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GOVERNMENT

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HEARING
BEFORE
SUBCOMMITTEE NO. 2
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

NINETIETH CONGRESS

FIRST SESSION

ON

H.R. 10216

TO RESTORE TO PERSONS HAVING CLAIMS AGAINST THE
UNITED STATES THEIR RIGHT TO BE REPRESENTED BY
LEGAL COUNSEL OF THEIR OWN CHOOSING

JULY 12, 1967

Serial No. 21



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¹ General jurisdiction over judiciary bills as assigned. Special jurisdiction over claims.

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TO RESTORE TO PERSONS HAVING CLAIMS AGAINST
THE UNITED STATES THEIR RIGHT TO BE REP-
RESENTED BY LEGAL COUNSEL OF THEIR OWN
CHOOSING

WEDNESDAY, JULY 12, 1968

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE No. 2,
Washington, D.C.

The subcommittee met, pursuant to call, at 10 a.m. in room 2226, Rayburn House Office Building, Hon. Robert T. Ashmore (chairman of the subcommittee) presiding.

Present: Messrs. Ashmore, Tenzer, Meskill, and Sandman. Also present: William P. Shattuck, subcommittee counsel.

Mr. ASHMORE. The committee will come to order.

We have a hearing this morning on H.R. 10216, a bill to restore to persons having claims against the United States their right to be represented by legal counsel of their own choosing.

Without objection, H.R. 10216 will be included in the record at this point.

(H.R. 10216 follows:)

90TH CONGRESS
1ST SESSION

H. R. 10216

IN THE HOUSE OF REPRESENTATIVES

MAY 23, 1967

Mr. ASHMORE introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To restore to persons having claims against the United States their right to be represented by legal counsel of their own choosing.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 SECTION 1. (a) Section 2678 of title 28 of the United
4 States Code is repealed.

5 (b) The table of sections at the beginning of chapter
6 171 of title 28 of the United States Code is amended by
7 striking

“2678. Attorney fees; penalty.”

8 (c) The amendments made by this section apply only

1 with respect to attorneys' fees in connection with claims
2 accruing after the date of enactment of this Act.

3 SEC. 2. (a) Chapter 5 of title 5 of the United States
4 Code is amended by adding at the end the following new
5 subchapter:

6 "SUBCHAPTER IV—ATTORNEYS' FEES

7 "§ 581. **Applicability**

8 "This subchapter applies to fees for attorneys for services
9 in connection with any claim before—

10 "(1) the Secretary of Health, Education, and Wel-
11 fare under title II or title XVIII of the Social Security
12 Act.

13 "(2) the Administrator of Veterans' Affairs under
14 title 38 of the United States Code.

15 "(3) the Foreign Claims Settlement Commission
16 under any provision of law administered by that Com-
17 mission.

18 "(4) the Secretary of Labor under chapter 81 of
19 this title.

20 "(5) the Secretary of Labor or a deputy commis-
21 sioner under the Longshoremen's and Harbor Workers'
22 Compensation Act.

23 "(6) the Railroad Retirement Board under the
24 Railroad Unemployment Insurance Act.

1 “(7) the President or his delegate under the
2 Trading with the Enemy Act.

3 **“§ 582. Definitions and constructions**

4 “For the purposes of this chapter—

5 “(1) The term ‘attorney’ refers to a person who
6 is both—

7 “(A) engaged in the practice of law in any
8 State, the District of Columbia, the Commonwealth
9 of Puerto Rico, or any territory or possession of the
10 United States, and

11 “(B) a member in good standing of the highest
12 court of the jurisdiction within which he is engaged
13 in the practice of law.

14 “(2) The term ‘fee’ includes any amount of com-
15 pensation (other than reimbursement for expenses
16 actually incurred) which is charged or requested to be
17 paid, regardless of whether payment is actually made.

18 “(3) Services in connection with any claim shall
19 be considered to have been performed in connection with
20 a claim before an agency if the claim has been presented
21 to the agency for administrative determination, regardless
22 of whether the services in question consisted of—

23 “(A) investigation of, evaluation of, and ad-

1 vice with respect to the claim, whether before or
2 after agency action thereon;

3 “(B) presenting the claim or representing or
4 assisting the claimant before the agency; or

5 “(C) the prosecution of an appeal, civil action,
6 or any other proceedings to establish or enforce the
7 claim in a forum other than the agency.

