WHAT ARE LAWYERS GOOD FOR?: THE RADIATION SURVIVORS CASE, NON-ADVERSARIAL PROCEDURES, AND LAY ADVOCATES

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I. INTRODUCTION

A defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in Powell v. Alabama: "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law."1

In this twenty-fifth anniversary year of the United States Supreme Court's landmark Gideon decision, it would be comforting to report that the Court's respect for the work of lawyers as advocates had only deepened. Actually, the opposite seems to be true. In a little noticed 1985 decision, Walters v. National Association of Radiation Survivors,2 Justice (now Chief Justice) Rehnquist, writing for a six-justice majority, articulated remarkably negative views about the legal profession and the adversary system—so negative, in fact, that Justice Stevens both began and ended his dissent with the extraordinary charge that the Court, "does not appreciate the value of individual liberty."3 The decision could well have significant implications in terms of limiting the future role of the trial bar.

The plaintiffs in the Radiation Survivors case were military veterans seeking benefits from the Veterans' Administration ("VA") for service-connected disabilities. They included veterans exposed to radiation during the occupation of Japan and in the postwar Pacific islands nuclear weapons tests, and Vietnam veterans with Agent Orange claims. The narrow issue in the case was the constitutionality of a Civil War-era federal statute that limited to $10 the fee that may be paid by a claimant to an attorney for assistance in a VA administrative proceeding (in

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3. Id. at 358, 372 (Stevens, J., dissenting).
which there is no opposing counsel, and from which there is no judicial review). Lawyers today are rarely willing to take cases for such a small fee, and Justice Rehnquist’s opinion treated the fee limitation as though it were an outright prohibition on lawyer representation. Even so, the decision of the district court, enjoining enforcement of the limitation, was reversed. Due process is satisfied, according to the Court, by the ready availability to claimants of free help from nonlawyer “service representatives” provided by veterans’ organizations.

The Court’s new negative attitudes are apparent in the reasoning behind its decision.

II. THE LIMITED USEFULNESS OF LAWYERS

Veterans’ disability cases usually turn on the extent of the claimant’s disability and whether it is service-connected. The district court in Radiation Survivors found, unremarkably, that the services of lawyers would probably be useful in resolving these issues through gathering and presenting evidence, cross-examining military physicians, and the like. But on the first issue, Justice Rehnquist responded only that “it is less than crystal clear why lawyers must be available to identify possible errors in medical judgment;” to causation, he said that the questions of fact in most claims are “simple,” and concluded that even in cases involving “complex issues of causation,” there is “no adequate showing of the effect the availability of lawyers would have on the proper disposition of these cases.” Lawyers can “aid in identifying legal questions and presenting arguments,” observed Justice Rehnquist, but “only the rare [disability] case turns on a question of law.”

Obviously, factual issues of causation, and the plaintiff’s physical condition, rather than questions of law, are also usually determinative in most workers’ compensation proceedings and most breach of warranty and other strict liability personal injury lawsuits. Even suits in which the defendant’s fault is at issue do not appear to demand signifi-

5. See Radiation Survivors, 473 U.S. at 326.
7. Id. at 1316, 1320, 1323.
9. Id. at 329-30.
10. Id. at 331.
11. Id. at 332.
12. Id. at 330.
cantly different fact development and advocacy skills. Does the conclusion that lawyers' services are not of great value in VA disability hearings suggest that the Court might reach a similar conclusion regarding their usefulness in workers' compensation or personal injury litigation? Probably not. But the differences the Court relies on are very narrow.

In Justice Rehnquist's words:

While counsel may well be needed to respond to opposing counsel or other forms of adversary at a trial-type proceeding, where as here no such adversary appears, and in addition a claimant or recipient is provided with substitute safeguards such as a competent representative, a decisionmaker whose duty it is to aid the claimant, and significant concessions with respect to the claimant's burden of proof, the need for counsel is considerably diminished. 13

Thus, even a majority of the Supreme Court now seems to believe that where there are no significant questions of law, there is nothing natural, as it were, about the need for lawyers' services: they are useful mainly for coping with the strict rules of procedure and evidence that characterize adversary judicial proceedings, and for countering the tactics and experience of other lawyers.

