The Ten Dollar Attorney Fee Limitation and Preclusion of Judicial Review in the Veterans Administration

Introduction

Congress has made adjudicatory practice before the Veterans Administration (VA) different from other federal administrative practice in two respects. It prohibits veterans from paying attorneys more than ten dollars for representation in matters regarding disability benefits from the VA,[1] and it precludes veterans from appealing final VA decisions to a federal court.[2] The right to retain an attorney and the right to judicial review are two common procedural safeguards in the American system of justice. These safeguards are partially the result of the due process guarantees of the Fifth and Fourteenth Amendments and of the free speech, association, and petition guarantees of the First Amendment. In *Walters v. National Association of Radiation Survivors*,[3] however, a plurality of the Supreme Court held that the VA ten dollar attorney fee limitation is not unconstitutional on its face.

This Note examines whether veterans and their dependents are denied procedural due process and first amendment protection by Congress and the VA. It first reviews VA benefits and procedures and provides a brief synopsis of the *Walters* decision. It then discusses the law regarding procedural due process, the First Amendment, and the right to an attorney, applies it to the facts in *Walters*, and proposes that Congress adopt a more moderate set of attorney fee limitations. Next, the Note analyzes whether the Constitution requires judicial review of agency decisions and, if not, whether judicial review is the most desirable way of ensuring the veteran's right to a neutral adjudication by the VA. Finally, this Note proposes that Congress adopt certain measures that will make VA adjudications more neutral.

I. VA Benefits and Procedures

In 1930, Congress established the VA to administer benefits programs for veterans.[4] With an annual budget of twenty-two billion dol-

1. 38 U.S.C. § 3404(c)(2) (1982).
2. *Id.* at § 211(a).
3. 105 S. Ct. 3180 (1985).
4. *Id.* at 3183.

lars, the VA is the third largest federal agency employing nearly 200,000 people.[5] The VA administers two types of benefit programs: those rewarding veterans for their service, and those compensating veterans and their families for service-connected disabilities.[6] Only veterans seeking the latter type of benefit are subject to the ten dollar attorney fee limitation[7] and precluded from judicial review.[8]

In 1978, approximately 800,000 claims were made for veteran disability benefits; the VA approved over 400,000 of these claims.[9] There are three types of VA disability benefits: compensation, pensions, and medical care. Veterans with service-connected disabilities receive VA compensation on a monthly basis.[10] Veterans with total and permanent disabilities receive pensions on the basis of their indigency.[11] Finally, veterans with service-connected disabilities are eligible for medical, hospital, or domiciliary care; and those who are over sixty-five years old or indigent are also eligible for hospital or domiciliary care.[12]

To keep VA benefit application procedures "informal and nonadversarial,"[13] Congress requires VA personnel to help veterans prepare their claims;[14] directs VA adjudicatory panels to resolve all reasonable doubts

5. Milford & Simon, *Is Uncle Sam Toying with Veterans?*, 16 CLEARINGHOUSE REV. 316, 318 (1982).

6. *Id.*

7. 38 U.S.C. § 3404(c)(2) (1982).

8. *Id.* at § 211(a). *See infra* note 33.

9. *Walters*, 105 S. Ct. at 3183.

10. 38 U.S.C. §§ 310, 321, 331, 341, 410 (1982); *id.* at § 315 (1985) (compensation to veterans is based solely on the severity of the veteran's disability). Compensation to the dependents of veterans who died as a result of their service is based on the veteran's pay grade and number of children. *Id.* at §§ 411, 413. Compensation is also awarded to the parents of deceased veterans if the parents are indigent. *Id.* at § 415 (1982).

11. *Id.* at § 521. Veterans of the Mexican Border Conflict of 1915 and of subsequent conflict periods are covered by the statute, while veterans of the Indian Wars and Spanish-American War are generally not covered by the need and income based pension; however, veterans of those earlier wars may under certain circumstances opt into the disability benefits available to the veterans of subsequent conflicts if they forego their flat rate pension. *Cf.* Gillan, *Legal Issues in Veterans Benefits Legislation: Programs for the Elderly*, 9 CLEARINGHOUSE REV. 839, 840-41 (1976). Dependent survivors of deceased veterans of most recent wars are awarded pensions on the basis of their service connection and indigency. *See generally* 38 U.S.C. §§ 541, 543 (1982).

12. *See generally* 38 U.S.C. §§ 610, 612 (1985).

13. *See Walters*, 105 S. Ct. at 3191-92, 3196; *see also infra* notes 126, 135-145 and accompanying text.

14. 38 C.F.R. § 3.103(a) (1985) requires all VA personnel to provide claimants with "every benefit that can be supported in law while protecting the interests of the Government." *But see* National Ass'n of Radiation Survivors v. Walters, 589 F. Supp. 1302, 1320 n.17 (N.D. Cal. 1984), *rev'd*, 105 S. Ct. 3180 (1985) [hereinafter *Radiation Survivors*]:

> [This] raises a question as to the extent to which it is possible to serve the interests of both the VA and claimants simultaneously. Clearly the financial interests of these two parties may often conflict, and it is not inconceivable that VA personnel might feel some pressure to protect the government purse.

in favor of the veteran;[15] makes veterans' hearings "*ex parte* in nature" where no government official opposes the veteran;[16] allows certain veterans' organizations to represent veterans in the claims process, at no expense to the government or the veteran;[17] and establishes no statute of limitations,[18] formal res judicata,[19] or formal rules of evidence and trial procedure.[20] The veteran, nevertheless, is still confronted with a variety of governing statutes, regulations, opinions, and memoranda[21] in addition to a complex appellate procedure.[22]

A veteran initiates his or her disability claim by applying to a VA regional office, where the claim is rated by a VA "rating board."[23] If the rating board denies the claim, the veteran has sixty days to submit new evidence or request a VA hearing by a three member regional office board.[24] If the claim is denied a second time, the veteran may appeal to the Board of Veterans Appeals (BVA).[25]

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15. 38 C.F.R. § 3.102 (1985):

> It is the defined and consistently applied policy of the Veterans Administration to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant.

16. *Walters*, 105 S. Ct. at 3183 (quoting 38 C.F.R. § 3.103(a) (1985)). An *ex parte* proceeding is a judicial or quasi-judicial proceeding where the rights of one of the parties to a controversy are adjudicated in that party's absence. BLACK'S LAW DICTIONARY 517 (5th ed. 1979).

17. 38 C.F.R. §§ 14.626, 14.634(a) (1986). The four largest organizations are the American Legion, the American National Red Cross, Disabled American Veterans, and Veterans of Foreign Wars. 38 U.S.C. § 3402 (a)(1) (Supp. I 1983). The representatives of these organizations need not be attorneys, 38 C.F.R. §§ 14.626-629 (1985), and generally are not: "The VA statistics show that 86% of all claimants are represented by service representatives, 12% proceed *pro se*, and 2% are represented by lawyers." *Walters*, 105 S. Ct. at 3184 n.4.

18. *Walters*, 105 S. Ct. at 3184.

19. Res judicata prohibits relitigation of a claim after a final decision on the claim's merits has been rendered by a court with proper personal and subject matter jurisdiction. *See* BLACK'S LAW DICTIONARY 1174 (5th ed. 1979). The veteran may relitigate a claim as long as new facts are presented in the second proceeding. *Walters*, 105 S. Ct. at 3184.

20. *Walters*, 105 S. Ct. at 3183-84 (the VA is directed to consider any evidence offered by the claimant).

21. *See Radiation Survivors*, 589 F. Supp. at 1319. The memoranda include a Board of Veterans Appeals (BVA) Manual, adjudication memoranda, VA circulars, and other informal memoranda. *Id.* These documents influence decisions at the local, regional, and national levels, but are seldom cited. *See* Milford & Simon, *supra* note 5, at 319.

22. *See infra* notes 23-33 and accompanying text.

23. *Walters*, 105 S. Ct. at 3183. The board consists of a medical specialist, a legal specialist, and an occupational therapist. 38 C.F.R. § 3.151 (1985). *See also Radiation Survivors*, 589 F. Supp. at 1318.

24. 38 C.F.R. § 3.160(d) (1985).

25. Prior to a BVA appeal, the veteran must file a "Notice of Disagreement" with the regional office, which will either change its decision or prepare a "Statement of the Case," the final regional office decision. 38 C.F.R. § 19.115 (1986). *See also Radiation Survivors*, 589 F. Supp. at 1318.

The BVA is part of the VA but independent of its regional offices.[26] The BVA is composed of sixteen panels, each with three members[27] appointed by the Administrator of the VA with the approval of the President.[28] Over two-thirds of the panelists are attorneys.[29] The BVA is authorized to make "a complete and independent *de novo* review of all the evidence of record,"[30] but it may not "question the legality of the regulations and instructions of the Administrator or the precedent opinions of the VA's General Counsel."[31] If the BVA denies the veteran's claim appeal and refuses to reconsider its decision, the VA's decision is final[32] and the veteran is precluded from receiving judicial review of the VA's decision.[33]

II. The VA Attorney Fee Limitation

A. *Walters v. National Association of Radiation Survivors*

In *Walters*, the plaintiffs challenged the VA ten dollar fee limitation as violative of their fifth amendment right to procedural due process[34] and their first amendment rights to petition and speech.[35] The plaintiffs included the National Association of Radiation Survivors, a veterans organization which seeks compensation for veterans who participated in atomic weapons testing and their families, and the Swords to Plowshares Veterans Rights Organization, an organization which promotes the interests of veterans of the Vietnam War.[36] The plaintiffs also included two

26. 38 U.S.C. §§ 4001-4009 (1982); 38 C.F.R §§ 19.1-.156 (1986).

27. *Radiation Survivors*, 589 F. Supp. at 1318.

28. 38 U.S.C. § 4001 (1982); 38 C.F.R. § 19.110 (1986).

29. *See* Milford & Simon, *supra* note 5, at 319.

30. Daschle, *Making the Veterans Administration Work for Veterans*, 11 J. LEGIS. 1, 4 (1984). *See also Radiation Survivors*, 589 F. Supp. at 1318:

> The BVA is to base its decision for affirmance, reversal, or remand of the rating board's determination "on the evidence and argument of record, and will not be limited to that cited in the statement of the case." 38 C.F.R. § 19.121(b)(5) (1986). The Board's decision should be based on a review of the entire record. 38 C.F.R. § 19.180 (1986). The regulations set forth no formal requirement of deference to the determination of the rating panel.