8 **“§ 583. Rules for determination of reasonable fees**

9 “Each agency specified in section 581 shall prescribe
10 rules for the determination of a reasonable amount for any
11 fee to which this subchapter applies. In the determination
12 of any fee, the rules shall provide for the application of such
13 of the following criteria as the agency may specify in the
14 rules as relevant in any given situation:

15 “(1) the time and professional skill required for
16 investigation, evaluation, and presentation or prosecu-
17 tion of the claim.

18 “(2) the value of the benefits resulting to the
19 claimant from the services.

20 “(3) the degree of certainty or contingency about
21 payment of the fee.

22 The rules may take into account differing levels of pro-
23 fessional charges prevailing in different geographical areas,
24 but shall in no event be so restrictive as ordinarily
25 to discourage the retention of attorneys of recognized pro-

1 fessional stature in connection with any claim before the
2 agency.

3 **“§ 584. Standard fees**

4 “Any agency specified in section 581 may by rule
5 specify a means of determining a standard fee for legal serv-
6 ices in connection with any claim solely on the basis of one
7 or more of the following factors:

8 “(1) the type of claim.

9 “(2) the administrative level at which it is acted
10 upon.

11 “(3) the amount awarded or other action taken
12 thereon.

13 **“§ 585. Reports**

14 “(a) Every attorney’s fee (except a fee described in
15 section 587 (d)) to which this subchapter applies shall
16 be reported to the agency handling the claim in such man-
17 ner and form as the agency shall by rule require. A fee
18 shall not be required to be reported more than once as
19 long as the amount is not changed, but shall in every case be
20 reported no later than thirty-one days after the termination
21 of the services for which it is charged.

22 “(b) In the case of any fee required to be reported
23 under subsection (a) —

24 “(1) which exceeds the applicable standard fee, if
25 any, or

1 “(2) with respect to which there is no applicable
2 standard fee,
3 the agency may by rule require the reporting of such in-
4 formation as it may specify in its rules as necessary to permit
5 the determination of the amount of a reasonable fee in accord-
6 ance with its rules issued under section 583.

7 **“§ 586. Penalty**

8 “Any person who willfully and knowingly files any
9 false or misleading information as a part of or in connection
10 with any report filed under section 584, 585, or 587 (d), or
11 willfully and knowingly fails to report to an agency any fee
12 which he is required to report to that agency under section
13 585 (a) or 587 (d), shall be fined not more than \$1,000, or
14 imprisoned not more than one year, or both.

15 **“§ 587. Notice of agency determination; penalty; exception**

16 “(a) Not later than twenty-one days after the filing of
17 any report under section 585 (a), if the agency finds that the
18 reported fee is in excess of—

19 “(1) the applicable standard fee, if any, deter-
20 mined in accordance with its rules issued under section
21 584, and

22 “(2) a reasonable fee determined in accordance
23 with its rules issued under section 583,

24 the agency shall determine the amount of a reasonable

1 fee in accordance with its rules under section 583, and
2 shall serve upon the attorney a notice of that determination.
3 Unless the agency serves a notice upon the attorney in
4 accordance with this subsection, the propriety of the amount
5 of the fee as reported by the attorney may not be challenged
6 under this subchapter or subchapter II of chapter 7.

7 “(b) Any notice served pursuant to subsection (a) of
8 this section shall be accompanied by an explanation of how
9 the agency’s determination was reached.

10 “(c) Any attorney who, after the service of a notice
11 upon him pursuant to subsection (a), willfully and know-
12 ingly accepts payment in excess of the maximum fee as set
13 forth in the notice, while the determination has been super-
14 seded neither by a final determination under section 588 nor
15 by a court order under section 757, shall be fined not more
16 than \$1,000, or imprisoned not more than one year, or both.

17 “(d) No determination pursuant to subsection (a) of
18 this section may be made by any agency with respect to
19 a fee which is—

20 “(1) paid as salary to an attorney who is an
21 employee,

22 “(2) paid as a retainer fee for general legal services
23 and which is not increased by reason of the services for
24 which the fee is reported, or

1 “(3) neither paid by, nor a legal or equitable
2 liability of, the claimant or a parent, spouse, or child
3 of the claimant.