III. NON-ADVERSARIAL PROCEDURES AS LAWYER SUBSTITUTES

One of the "substitute safeguards" to compensate for not having a lawyer, relied upon by Justice Rehnquist, is a direction to VA hearing officers in its regulations "to assist a claimant in developing the facts pertinent to his claim" 14—a direction that has its counterpart in many codes of administrative procedures.

Voicing some skepticism, the district court in Radiation Survivors questioned "the extent to which it is possible" for the VA's own employees "to serve the interests of both the VA and claimants simultaneously," and observed that, "[c]learly 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." 15 But Justice Rehnquist was prepared to simply assume that exhortations to assist claimants will be followed: "There is no indication of . . . bias [in favor of the government] in the record—quite the contrary. Nor are

13. Id. at 333-34.
we willing to accept that administrative adjudicators are presumptively subject to such bias.”

The second procedural safeguard that Justice Rehnquist relied on as a substitute for having a lawyer is a requirement in the regulations that any “reasonable doubt” be resolved in the claimant’s favor.17 But the main effect of the VA’s lengthy definition of reasonable doubt18 is just to shift the burden of persuasion to the government once the claimant has satisfied his or her production burden—an advantage that, at least until now, has not infrequently been enjoyed by litigants who also had the benefit of counsel.

IV. THE AVAILABILITY OF LAY ADVOCATES

The main substitute for representation by counsel that Justice Rehnquist relied upon is the nonlawyer “service representative” that a veteran can obtain from a veterans organization. Under the broad definitions of “the practice of law” that some state supreme courts have adopted—definitions that refer to the use of any legal knowledge not possessed by the ordinary layman19—these service representatives would be guilty of unauthorized practice. However, the United States Supreme Court had previously decided that the question of whether nonlawyers can practice before federal administrative agencies is to be left to Congress and the agencies themselves;20 and representation by service representatives is authorized by both the VA statutes and the agency’s regulations.21

But is the representation provided by these lay advocates so clearly adequate that veterans should be required to use them, if the veterans wish to be represented at all? There was undisputed evidence before the district court that the service representatives “worked very hard” for their clients;22 but there was also testimony that they are greatly overburdened, that they lack the resources to conduct investigations or hire expert witnesses, and that they are rarely able to engage in anything like full-scale written or oral advocacy.23 “Even in

17. 38 C.F.R. § 3.102 (1988).
18. Id.
23. Id. at 1321-22.
presenting a claimant's final appeal . . . it is standard practice for service organization representatives to submit merely a one to two page handwritten brief.' 24 Apparently, however, the mere presence of lay advocates is sufficient for Justice Rehnquist; there is no consideration in his opinion of their performance.

V. NOT WASTING MONEY ON UNNECESSARY LAWYERS

Though a veteran with a disability claim might not think it necessary to hire a lawyer, why should he or she be prohibited from doing so? One answer, according to Justice Rehnquist, is a paternalistic desire on the part of Congress to prevent claimants' benefits from being "unnecessarily diverted to lawyers." 25

However, as Justice Stevens' dissent points out, previous cases had "necessarily assumed that the individual's right to ask for, and to receive, legal advice from the lawyer of his choice was fully protected by the First Amendment;" 26 and even commercial speech can be restricted only on the basis of a substantial governmental interest, and only to the extent necessary to effectuate that interest. 27 Sustaining a prohibition on the expenditure of any substantial sum on a spokesperson when the prohibition is based solely on a belief that the speech is unnecessary would seem to be quite a radical, if not a frightening, step.

Actually, it is far from clear that Congress intended to prevent veterans from hiring lawyers: Justice Stevens points out that a $10 fee in 1864 was roughly the equivalent of a $580 fee today. 28 Lawyers are already forbidden by ethical rules to charge excessive fees; 29 and if veterans need further protection from unscrupulous lawyers, it could be provided by requiring agency approval of fee agreements or by putting a reasonable percentage or dollar cap on fees.

In light of his emphasis on Congress' desire to make sure veterans hold on to the benefit payments they receive, it is curious that Justice Rehnquist cites as another justification for sustaining the de facto ban on lawyer representation the fact that a failure to receive any disability benefits would not necessarily leave veterans destitute (as a denial of

24. Id. at 1322.
26. Id. at 368 n.16 (Stevens, J., dissenting).
welfare benefits would). Whether disability benefits are or are not to be viewed as truly vital to veterans seems to depend entirely on the needs of the particular argument being made at the moment.

