

“THE FUNCTION OF THE INDEPENDENT LAWYER
AS A GUARDIAN OF OUR FREEDOM”:
THE GREAT STEVENS DISSENT IN *WALTERS*

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I was a law student when I first became aware that there was something special about Justice John Paul Stevens. I happened to read his dissent in *Walters v. National Association of Radiation Survivors*,¹ a statutory interpretation case that is not today much remembered outside the narrow field of veterans’ rights law.² There were four opinions in the case. Three of them dealt with issues of statutory interpretation, due process, and appellate jurisdiction. Justice Stevens’s opinion, however, offered something deeper: a vision of the role of independent lawyers in preserving individual liberty. It deserves more attention than it has gotten.

Veterans who seek death or disability benefits related to their military service may hire legal counsel to assist them in presenting their claims. However, at the time of *Walters*, a federal statute provided that the attorney’s fees “shall not exceed \$10 with respect to any one claim.”³ Any attorney who charged more than that “shall be fined not more than \$500 or imprisoned at hard labor for not more than two years, or both.”⁴ The provision was enacted after the Civil War, in order to protect veterans from being charged by unscrupulous attorneys.⁵ At that time, ten dollars was a reasonable fee for the work.⁶ By the 1980s, the currency had of course inflated, and so the practical effect of the law was to deny claimants any ability to hire attorneys.⁷

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¹ 473 U.S. 305, 358 (1985) (Stevens, J., dissenting).

² I was never assigned the case in any class, but I remember doing some work on religious liberty issues, so it is possible that I discovered it because it appears in the United States Reports immediately before the much better-known case of *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985).

³ 38 U.S.C. § 3404(c)(2) (1982). The \$10 limit has since been removed. Now fee agreements are reviewed under an “excessive or unreasonable” standard. See 38 U.S.C. § 5904(c)(3)(A) (2012).

⁴ 38 U.S.C. § 3405 (1982).

⁵ *Walters*, 473 U.S. at 360; see also Stacey Rae Simcox, *Thirty Years After Walters the Mission Is Clear, the Execution Is Muddled: A Fresh Look at the Supreme Court’s Decision to Deny Veterans the Due Process Right to Hire Attorneys in the VA Benefits Process*, 84 U. CIN. L. REV. 671, 681–82 (2016).

⁶ *Walters*, 473 U.S. at 360–61.

⁷ *Id.* at 362.

A group of veterans and veterans' organizations challenged the statute as a violation of due process.⁸ The district court issued a preliminary injunction barring enforcement of the fee limitation.⁹ The Supreme Court took a direct appeal of the injunction and overturned it.¹⁰

Justice Rehnquist, writing for the Court, applied the familiar test of *Mathews v. Eldridge*,¹¹ assessing the fairness of the procedure by balancing the interests of the government and of the claimant, the value of any additional safeguards, and the risk of error.¹² He held that the government interest that was rationally served by the limitation was

that the system for administering benefits should be managed in a sufficiently informal way that there should be no need for the employment of an attorney to obtain benefits to which a claimant was entitled, so that the claimant would receive the entirety of the award without having to divide it with a lawyer.¹³

Justice O'Connor concurred, noting that any individual claims of unfairness in the process could still be brought on an "as applied" basis.¹⁴ Justice Brennan, joined by Justice Marshall, dissented, arguing that the Court did not have appellate jurisdiction: the district court's preliminary injunction did not hold any statute unconstitutional, but rather only noted a likelihood of success on the merits.¹⁵

Justice Stevens did not join that dissent, although Brennan and Marshall joined his.¹⁶ He reached the merits of the due process challenge.

Part of his dissent focused on the arbitrariness of the statute as interpreted by the Court. "In this case, the passage of time, instead of providing support for the fee limitation, has effectively eroded the one legitimate justification that formerly made the legislation rational."¹⁷ But more fundamentally, he challenged the idea that due process interest-balancing was the appropriate approach:

What is at stake is the right of an individual to consult an attorney of his choice in connection with a controversy with the Government. . . . The fundamental error in the Court's analysis is its assumption that the individual's right to employ counsel of his choice in a contest with his sovereign is a kind of second-

⁸ *Id.* at 308 (majority opinion).

⁹ *Id.*

¹⁰ *Id.* at 307.

¹¹ 424 U.S. 319, 335 (1976).

¹² *Walters*, 473 U.S. at 321 (citing *Eldridge*, 424 U.S. at 335).

¹³ *Id.* (citing *United States v. Hall*, 98 U.S. 343, 352-55 (1879)).

¹⁴ *Id.* at 337.

¹⁵ *Id.* at 339.

¹⁶ *Id.* at 338 (Brennan, J., dissenting), 358 (Stevens, J., dissenting).

¹⁷ *Id.* at 367 (Stevens, J., dissenting).

class interest that can be assigned a material value and balanced on a utilitarian scale of costs and benefits.¹⁸

The stakes, Stevens argued, were very high indeed:

If the Government, in the guise of a paternalistic interest in protecting the citizen from his own improvidence, can deny him access to independent counsel of his choice, it can change the character of our free society. Even though a dispute with the sovereign may only involve property rights, or as in this case a statutory entitlement, the citizen's right of access to the independent, private bar is itself an aspect of liberty that is of critical importance in our democracy. Just as I disagree with the present Court's crabbed view of the concept of "liberty," so do I reject its apparent unawareness of the function of the independent lawyer as a guardian of our freedom.¹⁹

The point, Stevens argued, applies "regardless of the nature of the dispute between the sovereign and the citizen."²⁰ When the citizen challenges the sovereign, the sovereign may not deny the citizen the power to choose his advocate.²¹

There is some tension between the arguments in the dissent written by Justice Brennan, joined by Justice Marshall, and the decision of both of those Justices to join Stevens's dissent. Brennan argued that the record was not sufficiently developed for the Court to rule on the merits.²² The evidence supporting the statute's purported purposes had never been tested at trial, and the Court's finding, that the challengers had not shown the irrationality of the statute, effectively punished them for their success in obtaining preliminary relief.²³ The Court having reached the merits, Brennan joined Stevens's dissent.²⁴

Stevens, however, did not join Brennan's, because he evidently did not believe that any further development of the record was necessary.

He had all the facts he needed. Individuals were embroiled in a dispute with the government. In that dispute, they wanted an attorney's help, and the government had made it a crime for attorneys to help them.

What's so striking about the *Walters* dissent is the clear indication that here Stevens had hit his moral bedrock. "[T]he citizen's right to consult an independent lawyer and to retain that lawyer to speak on his or her behalf is

¹⁸ *Id.* at 368–69.

¹⁹ *Id.* at 370–71 (citations omitted).

²⁰ *Id.* at 371.

²¹ *Id.* at 370–71.

²² *Id.* at 342 (Brennan, J., dissenting).

²³ *See id.* at 356–58.

²⁴ *Id.* at 358 (Stevens, J., dissenting).

an aspect of liberty that is priceless.”²⁵ It “should not be bargained away on the notion that a totalitarian appraisal of the mass of claims processed by the Veterans’ Administration does not identify an especially high probability of error.”²⁶

The liberty of the individual to have an attorney’s support in a conflict with the state is near the core of what Stevens cared about. The fundamental problem with the Court’s decision was that it “does not appreciate the value of individual liberty.”²⁷ There is, then, a crucial aspect of individual liberty that exists only because attorneys exist and are available for hire.

His *Walters* dissent gives an insight into what he thought he was doing with his life. And, if you happen to be an attorney, what you are doing with yours.

²⁵ *Id.* at 371.

²⁶ *Id.* at 372.

²⁷ *Id.*