4 The existence of every attorney’s fee of a type described in
5 this subsection to which this subchapter applies shall be
6 reported to the agency handling the claim in such manner
7 and form and with such information as the agency shall by
8 rule require to establish that the fee is of such a type, but
9 the amount of such a fee shall not be required to be reported.
10 Any report under this subsection shall be made not later
11 than thirty-one days after the termination of the services in
12 connection with the claim.

13 **“§ 588. Final agency determination**

14 “(a) Within the twenty-one-day period after service
15 of a notice pursuant to section 587 (a), the attorney may
16 file with the agency a request for a conference, or such
17 additional material in support of the reported fee as the
18 attorney deems appropriate, or both. A request for a con-
19 ference shall be granted if practicable, but no such con-
20 ference may be held more than twenty-eight days after the
21 latest date on which a request for it could be filed.

22 “(b) If the attorney neither requests a conference nor
23 files additional material within the twenty-one-day period
24 specified in subsection (a), then upon the expiration of that

1 period, the determination of the agency as set forth in the
2 notice served pursuant to section 587 (a) becomes effective
3 as its final determination.

4 “(c) If the attorney either requests a conference or
5 files additional material within the twenty-one-day period
6 specified in subsection (a), then within the period within
7 which a conference could be held, the agency may make
8 a final determination of the amount of a reasonable fee.
9 If the agency fails to make a final determination within
10 that period, then upon the expiration of that period, the
11 determination of the agency as set forth in the notice served
12 pursuant to section 587 (a) becomes effective as its final
13 determination.

14 **“§ 589. Notice of final determination; penalty**

15 “(a) Whenever a final determination has been made or
16 has become effective under section 588, the agency shall
17 promptly serve a notice upon the attorney of the date that
18 the final determination was made or became effective as such,
19 as well as its amount. If, within sixty days after that
20 date, the attorney neither brings an action under section
21 753 nor files a report with the agency stating that he
22 has reduced his fee in question to an amount not in excess of
23 the final determination and has refunded any amounts previ-

1 ously received in excess of the final determination, the agency
2 shall also serve such a notice upon the claimant.

3 “(b) Any attorney who, after the service upon him of a
4 notice pursuant to subsection (a), willfully and knowingly
5 accepts payment in excess of the amount of the final de-
6 termination as set forth in the notice, while the determination
7 has not been superseded by a court order under section 757,
8 shall be fined not more than \$1,000, or imprisoned not more
9 than one year, or both.

10 **“§ 590. Method of service of notice**

11 “(a) A notice required to be served pursuant to section
12 587, 588, or 589 may be sent by mail, registered or certified
13 with return receipt requested if either such service is avail-
14 able, properly addressed to the last known address of the
15 person upon whom service is to be made.

16 “(b) A notice sent by registered or certified mail in
17 accordance with subsection (a) shall be considered to be
18 served—

19 “(1) when actually delivered to the addressee or
20 an agent of the addressee;

21 “(2) when notice of its arrival is actually delivered
22 to the address of the addressee; or

23 “(3) when delivery of the notice, or delivery of a

1 notice of arrival of the notice, is refused by the addressee
 2 or his agent,
 3 whichever occurs first.

4 “(c) A notice sent by mail in accordance with subsec-
 5 tion (a) to an address to which neither registered nor certi-
 6 fied mail service is available shall be considered to be served
 7 on the third day following the date on which it is mailed.

8 “(d) A notice required to be served pursuant to section
 9 587, 588, or 589 which is sent by any means other than
 10 mail shall be considered to be served only if and when the
 11 person upon whom service is to be made actually receives the
 12 notice in written form.”

13 (b) The table of sections at the beginning of chapter 5
 14 of title 5 of the United States Code is amended by adding
 15 at the end:

16 “SUBCHAPTER IV—ATTORNEYS’ FEES

“Sec.

“581. Applicability.

“582. Definitions and constructions.

“583. Rules for determination of reasonable fees.

“584. Standard fees.

“585. Reports.

“586. Penalty.

“587. Notice of agency determination; penalty; exception.