VI. AVOIDING LAWYER-CREATED INEFFICIENCIES

The main reason cited in Justice Rehnquist's opinion for denying to veterans the option of hiring a lawyer is a fear that the introduction of lawyers would lead to costly inefficiencies in the VA's administrative process. Drawing upon a well-known article by Judge Henry Friendly, and a previous decision, where the Court refused to appoint counsel in a parole revocation proceeding, Justice Rehnquist presents quite an elaborate and alarming scenario: the appearance of lawyers would result in an increase in the adversarial nature of the proceedings, as well as consequent confusion and delay; hearing officers would be less sympathetic to claimants; the government would feel obliged to employ opposing counsel (or a representative who would "act like one"); proceedings in all cases would become more complex; and eventually all claimants would come to feel that they had to hire lawyers.

Justice Stevens disagreed completely, calling the fee limitation "an insult to the legal profession." He asserted that:

[T]here is no reason to assume that lawyers would add confusion rather than clarity to the proceedings. As a profession lawyers are skilled communicators dedicated to the service of their clients. Only if it is assumed that the average lawyer is incompetent or unscrupulous can one rationally conclude that the efficiency of the agency's work would be undermined.

VII. SUBORDINATING ACCURACY TO EFFICIENCY

When confronted with a category of cases in which some are complex, factually or legally, but most are simple, the American legal system has traditionally insisted that the entire category be processed through the elaborate and expensive procedures needed to produce

33. Friendly, supra note 31, at 1288.
35. Id. at 366 (Stevens, J., dissenting).
36. Id. at 363 (Stevens, J., dissenting).
accurate decisions in the complex cases. (Divorce and probate matters are the most obvious examples of such mixed categories of cases; other examples might include workers' compensation, automobile accident, and possibly other kinds of personal injury cases, and some kinds of collection and other contract-based actions.)

But noting that relatively few veterans' claims involve radiation or Agent Orange exposure, Justice Rehnquist concluded that simple procedures suited to simple cases can be utilized for all claims: "[A] process must be judged by the generality of cases to which it applies, and therefore a process which is sufficient for the large majority of a group of claims is by constitutional definition sufficient for all of them."38

Justice Stevens characterized this conclusion as saying that "if 80 or 90 percent of the cases are correctly decided, why worry about those individuals whose claims have been erroneously rejected and who might have prevailed if they had been represented by counsel?"; and he protested against the Court's use of "a utilitarian scale of costs and benefits."40

VIII. EMBARRASSING LATER DEVELOPMENTS

Since it was handed down, the Radiation Survivors decision has surely become something of an embarrassment to the Court. Within a matter of months, the United States General Accounting Office published a report concluding that the low radiation exposure estimates that the VA had relied upon in denying disability claims by Pacific islands test veterans should be adjusted upward; and the VA was prompted to concede that all atmospheric nuclear test disability claims might have to be reevaluated.42 It does not seem at all unreasonable to suppose that such a reassessment of the evidence concerning the effects of the nuclear tests might have occurred much earlier had all or many radiation claimants been represented by counsel.

Further, subsequent proceedings in Radiation Survivors, in which the district court (following a suggestion in Justice O'Connor's concurring opinion43) certified radiation claimants as a special class who could

37. Id. at 314-15.
38. Id. at 330.
39. Id. at 368 (Stevens, J., dissenting).
40. Id. at 369 (Stevens, J., dissenting).
42. Id. at 56.
allege an entitlement to counsel because their claims are complex, have unveiled a picture of the VA’s administrative process far different from the one painted by Justice Rehnquist. The District Court has heard evidence of a VA reward system that based merit pay and promotions for adjudicators on simply closing cases, sometimes without even requesting basic documentation; the VA has been fined by the court for willfully destroying evidence sought by the plaintiffs; and a prominent private attorney has been appointed Special Master to oversee the agency’s compliance with future discovery orders. The House and Senate Veterans Affairs Committees are also investigating VA mismanagement in handling disability claims.