31. Daschle, *supra* note 30, at 4 (referring to 38 C.F.R. § 19.103 (1986)). *See also* Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans Benefits: A Preliminary Analysis*, 27 STAN. L. REV. 905 (1975): "Neither rating boards nor the B.V.A. adhere to a system of precedent. Opinions are not published and they are not generally circulated." *Id.* at 922 n.65.

32. Milford & Simon, *supra* note 5, at 319. "A full exhaustion of administrative possibilities also might include a special appeal to the administrator of the VA or an 'administrative review' by the VA central office." *Id.*

33. 38 U.S.C. § 211(a) (1982). Section 211(a) by its terms does not apply to veterans appealing decisions of the VA concerning veterans life insurance programs and small business loan programs.

34. U.S. CONST. amend. V.

35. U.S. CONST. amend I.

36. *Radiation Survivors*, 589 F. Supp. at 1306.

individual veterans who were exposed to atomic radiation at Hiroshima and Nagasaki after World War II. One of those veterans was a current recipient of VA service-connected death and disability benefits facing a reduction of those benefits who was unable to obtain legal representation because of the fee limitation.[37] The other veteran, an applicant for VA benefits to compensate him for the death of four of his five children due to a rare congenital disease, was also unable to obtain legal representation because of the fee limitation.[38] Finally, a veteran's widow, applying for VA benefits for her husband's death which was possibly due to his service exposure to atomic radiation, joined as a plaintiff.[39]

The district court issued a preliminary injunction restraining the VA's enforcement of the limitation because the plaintiffs had shown "a high probability of succeeding in their argument."[40] The VA immediately appealed to the Supreme Court, which has jurisdiction over a district court interlocutory decree holding an Act of Congress unconstitutional.[41]

A plurality opinion, written by Justice Rehnquist and joined by Chief Justice Burger and Justices Powell and White, held that the limitation was not unconstitutional on its face.[42]

A concurring opinion, written by Justice O'Connor and joined by Justice Blackmun, stated that while the fee limitation was not unconstitutional per se, it might be an unconstitutional deprivation of due process "as applied" to some "discrete class of complex cases," such as atomic radiation claims, and that on remand, the district court could make additional findings regarding the plaintiffs' claims "as applied."[43]

A dissenting opinion, written by Justice Stevens and joined by Justices Brennan and Marshall, stated that the fee limitation was unconstitutional on its face.[44] The latter two justices also claimed that the Supreme Court did not have jurisdiction over the case.[45]

B. Procedural Due Process and the First Amendment

1. Procedural Due Process and Government Benefits

The Fifth Amendment prohibits the federal government from depriving a person "of life, liberty, or property, without due process of law."[46] Due process arises in two contexts: procedural due process guar-

37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 1329.
41. *Walters*, 105 S. Ct. 3180 (1985).
42. *Id.* at 3182.
43. *Id.* at 3197-98 (O'Connor, J., concurring).
44. *Id.* at 3209 (Stevens, J., dissenting).
45. *Id.* at 3198 (Brennan, J., dissenting).
46. U.S. CONST. amend. V.

antees that the government use procedural safeguards when it affects a person's life, liberty or property interests,[47] whereas substantive due process is used by the Court to protect certain fundamental rights from any congressional infringement.[48]

Much debate has been generated over the nature and degree of procedural due process to be afforded the claimants and recipients of governmental benefits who are potentially subject to the deprivation of those benefits by the government.[49] In *Goldberg v. Kelly*,[50] the Supreme Court held that welfare recipients are entitled to an evidentiary hearing before the government can terminate their benefits. The receipt of governmental benefits such as welfare is a "statutory entitlement,[51]" not a mere "privilege,"[52] and "[t]he extent to which procedural due process must be afforded the recipient . . . depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication."[53] Although the pretermination hearing "need not take the form of a judicial or quasi-judicial trial,"[54] the "hearing must be 'at a meaningful time and in a meaningful manner.' "[55]

Procedural due process is required only in administrative cases dealing with a "life," "liberty," or "property" interest.[56] In *Mathews v. Eldridge*,[57] the Court established a three part balancing test to determine

47. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 451-52 (3d ed. 1986) [hereinafter NOWAK].

48. *See generally id.* at 331-34. This Note subjects the ten dollar attorney fee limitation to a procedural, rather than substantive, due process analysis. The Supreme Court has been reluctant since 1937 to invalidate governmental action solely on the basis of the "vague" concept of substantive due process, preferring instead to rely upon the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 368. *See also id.* at 350-54, 367-72.

49. *See, e.g.*, Dolzer, *Welfare Benefits as Property Interests: A Constitutional Right to a Hearing and Judicial Review*, 29 ADMIN. L. REV. 525, 531-46 (1977); Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965); Reich, *The New Property*, 73 YALE L.J. 733 (1964); Simon, *Liberty and Property in the Supreme Court: A Defense of* Roth *and* Perry, 71 CALIF. L. REV. 146 (1983); Note, *Specifying the Procedures Required by Due Process: Towards Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975).

50. 397 U.S. 254 (1970).

51. *Id.* at 262.

52. *Id. See also* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); *see generally supra* note 49.

53. *Goldberg*, 397 U.S. at 262-63.

54. *Id.* at 266.

55. *Id.* at 267 (quoting Armstrong v Manzo, 380 U.S. 545, 552 (1965)).

56. Board of Regents v. Roth, 408 U.S. 564 (1972). "[W]e must look not to the 'weight' but to the *nature* of the interest at stake." *Id.* at 571 (emphasis in original). Before *Roth*, the Court had only required that the interest of the claimant or recipient of government benefits be "important." Bell v. Burson, 402 U.S. 535, 539 (1971). In Bishop v. Wood, 426 U.S. 341 (1976), the Court defined "property" as an interest created by state law or implied contract. *Id.* at 344.

57. 424 U.S. 319 (1976).

the process due when an administrative agency adjudication affects a property interest in governmental benefits:

> The specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[58]

Procedural due process does not require the government to provide benefits, however, when the government does decide to provide benefits it must also provide the potential recipients of the benefits with procedural safeguards to protect against the risk of erroneous deprivation of those benefits.[59]

2. *The First Amendment and Attorneys*

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[60] These first amendment rights are all "elements of a broad right to freedom of expression"[61] and are "equally fundamental."[62] Freedom of expression is "the security of the Republic, the very foundation of constitutional government."[63] Although the First Amendment is not ab-

58. *Id.* at 334-35.

59. See, e.g., Cleveland Bd. of Educ. v. Loudermill, 105 S. Ct. 1487, 1492 (1985), where the Court held that: (1) once Congress creates a property interest it may not deprive persons of that interest without complying with constitutional standards of procedural due process, such as notice and a hearing; (2) property rights may have a source other than the legislature which is trying to limit them; (3) life, liberty, and property interests cannot be defined solely by the procedures for their deprivation.

Loudermill thus rejects the plurality opinion in Arnett v. Kennedy, 416 U.S. 134 (1974), which held that an applicant or recipient of a government benefit receives a "legal entitlement" and must rely solely on the statutory procedures set forth by Congress. The *Loudermill* Court instead adopts the position of the concurring opinion in *Arnett* that "[w]hile the legislature may elect not to confer a property interest . . . , it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." *Id.* at 167 (Powell, J., concurring). *See also The Supreme Court, 1973 Term*, 88 HARV. L. REV. 13, 87 (1974) ("The only interest served by such a restriction on the state's power to design benefit programs would be to require greater candor when a legislature sought to limit the extent of an entitlement."); *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 58, 104 n.99 (1976); *see generally*, NOWAK, *supra* note 47, at 476-77.

60. U.S. CONST. amend. I.

61. NOWAK, *supra* note 47, at 1004.

62. De Jonge v. Oregon, 299 U.S. 353, 364 (1937).

63. *Id.* at 365.

solute,[64] it holds a "preferred position"[65] in the Constitution. Government restraints on first amendment freedoms are strictly construed, have a lower presumption of constitutionality than ordinary statutes, and require a strong showing of governmental interest.[66]

The Court has delineated several categories of protected speech and the consequent burdens which the government must overcome before it may restrain an individual's first amendment rights. Political speech is afforded the greatest protection from governmental regulation. There must be a "clear and present danger"[67] to the nation before the government may restrain political speech, and even then the restraint must be the least drastic means of avoiding the danger.[68] Commercial speech is entitled to a more limited first amendment protection;[69] and some forms of speech, such as obscenity,[70] child pornography,[71] libel,[72] and fighting words,[73] are afforded no first amendment protection at all. Limited first amendment protection extends beyond pure speech to forms of symbolic conduct which qualify as expression.[74] Whether an expression is symbolic conduct or pure speech, however, is not always clear. For instance,

64. *See generally* NOWAK, supra note 47, at 837-39; W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW 864 (5th ed. 1980) [hereinafter LOCKHART].

65. *See supra* note 64.

66. NOWAK, *supra* note 47, at 838.

67. *See, e.g.,* Dennis v. United States, 341 U.S. 494, 510 (1951): " 'In each case [courts] must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' " Furthermore, the trial court must find that the perceived threat poses a "clear and present danger . . . as a matter of law." *Id.* at 513. For instance, in *Dennis,* the Court was dealing with a perceived conspiracy to violently overthrow the government. For a discussion of the nature of political speech, see generally Brandenberg v. Ohio, 395 U.S. 444, 449 (1969) (per curiam); Yates v. United States, 354 U.S. 298, 318-20 (1957). In *Yates,* the Court describes protected speech as "advocacy in the realm of ideas." *Id.* at 320 (quoting *Dennis,* 341 U.S. at 502).

68. *See, e.g., Dennis,* 341 U.S. at 509-10.

69. Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557, 566 (1980):

> For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve the interest.

The Court had been initially reluctant to recognize commercial speech as entitled to any first amendment protection. *See* Valentine v. Chrestensen, 316 U.S. 52 (1942); *see generally* LOCKHART, *supra* note 64, at 826-27; NOWAK, *supra* note 47, at 904-09.

70. *See* Miller v. California, 413 U.S. 15 (1973).