“588. Final agency determination.

“589. Notice of final determination; penalty.

“590. Method of service of notice.”

1 SEC. 3. (a) Chapter 7 of title 5 of the United States
2 Code is amended by adding the following new subchapter
3 at the end:

4 “SUBCHAPTER II—REVIEW AND ENFORCEMENT
5 OF LIMITATIONS ON ATTORNEYS’ FEES

6 “§ 751. Jurisdiction of district court

7 “The United States district court has jurisdiction of any
8 civil action brought under this subchapter.

9 “§ 752. Venue

10 “The venue of any action brought by an attorney under
11 this subchapter is the judicial district in which he maintains
12 his office, or if there is no such district, the judicial district
13 in which he resides. If the attorney maintains offices in
14 more than one district, the venue is any such district wherein
15 the services for the fee in question were performed in sub-
16 stantial part.

17 “§ 753. Action to set aside final determination

18 “Any attorney whose fee is reduced by a final determi-
19 nation under subchapter IV of chapter 5 of this title may,
20 within sixty days after the final determination becomes effec-
21 tive, bring an action to set aside the determination in the
22 district court wherein venue lies. The action shall be against
23 the United States.

1 **“§ 754. Grounds for action**

2 “An action under section 753 may be brought only on
3 one or both of the following grounds:

4 “(1) that the agency erroneously applied its rules
5 for the determination of reasonable fees, and

6 “(2) that the rules in question are not in con-
7 formity with law.

8 **“§ 755. Form of evidence**

9 “In any action brought under section 753, evidence may
10 be taken orally or by deposition, or, in the discretion of the
11 court, by affidavit. If affidavits are admitted, either party
12 has the right to propound written interrogatories to the affi-
13 ants and to file answering affidavits.

14 **“§ 756. Bar association as party**

15 “In any action brought under section 753, any bar
16 association of which at least 10 per centum of the attorneys
17 within the district wherein the action is brought are members
18 may appear as a party of its own motion and as of right.

19 **“§ 757. Judgment of the court; law applicable; penalty**

20 “(a) In any action brought under section 753, if the
21 court does not sustain the agency’s determination, the court
22 shall enter an order fixing a reasonable amount for the fee
23 in question. In so doing, the court shall apply the same

1 rules of law as are made applicable to the agency by
 2 statute, and shall apply the substantive rules of the agency
 3 except to the extent that it finds them not in conformity
 4 with law.

5 “(b) If the attorney bringing the action has received
 6 payment of a fee in excess of the agency’s determination
 7 where the agency’s determination is sustained, or in excess
 8 of the amount set by order of the court where the agency’s
 9 determination is not sustained, the court shall order the
 10 attorney to promptly repay the excess.

11 “(c) Any attorney who willfully and knowingly ac-
 12 cepts payment of any fee in excess of the amount fixed
 13 in an order entered under subsection (a), while the order
 14 has not been modified or set aside, shall be fined not more
 15 than \$1,000, or imprisoned not more than one year, or both.

16 **“§ 758. Civil liability of attorney**

17 “Any attorney—

18 “(1) whose fee is reduced by a final determination
 19 reviewable under section 753,

20 “(2) who has received payment in excess of the
 21 amount specified in the final determination, and

22 “(3) who, before the expiration of the period
 23 within which an action may be brought under section
 24 753, neither brings such an action nor refunds the excess

1 is liable to the claimant in an amount equal to twice the
 2 amount of the excess, or in the amount of \$200, whichever
 3 is greater. An action to enforce this liability may be brought
 4 in any court of competent jurisdiction, and where judgment
 5 is for the plaintiff, the court shall award the plaintiff a reason-
 6 able attorney's fee together with the costs of the action."

7 (b) The table of sections at the beginning of chapter 7
 8 of title 5 of the United States Code is amended (1) by
 9 adding

10 "SUBCHAPTER I—JUDICIAL REVIEW
 11 GENERALLY"

12 at the beginning, and (2) by adding the following at the
 13 end:

14 "SUBCHAPTER II—REVIEW AND ENFORCEMENT
 15 OF LIMITATIONS ON ATTORNEYS' FEES

"Sec.

"751. Jurisdiction of district court.