IX. FUTURE IMPLICATIONS

Notwithstanding these embarrassing developments, the Supreme Court’s negative views in Radiation Survivors about the legal profession and the adversary system could well be influential in a number of different kinds of cases:

- Cases deciding whether a party is constitutionally entitled to an adversary hearing, which probably entails at least the option of representation by counsel.
- Cases deciding when the government must provide a party with a legal representative, and whether the representative must be a lawyer.

47. N.Y. Times, Jan. 8, 1987, at 1, col. 2.
49. N.Y. Times, March 15, 1987, at 22, col. 5; March 18, 1987, at 9, col. 6. See also N.Y. Times, Feb. 19, 1988, at 46, col. 1. Subsequently, legislation providing for limited judicial review of VA disability decisions by a new “Court of Veterans Appeals,” and enabling claimants to pay “reasonable” fees to attorneys for prosecuting such appeals, passed the Senate; and approval by the House and the President was expected. N.Y. Times, Oct. 19, 1988, at 8, col. 5.
50. See, e.g., Vitek v. Jones, 445 U.S. 480 (1980) (compare the plurality opinion requiring appointment of counsel for prisoners to be transferred to mental hospitals with the concurrence by Justice Powell approving nonlawyer advisers).
Cases, like *Radiation Survivors* itself, deciding when a party can be *denied the option* of retaining counsel, and whether the denial can be extended to bar *any* legal assistance.

And cases deciding when a party can *choose* to be represented by a lay advocate, instead of a lawyer, without running afoul of state law prohibitions against the unauthorized practice of law.

In such cases, and others, the legal profession will need to argue for the acceptance of certain basic principles that may be contrary to the views in *Radiation Survivors*.

First, psychological studies indicate that the adversary system stimulates fact-gathering and counteracts decision-maker bias. To substitute for fact-development by adversary lawyers, official fact-finders must therefore, at a minimum, be professionally trained (as are judges in non-adversarial courts in civil law countries), possessed of adequate investigatory resources, and independent of any governmental agency against which a claim is being made. Further, given the embarrassing developments following the *Radiation Survivors* decision, due process should probably require that fact-development be left in the hands of adversary lawyers whenever the propriety of the government’s own conduct is being questioned (as was the federal government’s conduct in monitoring nuclear test radiation and using Agent Orange in Vietnam).

Second, since civil cases and criminal cases (in which counsel must be provided to indigents) have always turned mainly on factual issues, it seems more than a little late in the day to contend that counsel is only needed to argue questions of law. Indeed, law school trial advocacy and clinical programs, bar examination performance tests, and continuing legal education programs are giving more attention today than ever before to fact-development skills. And to differentiate trial lawyers from lay advocates even more clearly, lawyers who wish to represent clients in the proof of facts could be required to have some previous trial-type experience.

53. See Friendly, supra note 31, at 1289.
55. For example, segregated “bar” and “trial bar” schemes have been proposed...
In any event, no litigant should be required to make do with a lay advocate instead of a lawyer if his or her case is complex, either legally or factually (with issues of intent and credibility, the need for expert testimony, and difficulties in obtaining information from the opposing party being good indicators of factual complexity). Government agencies themselves should be encouraged to identify and provide separate treatment for complex kinds of cases, with the possibilities of judicial class certification (as has subsequently occurred in Radiation Survivors) and case-by-case determinations of complexity open to additional litigants.

Third, lay advocates should not be allowed to participate in even simple cases without appropriate training, official certification of their professional competence, and governance by a code of ethics. In Radiation Survivors, for example, there is no indication of the nature of the training in the proof of facts that the service representatives received, and there is sharp disagreement about their competence among knowledgeable observers. Further, the VA regulations contain neither an obligation of confidentiality, nor an ethical requirement imposed today even on hard-pressed public defenders and legal services lawyers—that the representatives refuse to take additional cases that they cannot prepare for adequately. A possible model for holding lay advocates to very strict standards can be found in the comprehensive rules governing the new group of nonlawyer “licensed conveyancers” in England and Wales.

The negative attitudes in Radiation Survivors about trial lawyers and the adversary system could reappear with little or no advance warning, and the legal profession will need to be well prepared to respond to them.


57. See Gagnon, 411 U.S. at 778.


60. Of particular value is a summary of the comprehensive first report of the official Conveyancing Committee (the “Farrand Committee”), which provided the basis for the subsequent legislation and regulations. 134 NEW L.J. 858-61 (Oct. 5, 1984).