actions defeated the purpose of minimizing administrative cost when they resulted in the payment of large damages. If the system can support the cost of paying damages, it could easily support the introduction of attorneys into its proceedings.

Thus, the government interest in retaining the ten dollar fee limit is minimal or nonexistent as the district court in *Walters* found. It is easily outweighed by the substantial private interest involved plus the risk of erroneous deprivation and the likelihood that an attorney would avoid that risk, so the statute should be found unconstitutional as the district court held in *Walters*.

IV. PROPOSAL

New developments and the fact that the Supreme Court failed to consider factual realities, the content of the Senate hearings, and the original congressional intent behind the ten dollar fee limit undermine the validity of the Supreme Court's decision in *Walters*. On the other hand, these same elements strengthen the reasoning of the district court in *Walters*. It is the district court's reasoning that should be followed by the courts and Congress. The reasoning should be used to find the statute unconstitutional so that alternative means can be developed to ensure that attorneys' fees are not too high when representing veterans in SCDD proceedings.

However, it is unlikely that the Supreme Court will reverse its decision in *Walters*. It is the responsibility of Congress to amend 38 U.S.C. § 3404(c)(2). Congress should look to the FECA and social security statutes which involve proceedings where the award of benefits is not based on need but on disability, just like veterans' benefits awards, and which provide that the only limit on attorneys' fees be reasonableness.

The amended statute should abolish the ten dollar fee limit clause and read:

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147. See supra note 14.
The Administrator shall determine and pay fees to agents or attorneys recognized 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 a reasonable fee to compensate such agent or attorney for the services performed by him or her in connection with such claim; (3) shall be deducted from monetary benefits claimed and allowed; and (4) the recommended fee limit in 1989 shall be $750,148 such fee being reviewed yearly to ensure that it corresponds with current economic conditions.

V. CONCLUSION

A fee limit for attorneys representing veterans in veterans' benefits proceedings determined by 1) reasonableness and 2) current economic conditions would accurately reflect the federal government's goal of doing everything possible to help the veteran readjust to civilian life. It would also help veterans receive due process in attaining SCDD benefits because attorneys would not be discouraged from handling veterans' claims because of a ridiculously low fee of ten dollars. A fee based on these two considerations would also allow attorneys to be compensated appropriately for their work in developing the difficult substantive and procedural aspects of veterans' claims.

The FECA and social security proceedings for benefits which allow for representation of counsel with no fee limit are not based on need, but on disability as in veterans' benefits proceedings. The proposed amendments to § 3404(c)(2), as opposed to the ten dollar limit, would allow veterans to have a right to hire attorneys which is equal to the rights of FECA and social security claimants.

However, the Supreme Court of the United States has ruled that a ten dollar attorneys' fee limit is constitutional and provides adequate due process to veterans in SCDD proceedings. The Supreme Court's decision is a problem because it discourages the enactment of legislation which would more accurately reflect the government's paramount goal of helping the veteran readjust to civilian life. It is a goal which the Supreme Court ignored, but the district court in California supported. The district court decided that the substan-

148. This amount is based on a suggested fee limit which was originally included in S. 11. Cowen, supra note 119.
149. See supra note 1.
tial private interest in SCDD benefits plus the risk of erroneous depriva-
tion of those benefits and the likelihood that an attorney would
prevent the risk of erroneous deprivation outweighed the government
interest in maintaining the limit. The district court's reasoning is
supported by recent developments which, conversely, undermine the
Supreme Court's holding so that the ten dollar fee limit should now
be abolished.

However, it is unlikely that the Supreme Court will overrule its
decision in Walters. It is Congress' responsibility to enact a fee limit
which abolishes the ten dollar constriction and replaces it with a
limit based on reasonableness and current economic conditions. This
would ensure fair veterans' benefits proceedings and fulfill the
United States government's most important goal behind veterans'
legislation, which is to meet the needs of those who are disabled as a
result of military service for the United States of America.

Marguerite R. Caruso