71. *See* New York v. Ferber, 458 U.S. 747 (1982).

72. *See generally* LOCKHART, *supra* note 64, at 1038-72.

73. *See generally id.*; Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

74. *See* United States v. O'Brien, 391 U.S. 367, 377, *reh'g denied,* 393 U.S. 900 (1968) (the government may restrain "symbolic speech" only if there is a substantial government interest, and the restraint is unrelated to the content of the "speech"); *see generally* NOWAK, *supra* note 47, at 985-94; Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984). *But see* LOCKHART, *supra* note 64, at 1136-46 (discussing labor picketing cases and attorney solicita-

in *Buckley v. Valeo*,[75] the Court held that political spending by an individual is not conduct, but speech, and as such is entitled to the highest degree of first amendment protection. As to all forms of protected expression, the government has more latitude to regulate the time, place, and manner of an expression than to regulate the content of the expression.[76]

Without meeting the burdens required by the First Amendment, the government may not regulate the right to speak to and through an attorney,[77] even in administrative settings[78] or where only nonpolitical issues are involved.[79] In *Brotherhood of Railroad Trainmen v. Virginia*,[80] the Supreme Court held that a state could not prohibit unions from recommending a special pool of attorneys to its members for industrial injuries, because such a regulation would violate the members' first amendment rights to free speech and association.[81] In *United Mine Workers v. Illinois State Bar Association*,[82] the Supreme Court held that a state could not prohibit a union from hiring an attorney on a salary basis because

> the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments gives the petitioner the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights.
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> [T]he First Amendment does not protect speech and assembly only to the extent it can be characterized as political.[83]

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tion cases where the "speech" is so often an integral part of unprotected, nonsymbolic conduct that it is not protected under the First Amendment).

75. 424 U.S. 1 (1976) (per curiam).

76. *See* NOWAK, *supra* note 47, at 970-84.

77. *See generally* Ohralik v. Ohio State Bar, 436 U.S. 447 (1978); United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964).

78. *UMW*, 389 U.S. 217 (1967).

79. *Trainmen*, 377 U.S. 1 (1964).

80. *Id.*

81. *Id.* at 5. The Virginia State Bar requested an injunction. The Supreme Court held that the state bar regulation proscribing union recommendations violated the First Amendment because the regulation prevented union members from "gather[ing] together for the lawful purpose of helping and advising one another." *Id.*

82. 389 U.S. 217 (1967). The union had sought an attorney to represent its members in their claims for workers' compensation, and had explicitly agreed not to interfere with the attorney-client relationship of union members. *See id.* at 219-20. Members were free to hire an attorney of their own choice. *Id.*

83. *Id.* at 221-23 (footnotes omitted).

> Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of interest.

Id. at 223.

At the time of *UMW*, the Court did not recognize commercial speech as protected under the First Amendment, *see supra* note 69, and thus the right to associate for the purpose of

The government may regulate the commercial aspects of the legal profession,[84] but "laws which actually affect the exercise of [first amendment] rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the state's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil."[85] The Court requires the showing of a substantial or compelling interest before it will uphold a governmental restraint on the association of attorneys with their clients.[86] In *Ohralik v. Ohio State Bar*,[87] the Court found a substantial interest in a state prohibition against in-person solicitation of potential clients by attorneys for commercial gain;[88] whereas, in *In re Primus*,[89] the Court did not find a compelling governmental interest to justify a state prohibition of an attorney's solicitation of potential clients through the mails, where the attorney wished to litigate an issue of public interest which qualified as a "form of political expression," and where there was no actual harm to the client.[90] Thus, depending on the governmental interests involved and the purposes for which the attorney was hired, the government may regulate the manner in which attorneys and clients come together but only after it has met the burdens established by the First Amendment.

C. Procedural Due Process and the VA Attorney Fee Limitation

1. The Private Interest of Veterans

Courts use the three part balancing test of *Mathews v. Eldridge*[91] to determine whether an administrative agency is providing procedural due process.[92] Both the district court and the Supreme Court in *Walters* applied the *Mathews* test to the prohibitive effect[93] of the VA's ten dollar attorney fee limitation.[94] Applying the test's first prong to the VA's at-

petitioning the government on a "nonpolitical" matter may be entitled to greater first amendment protection than commercial speech.

84. *See Ohralik*, 436 U.S. at 460-62; *UMW*, 389 U.S. at 222; *Trainmen*, 377 U.S. at 6-8. *But see In re* Primus, 436 U.S. 412 (1978) (the state's right to restrict solicitation is reduced when vital first amendment interests are involved and the attorney is less motivated by pecuniary gain).

85. *UMW*, 389 U.S. at 222.

86. *Id.*

87. 436 U.S. 447 (1978).

88. The Court held that the government had substantial interests in protecting individuals from overreaching attorneys and in avoiding unnecessary litigation. *Id.* at 460-61.

89. 436 U.S 412 (1978).

90. *Id.* In *Ohralik* there was no actual harm to the client. Nevertheless the state's interest in enacting a prophylactic rule against the purely commercial activity of the attorney was held sufficient.

91. 424 U.S. 319 (1976).

92. *See supra* notes 57-58 and accompanying text.

93. *See infra* notes 127-134 and accompanying text.

94. 105 S. Ct. at 3189 n.8; 589 F. Supp. at 1310. It should be noted that neither the district court nor the Supreme Court in *Walters* disputed the claim that recipients of veterans

torney fee limitation weighs the private interest of veterans.[95] Many VA disability benefits are specifically based on "indigency" or medical need.[96] In *Goldberg*, the Court required a pretermination evidentiary hearing because of the "crucial" fact that termination of benefits "may deprive an *eligible* recipient of the very means by which to live."[97] The *Goldberg* Court indicated that procedural due process also required that the recipient have the right to retain counsel.[98] In *Mathews*, however, the Court did not extend the right to a pretermination hearing to the recipients of social security disability benefits because such benefits are awarded on the basis of income, age, and "other factors not directly related to financial need."[99]

In *Walters*, the Court held that VA disability benefits "are more akin to the social security benefits involved in *Mathews* than they are to the welfare payments upon which the recipients in *Goldberg* depended for their daily subsistence."[100] Unlike the Court in *Mathews*, the *Walters* Court did not examine the specific statutory basis for awarding each of the various veteran disability benefits.[101] Yet, many of those benefits, like the welfare benefits in *Goldberg*, are explicitly awarded on the basis of need.[102]

The veteran's interest in VA disability benefits is often greater than the disabled worker's interest in social security benefits. First, unlike social security disability benefits, many VA disability benefits are based on indigency and the presumption that the veteran or dependent has no other means of support.[103] Second, disabled workers ineligible for social

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disability benefits have a "property" interest in those benefits. *See* 105 S. Ct. at 3189; 589 F. Supp. at 1312-14. The district court also held that the *applicants* for those benefits possess a property interest, but the Supreme Court refused to address that question since there was in fact a recipient before it. 105 S. Ct. at 3189 n.8; 589 F. Supp. at 1313. *See generally supra* note 56.

95. *Mathews*, 424 U.S. at 334-35.

96. *See supra* notes 11-12 and accompanying text.

97. *Goldberg*, 397 U.S. at 264 (emphasis in original). *See supra* notes 50-55 and accompanying text.

98. *Goldberg*, 397 U.S. at 270 ("We do not say that counsel must be provided at the pretermination hearing, but only that the recipient must be allowed to retain an attorney.").

99. *Mathews*, 424 U.S. at 340 n.24. The right to retain counsel was not discussed in *Mathews*.

100. *Walters*, 105 S. Ct. at 3195.

101. By only looking to the statutory basis of a benefit, the *Mathews* Court may have been myopic, for social security disability benefits, like veterans disability benefits, are in fact "the means by which to live" for most recipients. *See* Popkin, *The Effect of Representation in Nonadversary Proceedings—A Study on Three Disability Programs*, 62 CORNELL L. REV. 989, 1036 n.183 (1977).

102. *See supra* notes 10-12 and accompanying text.

103. *See* Gillan, *supra* note 11, at 840-41:

> [T]he amount of the [VA] pension . . . [is] based upon annual income—the lower the income, the greater the pension, and no pension [is awarded] if annual income exceeds $3,000 ($4,200 if supporting dependents) [38 U.S.C. § 521 (1986)]. . . . [I]n

security benefits may often seek relief from their employers, workers compensation, or a third party tortfeasor; veterans may not sue their employer, the United States government, for service connected injuries,[104] nor can veterans sue the victorious or vanquished enemy.[105] Third, unlike the disabled worker, who often has had the opportunity to buy medical, disability, and survivors insurance, veterans are unable to pierce the insurance industry's longstanding exclusion of war-related injuries.[106] The veteran's interest in VA disability benefits is often his or her only remedy for a serious injury, and should therefore be considered by the Court as an important and often crucial interest.

2. *Risk of Erroneous Deprivation of VA Benefits and the Value of Additional Safeguards*

The second part of the *Mathews* balancing test weighs the risk to the veteran of an erroneous deprivation of VA disability benefits through the fee limitation procedure, and the value provided by the substitute procedural safeguard of attorney representation.[107]

> computing income provision is made for various important disregards, including welfare payments and payments by third parties toward Part B Medicare coverage. [38 U.S.C. §§ 503(2), (16) (1982); *id.* at § 521(d) (1986)]. . . . Finally, provision is made for denial or discontinuance of a pension if, in the administrator's judgment, the veteran's net worth would render a pension inappropriate [38 U.S.C. § 522 (1982)].

See also supra note 99 and accompanying text. The Social Security Administration gives an eligible applicant disability benefits regardless of the applicant's need.

104. Under the Federal Tort Claims Act (FTCA), there is an exception from the general waiver by the federal government of its sovereign immunity from suits in tort for negligence. The FTCA excludes "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j) (1982). In Feres v. United States, 340 U.S. 135 (1950), the Supreme Court held that this exemption applied to all injuries that "arise out of or . . . in the course of activity incident to service." *Id.* at 146. *See generally* Cohen-Klein & Berkower, *The Cancer Spreads: Atomic Veterans Powerless in the Aftermath of* Feres v. United States, 6 CARDOZO L. REV. 391 (1984); Daschle, *supra* note 30; Milford & Simon, *supra* note 5. Veterans may not sue private third parties, such as government contractors, who were acting according to government specifications. *See* Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, *reh'g denied*, 434 U.S. 882 (1977); *see also* Milford & Simon, *supra* note 5, at 318. Sovereign immunity still has much vitality in this area whereas it has been largely abandoned elsewhere. *See* Cohen-Klein & Berkower, *supra*, at 403-06 nn.74, 77.

105. In the four major wars which America has fought during this century it has only sought and received any reparations whatsoever in one, World War I, and even in that instance some historians have condemned this postwar Allied effort as a cause of the subsequent rise of Nazism and World War II. *See, e.g.*, C. KING, A HISTORY OF CIVILIZATION 875 (1969); B. COLLIER, BARREN VICTORIES—VERSAILLES TO SUEZ—THE FAILURE OF THE WESTERN ALLIANCE: 1918-1956, at 75-76 (1964); Q. HOWE, THE WORLD BETWEEN THE WARS 57 (1953).

106. *See* R. KEETON, INSURANCE LAW BASIC TEXT 621 (1971) (exclusion for war injuries in the accidental death benefit of a sample life insurance policy); *id.* at 622 (exclusion for war injuries in the waiver of premium benefit of a sample life insurance policy); *id.* at 631, 639, 648 (total exclusion of war injuries from three sample health and accident policies).

107. *See supra* notes 50-55, 58 and accompanying text.

The *Walters* plurality put great faith in the ability of VA personnel and the representatives of veterans organizations to ensure that veterans receive their statutory entitlements;[108] however, the district court record showed that VA personnel rarely subpeona data on behalf of veterans, rarely request independent examinations, and usually rely on veterans to produce evidence of service-connected disability.[109] Furthermore, VA personnel spend an average of only 2.84 hours processing each claim and "their performance is measured in part by the speed with which they process claims."[110]

The full-time representatives provided by veterans organizations are well intentioned and dedicated, although overworked;[111] like the VA personnel, they are unable to devote the time and resources necessary to properly assist each and every veteran making a claim.[112] In *Walters*, the plurality noted that pro bono attorneys are only marginally more successful than the representatives of veterans organizations, and concluded that the absence of attorneys did not significantly increase the risk of erroneous deprivation of VA benefits.[113] Yet, statistics show that attorneys practicing in an area of veterans law without a prohibitive fee limitation[114] succeed in seventy-two percent of their cases, whereas the representatives of veterans organizations succeed in only forty-eight percent of their cases.[115] Most pro bono attorneys handle veterans disability claims only sporadically and are thus unfamiliar with this area of veterans law. However, the representatives of veterans organizations work full time on VA claims and thereby develop closer longterm relationships with VA adjudicators. Full time attorneys working in this area could also establish the same rapport.

The plurality in *Walters* refused to invalidate the fee limitation for attorneys retained to pursue complex veteran claims such as those based on Agent Orange exposure, atomic radiation exposure, or post traumatic stress syndrome.[116] Justice Rehnquist stated that such cases constituted only a small percentage of all VA cases and that the district court record did not show that the availability of lawyers would reduce the risk of deprivation. The plurality concluded that:

> Even if the showing in the District Court had been much more favorable, appellees still would confront the constitutional hurdle posed by the principle enunciated in cases such as *Mathews* to the

108. 105 S. Ct. at 3192-96.
109. 589 F. Supp. at 1320-21.
110. *Id.* at 1320.
111. *Id.* at 1321-22. *See also* Rabin, *supra* note 31.
112. 589 F. Supp. at 1321-22.
113. 105 S. Ct. at 3193.
114. For example, the upgrading of military discharges.
115. *Walters*, 105 S. Ct. at 3193.
116. *Id.* at 3186, 3194.

> effect that a process must be judged by the generality of cases to which it applies, and therefore, process which is sufficient for the large majority of a group of claims is by constitutional definition sufficient for all of them.[117]

This suggests that what is due process in most cases is due process in all cases.[118]

Generally, the Supreme Court has appreciated the value of attorneys in administrative adjudications.[119] Veterans law has many complicated procedural aspects where an attorney's special skill would be useful in avoiding an erroneous deprivation.[120] Disabled veterans must overcome their burden of proof by providing evidence to support their claims.[121] Furthermore, veterans' claims often raise complex substantive issues.[122] Attorneys are professionally trained to handle complex issues and procedures such as these and their presence would serve as a valuable safe-

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117. *Id.* at 3194.

118. The plurality also stated:

> In applying . . . [the *Mathews*] test we must keep in mind, in addition to the deference owed to Congress, the fact that the very nature of the due process inquiry indicates that the fundamental fairness of a particular procedure does not turn on the result obtained in any individual case; rather, "procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions."

Id. at 3189 (quoting *Mathews*, 424 U.S. at 344).

The plurality rejected an analogy to the probation cases, where an attorney is provided at the government's expense in exceptional circumstances, by noting that probation involves a "liberty" interest, not a "property" interest. *Id.* at 3195.

The concurring opinion of Justice O'Connor suggests that, on remand, the district court remained free to determine whether the fee limitation "as applied" to complex cases afforded veterans procedural due process. *Id.* at 3197-98 (O'Connor, J., concurring). However, the concurring opinion still does not bode well for those who argue that even "ordinary" VA cases are complicated enough for due process to require the right to retain an attorney. *Id.*

119. In Goldberg v. Kelly, 397 U.S. 254 (1969), the Court insisted that welfare recipients be permitted to retain counsel because "[c]ounsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient." *Id.* at 270-71. Similarly, in *Mathews*, the right of a social security disability pensioner to retain an attorney was not questioned by either the Social Security Administration or the Court. 424 U.S. at 339. In Gagnon v. Scarpelli, 411 U.S. 778 (1973), the Court held that parolees at a parole board hearing are not generally entitled to attorneys provided at government expense, but there are exceptions to the rule, and the Court did not question the parolee's right to retain an attorney at his or her own expense. *See id.* at 787-91.

120. *See supra* notes 21-33 and accompanying text.

121. *Radiation Survivors*, 589 F. Supp. at 1319 (referring to 38 C.F.R. § 3.103(b) (1985), and *id.* at § 19.172 (1986): "At all stages of a claimant's dealings with the VA the claimant is permitted by regulation to introduce documentary, testimonial, or other evidence in support of his claim, as well as to raise any arguments he seeks included in the record."). The veteran must meet his or her burden of proof by submitting "evidence sufficient to justify a belief in a fair and impartial mind that [the] claim is well grounded." *Id.* at 1318 (quoting 38 C.F.R. § 3.102 (1985)).

122. Such as whether a disability is service-connected, the degree of disability, the type of discharge received by the veteran (and whether the veteran deserved it), the veteran's constitutional rights, and the liability of third parties.

guard in VA adjudications.[123]

3. The Government Interest

The third part of the *Mathews* test assesses the government's interest, including the burden to the government from additional procedural requirements.[124] The *Walters* plurality found two governmental interests in the ten dollar fee limitation which outweigh the risk of erroneous deprivation of the veteran's vital interest in his or her disability benefits: first, protecting the veteran's award from exorbitant legal fees;[125] and second, keeping the procedures of the VA "informal and nonadversarial."[126]

a. Protecting the Veteran

The original intent of Congress in enacting the ten dollar attorney fee limitation in 1864 was to protect the veteran from exorbitant legal fees.[127] In 1864, ten dollars was the equivalent of approximately 580 dollars today.[128] Congress and the Supreme Court plurality in *Walters* ignored the effects of inflation, thereby effectively prohibiting the use of attorneys by veterans rather than merely regulating attorney fees.[129] It may indeed be the present intent of Congress to prohibit the use of attorneys for VA claims. Congress was informed by the VA's director in 1982 that the fee limitation "effectively precludes attorney representation before the VA" and yet Congress has still not abolished the fee limitation.[130] It is true that Congress has imposed fee limitations in other administrative settings such as Social Security,[131] class

123. For instance, one complex issue in veterans disability law, arising out of the Vietnam War, involved the exposure of servicemen and women to the defoliant commonly known as Agent Orange, a carcinogen. *See generally* Daschle, *supra* note 30, at 6-9. Until several attorneys brought a federal class action suit on behalf of the concerned veterans, the VA ignored veterans' claims for their resulting medical and financial needs. *See* Wagner, *The New Elite Plaintiff's Bar*, 72 A.B.A. J. 44-49 (Feb. 1986). The veterans may never have received help were it not for a federal statute providing attorney fees for successful class action suits against the federal government. *See also* Daschle, *supra* note 30, at 8-9.

124. 424 U.S. at 334-35.

125. *See Walters*, 105 S. Ct. at 3189-91; *see also id.* at 3209-11 (Stevens, J., dissenting); *Radiation Survivors*, 589 F. Supp. at 1323 n.20.

126. *See Walters*, 105 S. Ct. at 3191-92, 3196; *see also infra* notes 135-145 and accompanying text.

127. *See Walters*, 105 S. Ct. at 3189-90.

128. *See id.* at 3210-11 (Stevens, J., dissenting).

129. Popkin, *supra* note 101, at 1042.

130. *See Walters*, 105 S. Ct. at 3190 n.10.

131. 42 U.S.C. § 406(a) (1983); 20 C.F.R. § 404.1720 (1985). *See* 2 H. McCORMICK, SOCIAL SECURITY CLAIMS AND PROCEDURE 384 (3d ed. 1983). The statutes require that the fee be "the smaller of (a) 25% of the total amount of past-due benefits, (b) the amount of the attorney's fees as fixed by the Secretary, or (c) the amount agreed upon between the claimant and the attorney as fee." *Id.* at 386.

actions,[132] and suits against the federal government,[133] but, unlike VA disability benefit practice, these limitations do not make it impossible for attorneys to support themselves.[134] Unfortunately, to protect veterans from exorbitant legal fees, Congress has ensured that veterans will have no legal representation at all before the VA.

b. Keeping the VA "Informal and Nonadversarial"

The second governmental interest in the attorney fee limitation emphasized by the Court is keeping the VA "informal and nonadversarial." In reality, this governmental interest consists of two separate and unrelated objectives: keeping VA adjudications informal and keeping them nonadversarial.[135] Nevertheless, the Court in *Walters* blended the concepts of informality and nonadversariality, often pairing the words, "informal and nonadversarial," together, as if they were synonymous.[136] In doing so, the Court suggests that the VA's informal procedures will make the relationship between the veteran and the VA less adversarial.

The interests of the disabled veteran conflicts with those of Congress, the VA, and VA personnel in clear and substantial ways. The veteran simply wants compensation for his or her service-connected injury. Congress, however, has two basic, but conflicting, interests regarding veterans: on the one hand, it wishes to provide " 'for him who has borne the battle, and his widow and his orphan' "[137] but, on the other hand, like any disability insurer, it also wishes to minimize expenditures. The government's desire to economize will always conflict with the veteran's statutory right to compensation and his or her constitutional right to procedural safeguards.[138] The VA and its personnel are charged with serving the veteran,[139] but these personnel also have a separate conflicting interest in keeping their work environment at the VA pleasant, uniform, and efficient. This interest can often conflict with the veteran's

132. *See generally* 3 H. NEWBERG, CLASS ACTIONS 184-91 (1985) (describing the factors used by a judge to determine a reasonable attorney's fee).

133. 28 U.S.C. § 2678 (1982). *Cf.* M. DERFNER & A. WOLF, COURT AWARDED ATTORNEY FEES 5-44 (1985).

134. *See* Gillan, *supra* note 11, at 846: "A percentage limitation, which is similar to that written into the Social Security Act, might reduce a fee otherwise chargeable, but does not slam the law office door." *See also* Popkin, *supra* note 101, at 1037.

135. For instance, summary trials in a totalitarian country could be extremely informal, yet the relationship between the state and the accused is very adversarial. Conversely, the gratuitous transfer of a deed of real property between a parent and a child involves a high degree of formality but the relationship is nonadversarial.

136. *Walters*, 105 S. Ct. at 3191, 3196.

137. *Id.* at 3183 (quoting the Second Inaugural Address of Abraham Lincoln (1865)). *See also infra* note 167.

138. *See Radiation Survivors*, 589 F. Supp. at 1320 n.7.

139. *See supra* note 14.

need for individualized, but time consuming, assistance.[140] It is not clear, therefore, how making the VA's adjudicatory procedures less formal will reduce the level of substantive conflicts existing between the government and the veteran.

Nevertheless, to support its thesis, the plurality in *Walters* quotes extensively from an article by Judge Friendly for the proposition that informality, particularly the absence of legal counsel, will help avoid conflict:

> These problems concerning counsel and confrontation inevitably bring up the question whether we would not do better to abandon the adversary system in certain areas of mass justice. . . . While such an experiment would be a sharp break with our tradition of adversary process, that tradition, which has come under serious general challenge from a thoughtful and distinguished judge, was not formulated for a situation in which many thousands of hearings must be provided each month.[141]

The Supreme Court, however, ignores Judge Friendly's admonition in the same article that the abandonment of the adversary system in "certain areas of mass justice" should only occur after the provision of a more neutral adjudicator where "an examiner—or administrative law judge if you will—with no connection with the agency [should] have the responsibility for developing all the pertinent facts and making a just decision."[142] Judge Friendly also suggested that "agencies might be offered an option of less procedural formality if the decsionmaker were not a member of the agency and of still less if, as in England, he were not a

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140. *See* Rabin, *supra* note 31, at 919:

> Arguably, of course, experience, informality, and mutual trust are indispensable attributes of a system designed to handle mass claims in an expeditious manner. Unfortunately, it is just this atmosphere of mutual supportiveness that generates concern over the absence of judicial review. Experience with other decisionmaking systems teaches that where the "advocate" develops loyalty and a sense of obligation to the decisionmaker as well as to his client, role conflict is inevitable.

See also id. at 919-20 nn.56, 60.

141. *Walters*, 105 S. Ct. at 3191-92 (quoting Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1287-1290 (1975)). The plurality continued to quote Judge Friendly:

> To be sure, counsel can often perform useful functions even in welfare cases or other instances of mass justice; they may bring out facts ignored by or unknown to the authorities, or help to work out satisfactory compromises. But this is only one side of the coin. Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client's cause by any ethical means. Within the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty. The appearance of counsel for the citizen is likely to lead the government to provide one—or at least to cause the government's representative to act like one. The result may be to turn what might have been a short conference leading to an amicable result into a protracted controversy.

Id. (quoting Friendly, *supra*, at 1287-88).

142. *See* Friendly, *supra* note 141, at 1289.

full-time government employee at all."[143] VA regional adjudicatory panels consist of government agency employees[144] and thus do not satisfy Judge Friendly's requirement of independent adjudication as a prerequisite to the abandonment of the adversarial system by the VA.[145] Judge Friendly's advice that an adjudicative proceeding should be made less adversarial through the use of a more neutral adjudicator *before* it may be made less formal was mistaken by the Court to mean that a proceeding will be less adversarial *after* it is made less formal. Under Judge Friendly's analysis, the fee limitation cannot serve the governmental interest in making the VA less adversarial—it merely leaves the veteran more vulnerable to bureaucratic mistreatment in an informal, but equally adversarial situation.

c. Minimizing Administrative Expenses

An informal VA adjudicatory process is said to serve a separate governmental interest of minimizing administrative expenses—which is a legitimate governmental interest under the *Mathews* balancing test.[146] Many fear that attorneys for veterans may protract litigation, cling to formalities, consume more of the VA's resources, and force the VA to hire extra attorneys.[147] However, such fears are exaggerated: attorneys would not increase administrative expenses. First, attorneys would not

143. *Id.* at 1279. Judge Friendly further suggested that "[d]istrust of the bureaucracy is surely one reason for the clamor for adversary proceedings in the United States. But a better answer may not be more insistence on adversary proceeding but less reliance on the bureaucracy for decisionmaking." *Id.* at 1279-80.

144. *See supra* notes 23-24 and accompanying text. *See generally infra* note 211.

145. *See supra* notes 142-143; *see also supra* note 14. *But see Walters*, 105 S. Ct. at 3186 n.6; Prygoski, *Due Process and Designated Members of Administrative Tribunals*, 33 ADMIN. L. REV. 441 (1981):

> Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.

Id. at 449 (quoting United States v. Morgan, 313 U.S. 409, 421 (1940)). The Supreme Court has also stated:

> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. *It must overcome a presumption of honesty and integrity in those serving as adjudicators*; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals *poses such a risk of actual bias or prejudgment* that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Id. (quoting Withrow v. Larkin, 421 U.S. 35 (1974) (emphasis added)).

146. *Mathews*, 424 U.S. at 335 ("the government's interest [which may be considered includes] the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.").

147. *See generally supra* note 141.

want to protract litigation if it were not in the veteran's best interest—the attorney, as well as the VA, owes the veteran a fiduciary duty. Since the attorney's fees would come only from an award, speedy resolution of claims would be encouraged.[148] Second, the use of attorneys would not inhibit the truthfinding process because an attorney cannot ethically distort the truth.[149] Furthermore, the VA already has the veteran's service records and may use the discovery process to compel a medical examination or copies of the veteran's post-service medical files.[150] Third, attorneys would have fewer formalities in veterans law to protract proceedings than they have in civil law.[151] Fourth, attorneys are trained negotiators as well as litigators. The legal profession emphasizes negotiation[152] and most cases are settled rather than litigated.[153] Finally, any additional litigation that reduces the risk of erroneous deprivation still serves the primary governmental interest in providing for disabled veterans.

In summary, after applying the *Mathews* test to the fee limitation, the veteran's private interest and the risk of erroneous deprivation are more substantial than recognized by the plurality in *Walters*, whereas the governmental interests in the limitation are more illusory than real.

D. The First Amendment Applied to the VA Attorney Fee Limitation

Prior to *Walters*, the Court never addressed the government's power to effectively prohibit a person from retaining an attorney with his or her own resources. The *Walters* Court avoided a detailed first amendment analysis by finding that the veteran's "First Amendment arguments, at base, are really inseparable from their due process claims,"[154] and the veterans organizations were only rearguing their claim that veterans are

148. There are neither punitive damages nor damages for pain and suffering in veterans law. The only relief available to the veteran is compensation, a pension, and medical expenses. *See generally supra* notes 10-12 and accompanying text. Furthermore, it must be assumed that if Congress were to abolish the present ten dollar fee limitation it would still retain some moderate fee controls as it does in other administrative settings. *See supra* notes 131-133; *see also infra* note 168 and accompanying text.

149. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-27, DR 7-102(A)(5) (1981); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1983): "In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse." *Id.* at Rule 3.3(a)(4)(d). *See also id.*, Preamble: "As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others."

150. 38 U.S.C. § 3311 (1982). *See generally* Popkin, *supra* note 101, at 1027-28.

151. *See supra* notes 13-20 and accompanying text. *But see supra* notes 21-33 and accompanying text.

152. *See* MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 149, Preamble.

153. *See generally* L. KANOWITZ, ALTERNATIVE DISPUTE RESOLUTION (1986). Only 5-10% of all cases filed reach court, and the vast majority are settled. There are many additional disputes which are settled by attorneys prior to the filing of a claim. *Id.* at 7.

154. 105 S. Ct. at 3196-97.

denied " 'meaningful access to the courts.' "[155] Indeed, the rights of due process and free expression are related: the " 'fundamental requisite of due process' " is the right to be heard;[156] and the First Amendment protects the right to speak freely. Furthermore, it is through the Fourteenth Amendment's Due Process Clause that the right of free expression is protected from state regulation.[157] However, the right of free speech is not limited to or diminished in the courtroom, nor is due process limited to matters of expression. Moreover, before it may restrain first amendment rights, the government must show a compelling or substantial interest;[158] whereas to comply with procedural due process it need only show that the governmental interest is greater than the risk of erroneous deprivation to the private interest.[159]

In *Walters*, the plurality found that the governmental interests in the fee limitation were "significant" but held that "the constitutional analysis of a regulation that restricts core political speech . . . will differ from the constitutional analysis of a restriction on the available resources of a claimant in government benefits proceedings."[160] The plurality did not elaborate on how the analysis would be different, but implied that the right to spend money on a lawyer in a benefits proceeding does not have as high a degree of first amendment protection as that accorded to political speech by the Court in *Buckley v. Valeo*.[161] In *Buckley*, the Court held that the right to spend money on political causes was pure speech protected by the First Amendment.[162]

The government regulations in *UMW*, *Trainmen*, *Ohralik*, and *Primus* involved only the manner in which an attorney could solicit potential clients,[163] yet, in *Walters*, the Court holds that an individual's very ability to retain an attorney is not entitled to first amendment protection. In *UMW* and *Trainmen*, the Court also held that the right to hire an attorney is protected by the First Amendment regardless of whether the attorney is hired for political purposes.

The *Walters* plurality did not acknowledge the similarities between the veteran's situation and the worker's situation in *UMW* and *Trainmen*. The veteran and the worker are both injured parties seeking relief from their employers in informal administrative systems designed to protect them from exorbitant legal fees. The *Walters* plurality distinguished *UMW* and *Trainmen* as follows:

155. *Id.* at 3197.
156. *Goldberg*, 397 U.S. at 267 (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)).
157. *See generally* NOWAK, *supra* note 47, at 361-67.
158. *See generally supra* notes 60-74.
159. *See supra* text accompanying note 58.
160. 105 S. Ct. at 3197 n.13.
161. 424 U.S. 1 (1976) (per curiam).
162. *Id.*
163. *See supra* notes 77-90 and accompanying text.

> [T]hose cases involved the rights of unions and union members to retain or recommend counsel for proceedings where counsel were allowed to appear, and the First Amendment interest at stake was primarily the right to associate collectively for the common good. In contrast, here the asserted First Amendment interest is primarily the individual interest in best prosecuting a claim. . . .[164]

This distinction has three flaws. First, as a technical matter, counsel for the veteran is "allowed to appear" before the VA, just as counsel was allowed to appear in the workers' compensation proceedings in *UMW*. Second, in *UMW*, the Court specifically described the "litigation in question" as "solely designed to compensate the victims of industrial accidents,"[165] and rejected the contention that first amendment protection is "applicable only to litigation for political purposes."[166] Third, in *Walters*, the interest involved was more than just the individual interest in prosecuting the claim: veterans benefits promote important national defense interests by assuring future soldiers and veterans that they will be provided for if injured during service.[167]

Thus, the *Walters* plurality should have considered the first amendment issue separately from the due process issue; and upon closer analysis, the plurality should have adopted the principle of *UMW* and *Trainmen*—that the First Amendment requires the government to show a substantial or compelling interest before the Court will uphold a restraint on the association of attorneys and clients. In *Walters*, no such interest was found and thus the fee limitation should not have been upheld.

E. The Fee Limitation—A Proposal

Congress should replace its prohibitive fee limitations with moderate ones based on the size of the veteran's or dependent's award, the work expended, and the level reached by the claim in the VA's adjudicative process.[168] Moderate fee limitations would reduce the risk of errone-

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164. 105 S. Ct. at 3196.

165. 389 U.S. at 223.

166. *Id.*

167. *See* Veterans Health Care Amendments, Pub. L. No. 98-160, § 501, 97 Stat. 1005 (1983):

> The Congress finds that—
> (1) the Nation has an historic and deeply-rooted commitment to providing benefits and services to those who served in the Armed Forces;
> (2) this commitment must be continued and maintained, both to fulfill moral obligations to those who served in the past and to assure current and potential members of the Armed Forces that the Nation's obligations to those who serve will always be honored.

168. An appropriate limitation would be a maximum of 5% of the veteran's award if the claim is resolved before a hearing, 15% if it is resolved during the hearing, and 25% if it is resolved upon appeal to the BVA, with a maximum fee of $1,500 per veteran's injury. An attorney should not receive a fee if there is ultimately no award. Although these limitations

ous deprivation to disabled veterans and their dependents by encouraging more attorneys to practice veterans disability law on a daily basis. Moderate fee limitations would at the same time protect veterans from exorbitant fees, which would be consistent with Congress' original intent in enacting the limitation. The VA would not need to hire additional attorneys since the regional rating boards and the BVA already have attorneys.[169] Furthermore, veterans' attorneys would save VA resources by facilitating orderly proceedings and replacing VA personnel as the veteran's advisor.[170] The present fee limitation only saves VA resources, not insubstantial, by increasing the level of benefits erroneously deprived without due process from those who are entitled to them.

Moderate fee limitations would also eliminate the serious threat which the VA's uniquely prohibitive fee limitation poses to the first amendment rights of veterans and all Americans—to speak to and through an attorney. Unlike other government regulations of attorneys which only restrain the manner in which persons may retain attorneys, the VA fee limitation eliminates a person's very ability to retain an attorney.[171] Lifting this prohibitive fee limitation will prevent it from acting as a precedent to be followed in other settings.

In workers' compensation law, where similar medical-legal issues of disability and causation arise and where informal procedures are also encouraged,[172] attorneys facilitate compensation and are therefore only subject to moderate fee controls.[173] Moreover, in workers' compensation law, a neutral party, the state, adjudicates workers' claims against their employers, whereas in veterans law, the veteran's claim against his former employer, the government, is adjudicated by the VA, which has a direct financial interest in the outcome of the claim.[174]

III. Preclusion of Judicial Review of VA Adjudications

A. Judicial Review of Administrative Agency Decisions

Neutral adjudication is an essential element of the constitutional re-

might still discourage an attorney from undertaking complex individual claims, they are similar to other moderate fee limitations established by the federal government in other settings. *See, e.g., supra* notes 131-133 and accompanying text.

169. *See supra* notes 23, 29 and accompanying text.

170. As the Court in *Goldberg* observed, attorneys can help adjudications proceed in an orderly manner. 397 U.S. at 270-71.

171. *See supra* notes 77-90 and accompanying text.

172. *See generally* 3 LARSON, THE LAW OF WORKMEN'S COMPENSATION 15-1 to 15-78 (1983).

173. *See generally id.* at 15-672 to 15-716 (as to necessity for attorneys); *id.* at 15-639 to 15-703 (as to fee controls).

174. If workers' compensation used VA procedures, employees would rely solely on union representatives and only employers would compose the workers' compensation boards.

quirement of procedural due process.[175] Judge Friendly's proposal, discussed above, suggests that the provision of more neutral adjudication is a better way of ensuring procedural due process than the provision of formal and adversarial proceedings.[176] Granting the veteran access to judicial review would presumably be one way of providing veterans with a more neutral adjudication consistent with Judge Friendly's proposal.[177] The veteran seeking disability benefits is currently precluded from appealing the findings of the VA to a federal court.[178] All adjudicative decisions of the VA "on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision."[179]

The Constitution grants Congress the power "[t]o constitute Tribunals inferior to the Supreme Court"[180] and provides that "the judicial Power shall extend . . . to Controversies to which the United States shall be a Party"[181] and "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."[182] Congress can limit[183] or withhold[184] lower federal court jurisdiction to determine federal questions and regulate the appellate jurisdiction of the Supreme Court.[185] Congress may also vest decisionmaking authority in governmental agencies,[186] as well as limit or deny judicial review of those agency decisions

175. Goldberg v. Kelly, 397 U.S. 254, 271 (1970). *See also* Prygoski, *supra* note 145, at 453; NOWAK, *supra* note 47, at 501; Hahn, *Procedural Adequacy in Administrative Decisionmaking: A Unified Formulation*, 30 ADMIN. L. REV. 467, 500-04 (1978); *see generally infra* note 239.

For the proposition that a neutral adjudicator is one of the more primary of the essential requirements of due process, see Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 750-52 (1976).

176. *See supra* notes 141-143 and accompanying text.

177. Of course, access to judicial review would necessitate effective access to an attorney. *See* Rabin, *supra* note 31, at 920.

178. 38 U.S.C. § 211(a) (1982).

179. *Id.*

180. U.S. CONST. art. I, § 8, cl. 9.

181. U.S. CONST. art. III, § 2, cl. 1.

182. U.S. CONST. art. III, § 2, cl. 1-2.

183. *See* Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850).

184. *See* Lockerty v. Phillips, 319 U.S. 182 (1943).

185. *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868); *see generally* C. WRIGHT, THE LAW OF FEDERAL COURTS 35 (1983) ("The orthodox view . . . is that Congress possesses plenary power to confer or withhold appellate jurisdiction.").

186. Thomas v. Union Carbide Agric. Prod. Co., 105 S. Ct. 3325, 3334 (1985) ("Congress is not barred from acting pursuant to its powers under Article I to vest decisionmaking authority in tribunals that lack the attributes of Article III courts"—life tenure and no reduction in compensation during tenure). *Cf. infra* note 217.

affecting private interests.[187] In *Ex parte McCardle*,[188] the Supreme Court held that Congress could deny the Supreme Court the authority to review habeas corpus proceedings.[189] Thus, if Congress can deny appellate jurisdiction where a strong liberty interest is involved, then arguably it can preclude judicial review of agency decisions concerning government benefits.

The Court, however, might not follow *McCardle* today if Congress sought to deprive the Supreme Court of jurisdiction over important constitutional questions.[190] In *Johnson v. Robison*,[191] the Court indicated that a congressional statute seeking to deny the Supreme Court appellate jurisdiction over important constitutional issues would "raise serious questions concerning the constitutionality of" the statute.[192] In any case, the VA's preclusion of judicial review does not extend to controversies involving constitutional issues, but only to issues of law and fact arising "under any law administered by the Veterans Administration."[193] Therefore, the VA's preclusion of judicial review of VA adjudications is constitutional.

B. The Utility of Agency Preclusion of Judicial Review

"[J]udicial deference to an agency's interpretation of 'its' statute is surely the norm in contemporary administrative law."[194] Preclusion of judicial review is merely a strong form of congressionally imposed judicial deference to agency autonomy. Congress totally precludes judicial review of Medicaid[195] and VA adjudications, while it partially precludes judicial review of Social Security Administration adjudications.[196] Most federal agencies, however, are subject to full judicial review although the

187. *See supra* note 186; *see also infra* note 208 and accompanying text.

188. 74 U.S. (7 Wall.) 506 (1869).

189. *Id.* at 512-15.

190. There has been little opportunity for the Court to reaffirm *McCardle* because Congress rarely restricts the Supreme Court's jurisdiction over federal agencies. *See* C. WRIGHT, *supra* note 185, at 39.

191. 415 U.S. 361 (1974).

192. *Id.* at 366. *But see id.* at 366 n.8.

193. *See* 38 U.S.C. § 211(a) (1982).

194. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 598 (1985).

195. *See* H. MCCORMICK, MEDICARE AND MEDICAID CLAIMS AND PROCEDURES 510 (1977) (*see also* Supp. 1984, at 168).

196. See 42 U.S.C. § 405(g) (1982), which requires that:

> The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations.

See also H. MCCORMICK, *supra* note 131, at 336.

reviewing court must defer to agency determinations of fact which are supported by "substantial evidence" and are not "arbitrary [and] capricious."[197] There is a strong debate over the desirability of judicial deference to "administrative discretion."[198] The following factors should be considered in deciding whether Congress should continue to totally preclude judicial review of VA decisions.

1. Interpretive Skills

Some commentators argue that, in the general business of interpret-

197. *See* 5 U.S.C. § 706 (1982):

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

See also D. BARRY & H. WHITCOMB, THE LEGAL FOUNDATIONS OF PUBLIC ADMINISTRATION 100-02, 118-19 (1981).

198. *See, e.g.*, K. DAVIS, DISCRETIONARY JUSTICE (1971). Some writers argue that "in our system of remedies, an individual whose interest is acutely and immediately affected by an administrative action has a right to secure at some point a judicial determination of its validity." D. BARRY & H. WHITCOMB, *supra* note 197, at 71. *See also* Diver, *supra* note 194, at 551. Others argue that judicial review of agency decisions is a "mischievous abstraction" and that "[t]here is no such thing as a common law of 'judicial review' in the federal courts." D. BARRY & H. WHITCOMB, *supra* note 197, at 71.

Nineteenth century cases adopted the latter position and presumed that an agency decision was not reviewable. *Id.* at 71-72. In Decatur v. Paulding, 39 U.S. (14 Pet.) 497 (1840), the Court refused to adjudicate whether a veteran's widow was entitled to a government pension, stating that judicial interference in executive departments would "be productive of nothing but mischief." *Id.* at 516. Since the beginning of the twentieth century, the Court has retreated from this presumption against reviewability. D. BARRY & H. WHITCOMB, *supra* note 197, at 72-73. Professor Jaffe, a strong proponent of judicial review of agency decisions, has described the present attitude of the Court as follows: "Congress, barring constitutional impediments, may indeed exclude judicial review. But judicial review is the rule. It rests on the congressional grant of general jurisdiction to the article III courts." *Id.* at 73 (quoting L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 344 (1965)).

ing statutes, courts have more expertise than agencies.[199] But it has also been argued that "judicial methods of unearthing legislative intent are primitive and naive given contemporary standards of social science. Courts rely almost exclusively on the recorded public statements of immediate participants in the legislative process, and almost never probe into legislators' unspoken motives."[200] "Agency decisionmakers often have direct knowledge of the circumstances surrounding enactment of the statutes that they administer,"[201] for they often enact agency rules, propose statutory changes, and answer legislative and public inquiries, in addition to their role as adjudicator.[202] Consequently, agency decisionmakers are better than courts at understanding "[w]hether the legislature intended to speak in 'ordinary' or in technical language."[203] Agency decisionmakers have more technical expertise than courts in the factual milieu of their agency's law.[204]

2. *Legislative Control of Agency Policy*

To effectuate its legislative policies, Congress controls the administrative agencies which it creates by retaining in itself a voice in the appointment of agency rulemakers and agency adjudicators—collectively known as agency decisionmakers. When federal judges intervene in the agency rulemaking and adjudicatory processes, Congress loses control because federal judges are appointed for life on the basis of general judicial qualifications, constitutional philosophy, and integrity—not on the basis of their attitudes in any one field of administrative law. With agency decisionmakers of limited tenure, Congress can better focus its investigation of candidates and their attitudes toward the specific congressional policies involved. Once appointed, federal judges "are unlikely to be especially responsive to the wishes of current legislatures."[205]

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199. Diver, *supra* note 194, at 578.

200. *Id.* at 574.

201. *Id.* at 575.

202. *Id.*

203. *Id.* at 577.

204. *See* D. BARRY & H. WHITCOMB, *supra* note 197, at 118:

> It remains true, however, that to the extent that the validity of a particular administrative ruling depends on practical experience with individual circumstances, rather than on guidelines extrapolated from a statute through the customary tools of construction, the arguments in favor of deference to an agency (which we have shown to be substantial even on "legal" questions) become far more compelling.

But see Schwartz, *Administrative Law in the Next Century*, 39 OHIO ST. L.J. 805, 831 (1978):

> The limitations of the expert—inability to see beyond the narrow confines of his own experience, intolerance of the layman, and excessive zeal in carrying out his own policy regardless of the cost to other, broader interests of society—are subjected under our system to the trained scrutiny of the non-expert judge, who, uninfluenced by professional bias, is able to take a view broader than mere promotion of administrative policy in the particular case without regard for the ultimate cost.

205. Diver, *supra* note 194, at 581. Professor Diver points out that judges have life tenure and a guaranteed salary, and he further observes that judges are at the apex of their career and

Indeed, allowing the judiciary a free hand in determining legislative-administrative policy may actually weaken the ability of the people to govern themselves through Congress.[206]

Two objections have been raised against legislative-administrative independence from judical review. First, private parties, it is argued, deserve a day in court before a judge.[207] However, administrative adjudicatory panels are courts: they decide in a neutral manner whether the facts and law of a case justify satisfaction of a particular claim.[208] Most of these administrative courts are presided over by what are known as Administrative Law Judges (ALJ's)[209] who are well paid and carefully selected in a manner similar to that of traditional judges.[210] Second, it is argued that the limited tenure of most ALJ's make them too partial to

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may have foregone power and prestige to promote a "personal conception of the public good." To do so, they "would presumably prefer to be freed from the bonds of the enactor's intent." *Id.*

206. Note, *Judicial Intervention and Organization Theory: Changing Bureaucratic Behavior and Policy*, 89 YALE L.J. 513, 515 n.11 (1980) (" 'excessive reliance upon courts instead of self government through democratic processes may deaden a people's sense of moral and political responsibility for their own future.' " (quoting A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 103 (1976))).

207. Justice Brandeis once noted that "[t]he supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly." Saint Joseph Stock Yard Co. v. United States, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring).

208. In Thomas v. Union Carbide Agric. Prod. Co., 105 S. Ct. 3325 (1985), the Court noted: "Many matters that involve the application of legal standards to facts and affect private interests are routinely decided by agency action with limited or no review by Article III courts." *Id.* at 3334.

209. For a brief history of the ALJ designation, see Schwartz, *supra* note 204. ALJ's were first called "referees," "hearing officers," and "examiners." Beginning in the late 1940's there were several unsuccessful attempts in Congress to have the examiner's title match the actual judicial powers his office entailed. Finally, in 1972 the Civil Service Commission promulgated a regulation that made the change. 5 C.F.R. § 930.203a (1978). "By a simple administrative stroke of the pen the federal agencies were endowed with a full grown administrative judiciary." *Schwartz, supra* note 204, at 821. In 1978 there were 997 ALJ's. *Id.* at 822. *See also id.* at 823:

> The recent rise of the federal administrative judiciary indicates that the administrative law of the next century may follow the pattern of the executive tribunals of three centuries ago. The justice now dispensed by the agencies will become truly judicialized and administered by judges possessing solely judicial authority. Our administrative law will then become as much a part of our ordinary law as has the law of equity which was originally developed by the Court of Chancery.

210. Gladstone, *The Adjudicative Process in Administrative Law*, 31 ADMIN. L. REV. 237, 243 (1979):

> [T]he top ranked ALJ today draws a salary of $47,500 per year. He has been carefully handpicked on a merit basis that surpasses in rigor the inquiry into the qualifications of a Federal District Court Judge. It is time either to acknowledge the capability of the ALJ to judge in every sense of the word and office and let him earn his salary, or stop throwing this money away.

the government and public interest.[211] However, where an ALJ adjudicates an issue involving a claim by one private party against another and a public interest is implicated, a certain partiality to the public interest is probably desirable. But where a private party asserts a pecuniary claim[212] against the government, an ALJ's lack of neutrality could prevent a fair hearing.[213] VA procedures do not satisfy the standard of neutrality suggested by Judge Friendly for administrative adjudications.[214] The VA claims examiners and regional adjudicators are government employees and the panelists at the BVA are appointed solely by the VA administrator with the approval of the President, but without the advice and consent of the Senate.[215] Furthermore, the judicial powers of VA adjudicators are sharply curtailed.[216] These factors have led some to propose that Congress grant veterans access to Article III federal judges who, due to the independence guaranteed them in the Constitution,[217] are arguably more neutral than VA adjudicators.[218] However, judicial review of VA adjudications is not the only way to ensure that veterans receive neutral adjudication.[219]

3. *Reducing the Burden of the Court*

The amount of federal litigation has increased explosively in the last two decades,[220] and reviewing the increasing amount of administrative law has become a large part of a federal judge's work.[221] In 1982, ap-

211. *See* Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109, 110 (1981) (ALJ's themselves are subject to doubts about their independence due in part to their employment status as agency personnel). *See also supra* notes 143-145, 205 and accompanying text.

212. The VA, SSA, Farm Home Administration (FHA), and Aid to Families with Dependent Children (AFDC) are all examples of federal agencies where the government has a pecuniary interest in the outcome of agency adjudications.

213. *See* Friendly, *supra* note 141, at 1279-80.

214. *See supra* notes 142-143.

215. *See supra* notes 27-29 and accompanying text.

216. *See supra* notes 30-31 and accompanying text.

217. Article III of the Constitution grants federal judges life tenure and a salary that cannot be reduced. U.S. CONST. art. III, § 1. *See generally* C. WRIGHT, *supra* note 185, at 40 n.2. Moreover, federal judges are not paid by the VA. *See generally supra* notes 23, 26 and accompanying text.

218. *See, e.g.*, Daschle, *supra* note 30, at 11-14; *see generally* Moss, *VA Judicial Review?*, 72 A.B.A. J. 29 (Sept. 1986) (concerning House Resolution 525 which would lift the ten dollar limit).

219. *See infra* notes 234-240 and accompanying text.

220. *See* H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 15-55 (1973); Alsup & Salisbury, *A Comment on Chief Justice Burger's Proposal for a Temporary Panel to Resolve Intercircuit Conflicts*, 11 HASTINGS CONST. L.Q. 359 (1984); Rosenn, *Trends in Administration of Justice in the Federal Courts*, 39 OHIO ST. L.J. 791, 793, 795 nn. 9, 20 (1978) (between 1962 and 1977 the number of cases before the federal courts of appeal rose 296% whereas the number of judges therein rose only 24%).

221. *See* H. FRIENDLY, *supra* note 220, at 797-98.

proximately one-third of the Supreme Court's cases primarily involved issues of administrative law.[222] The growing complexity of administrative law in each of the numerous agencies makes it increasingly difficult for federal judges to master the law of any one agency.

Numerous solutions have been proposed to reduce this burden. One proposal would create a fourth level in the federal judiciary—a National Court of Appeals—which would screen certain types of cases,[223] and resolve intercircuit disputes.[224] This new court, however, would have three serious drawbacks: it would continue to lack expertise in administrative law due to its general subject matter jurisdiction; it would still be less accountable to congressional policy than agency courts are;[225] and it would create the extra expense of an additional layer of appellate review.

A second proposal envisions a National Court of Administrative Appeals.[226] This court would be given appellate jurisdiction over most agency adjudications, permitting the rest of the federal judiciary to concentrate on constitutional, civil, and criminal cases. However, this proposal has the same deficiencies, albeit to a lesser degree, as the previous proposal.

A third proposal suggests that the federal courts afford more deference to administrative determinations while still permitting access to judicial review.[227] In other words, this proposal envisions deference just short of preclusion. Nevertheless, the possibility of review inevitably leads to the continued utilization of that review,[228] thus maintaining the burden on the courts.

A fourth proposal would follow the example of the VA, the Court of

222. Hellman, *The Proposed Intercircuit Tribunal: Do We Need It? Will it Work?*, 11 HASTINGS CONST. L.Q. 375, 452-55 (1984).

223. FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASE LOAD OF THE SUPREME COURT (1972) (reprinted in 57 F.R.D. 573 (1973)). Another study proposed that, instead of permitting this new appellate court to screen petitions to the Supreme Court, the Court should first review its petitions and then refer some to the new appellate court. *See* COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975) (reported in 67 F.R.D. 195 (1975)); *see generally* Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634 (1974).

224. *See* Burger, *Annual Report on the State of the Judiciary*, 69 A.B.A. J. 442 (1983); *see generally* Alsup & Salisbury, *supra* note 220.

225. *See supra* notes 205-206 and accompanying text.

226. *Cf.* Rosenn, *supra* note 220, at 798. This proposal has attained partial realization with the creation in 1982 of the new Court of Appeals for the Federal Circuit; *see generally* C. WRIGHT, *supra* note 185, at 17.

227. *See* H. FRIENDLY, *supra* note 220, at 182-88; Rabin, *supra* note 31, at 921-22.

228. *See supra* note 227 and accompanying text. A claimant who has already expended the energy and other resources bringing his claim to the highest adjudicatory body in an agency may very well risk the marginal additional expense of filing an appeal to a federal court even if that court will accord the agency the greatest deference.

Claims, and the Court of Customs and Patent Appeals,[229] where specialized courts have to varying degrees retained exclusive and final jurisdiction over their respective subject matters.[230] This proposal envisions separate sets of mini-supreme courts, where only constitutional issues are subject to review, and is modeled loosely "on the French system of administrative courts."[231] Judge Friendly found much to recommend in this proposal but felt that it did not quite overcome the presumption in favor of the status quo.[232] Nevertheless, his actual proposals for a tax court and a patent court with exclusive and final jurisdiction except as to "substantial constitutional" issues are very much in the direction of the specialty courts proposals.[233]

C. The Need for Neutral Adjudication in the VA—A Further Proposal

VA administrative adjudicative procedures should be made as neutral as possible where the government has a direct pecuniary interest in the outcome of the hearing.[234] Congress, however, should not attempt to do this by establishing judicial review of VA adjudicative decisions. The federal courts lack administrative expertise[235] and accountability to Congressional policy in the agency.[236] The number and nature of VA appeals would also place a new and substantial burden on the courts.[237] Finally, the veteran would suffer from the delays resulting from these appeals[238] and the veteran's counsel would suffer from the confusion produced by intercircuit rivalries.[239] Instead, Congress should make the VA adjudicative system itself more neutral.

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229. In 1982, the Court of Customs and Patent Appeals was merged into the Court of Appeals for the Federal Circuit. *See generally supra* note 226; C. WRIGHT, *supra* note 185, at 43.

230. *See* H. FRIENDLY, *supra* note 220, at 182-83; *see also* Friendly, *supra* note 223, at 643-44.

231. H. FRIENDLY, *supra* note 220, at 182. *See generally* Arner, *Establishing a Social Security Court—An Alternative to Nonacquiescence?*, 1984 DET. C.L. REV. 907, 910: "The Center [for Administrative Justice] stated that such a specialized court had 'clear advantages' over a 'federal judiciary that is institutionally incapable of producing uniform precedents through Supreme Court review of any but the most significant issues of interpretation.' "

232. H. FRIENDLY, *supra* note 220, at 183 ("So radical a change from centuries of tradition could be justified only by proof that our system has not worked in the past or that it cannot be expected to work in the future." Judge Friendly felt that neither "proposition can be established.").

233. Friendly, *supra* note 223, at 642-43.

234. *See supra* notes 175-176 and accompanying text.

235. *See supra* notes 199-204 and accompanying text.

236. *See supra* notes 205-206 and accompanying text.

237. *See supra* notes 220-223 and accompanying text.

238. *See generally* Wright, *Musings on Administrative Law*, 33 ADMIN. L. REV. 177, 179 (1981).

239. *See* Diver, *supra* note 194, at 585-87.

The VA and BVA adjudicatory systems could be made more neutral as follows: (1) adjudicators should not be VA employees; (2) VA adjudicators should be given longer tenure and afforded a salary similar to that of Article III judges; (3) regional adjudicators should be appointed by the BVA, not the VA; (4) BVA panelists should be appointed under Congressional guidelines allowing for greater input from veterans' groups; (5) the BVA should be given the exclusive power to interpret veterans' statutes and regulations; and (6) regional VA adjudicators should only consist of one instead of three ALJ's, and the present "legal specialists" should be made the VA's representative before the ALJ when the VA contests a claim.

In a manner similar to the way Article III increases the independence of the federal judiciary, the first five of these proposals would neutralize veterans disability law by reducing sources of external pressure on veteran adjudicators, such as vulnerability to removal from office, the enticements of promotion and compensation, and the adjudicators' appointment method. By lodging the adjudicatory function solely in the BVA and leaving the investigatory function in the VA, the sixth element of the proposal would free the VA from its present schizophrenic role of acting as judge, prosecutor, defendant, and friend of the plaintiff, while attempting to serve the often conflicting interests of the government and the veteran.[240] The VA would be able to serve the single governmental interest of keeping expenditures to a minimum by investigating veterans' claims and, in cases involving questionable claims, opposing them before a neutral BVA. Finally, this proposal does not have any of the drawbacks inherent in judicial review, as discussed in the previous section.[241]

Conclusion

The right to retain an attorney and the right to a neutral adjudicator are two fundamental elements of procedural due process. In holding that the VA's ten dollar attorney fee limitation affords veterans and their dependents an adequate measure of procedural due process as guaranteed

240. *See generally* Gladstone, *supra* note 210, at 242:

> [T]he presiding judge is forced to wear at least three hats. He must sometimes be government counsel; he must sometimes be a case investigator; and he must sometimes function as the claimant's counsel. This puts the judge in an untenable position and deprives him of the opportunity to properly perform his true function.

See also Popkin, *supra* note 101, at 991-92; Prygoski, *supra* note 145, at 460-64.

Congress often combines an agency's rulemaking, adjudicatory, and prosecutorial authority in the hands of one body—for example, the SEC, the ICC, and the FTC. This policy appears to have been the response of Congress to the unfortunate early experience of the Commerce Court of 1910-1913. Created as a judicial counterweight to the ICC, the Commerce Court was quickly abolished when it was perceived to have fallen into the hands of the railroad interests. *See* H. FRIENDLY, *supra* note 220, at 153-54; C. WRIGHT, *supra* note 185, at 18-19.

241. *See supra* notes 199-233 and accompanying text.

under the Constitution, the *Walters* Court misapplied the *Mathews* balancing test. The *Walters* Court did not recognize the strong risk of erroneous deprivation which the prohibitive fee limitation poses to the veteran's vital interest in his or her VA benefits. The Court instead chose to emphasize the governmental interests of "keeping" the VA "nonadversarial" and of reducing administrative expenses. In doing so, the Court ignored the strong conflict of interest between the veteran and Congress.

The ten dollar fee limitation also threatens the first amendment rights of veterans in two respects: first, the fee limitation effectively eliminates in an unprecedented manner the heretofore untouched individual right to speak to and through an attorney, whether it be for political or nonpolitical purposes; second, it restricts the right of persons to spend out of their own resources and on their own behalf for communicative purposes. In refusing to strike down the fee limitation as a violation of the First Amendment, the *Walters* decision could provide precedential support for future prohibitive restrictions on the right to spend money on an attorney in all administrative contexts where "only" a private property interest is involved.

If veterans are to be deprived of the assistance of counsel, then the VA's adjudicatory process must be especially neutral. Congress has directed the VA in its adjudicatory function to serve the best interests of both the government and the veteran. However, government employees do not make particularly neutral adjudicators where the government has a pecuniary stake in the outcome.

It would be unwise to provide veterans with access to neutral adjudication by abolishing the VA's preclusion of judicial review. Judicial review would increase the burden of the already overworked federal courts, devalue the interpretive expertise of agency adjudicators, reduce congressional control of VA affairs, and create intercircuit rivalries and delay. Instead, the VA's adjudicatory procedures should be made more neutral from within.

This Note's proposal would restore to the veteran two important and common procedural safeguards: the right to retain an attorney and the right to a neutral adjudicator. Moderate fee limitations would continue to protect veterans from exorbitant legal fees while providing them with access to attorneys. The use of attorneys by veterans would not increase the VA's administrative expense. The additional protection to veterans of more neutral adjudication through an independent BVA also avoids the drawbacks of judicial review of agency decisions.

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