"752. Venue.

"753. Action to set aside final determination.

"754. Grounds for action.

"755. Form of evidence.

"756. Bar association as party.

"757. Judgment of the court; law applicable; penalty.

"758. Civil liability of attorney.

16 "SUBCHAPTER I—JUDICIAL REVIEW
 17 GENERALLY"

18 SEC. 4. (a) Section 206 (a) of the Social Security Act
 19 (42 U.S.C. 406 (a)) is amended by striking the next
 20 to the last sentence and inserting "The Secretary may, by

1 regulation, prescribe the maximum fees which may be
2 charged for services performed in connection with any claim
3 before the Secretary under this title, but any such regula-
4 tion shall be consistent with subchapter IV of chapter 5 of
5 title 5 of the United States Code insofar as it applies to
6 attorneys. Any agreement in violation of such regulations
7 is void.”.

8 (b) Section 206 (b) of the Social Security Act (42
9 U.S.C. 406 (b)) is amended to read:

10 “(b) Whenever a court renders a judgment favorable
11 to a claimant under this title who was represented before
12 the court by an attorney, the court may allow as part of
13 its judgment a fee in accordance with subchapter IV of
14 chapter 5 of title 5 of the United States Code for such
15 representation, and the Secretary may, notwithstanding the
16 provisions of section 205 (i) of this title, certify the amount
17 of such fee for payment to such attorney out of, and not
18 in addition to, the amount of such past-due benefits.”

19 SEC. 5. Section 784 (g) of title 38 of the United States
20 Code is amended by changing “proper, said fees not to
21 exceed 10 per centum of the amount recovered and to be
22 paid by the Veterans’ Administration out of the payments to
23 be made under the judgment or decree at a rate not exceed-
24 ing one-tenth of each such payments until paid; except that,
25 in” to read “proper. Subchapter IV of chapter 5 of title 5

1 of the United States Code applies to such fees, and they
2 may be ordered by the court to be paid in whole or part
3 by the Veterans' Administration out of the payments to be
4 made under the judgment or decree. In the case of".

5 SEC. 6. Section 3404 (c) of title 38 of the United States
6 Code is amended by adding the following new sentence at
7 the end: "This subsection does not apply to any fee to which
8 subchapter IV of chapter 5 of title 5 of the United States
9 Code applies."

10 SEC. 7. Section 3405 of title 38 of the United States
11 Code is amended to read:

12 **"§ 3405. Penalty for certain acts.**

13 "Whoever—

14 "(1) except as provided in section 3404 or 784 of
15 this title, directly or indirectly solicits, contracts for,
16 charges, or receives, or attempts to solicit, contract for,
17 charge, or receive, any fee or compensation other than
18 a fee to which subchapter IV of chapter 5 of title 5
19 of the United States Code applies, or

20 "(2) wrongfully withholds from any claimant or
21 beneficiary any part of a benefit or claims allowed and
22 due him,

23 shall be fined not more than \$500, or imprisoned at hard
24 labor for not more than two years, or both."

1 SEC. 8. Section 4 (f) of the International Claims Settle-
2 ment Act of 1949 (22 U.S.C. 1623 (f)) is amended to read:

3 “(f) Subchapter IV of chapter 5 of title 5 of the United
4 States Code applies to any attorney’s fee for services ren-
5 dered in connection with a claim before the Commission.”

6 SEC. 9. (a) Section 8127 (b) of title 5 of the United
7 States Code is amended by changing “legal or other services”
8 to read “services (other than services with respect to the
9 fee for which subchapter IV of chapter 5 of this title
10 applies)”.

11 (b) Section 8127 of title 5 of the United States Code is
12 amended by adding the following new subsection at the end:

13 “(c) Subchapter IV of chapter 5 of this title applies
14 to any attorney’s fee for services furnished in respect to a
15 case, claim, or award for compensation under this sub-
16 chapter.”

17 SEC. 10. The first sentence of section 28 (a) of the
18 Longshoremen’s and Harbor Workers’ Compensation Act
19 (33 U.S.C. 928 (a)) is amended by changing “legal serv-
20 ices or other services” to read “services (other than
21 a claim for a fee to which subchapter IV of chapter 5 of
22 title 5 of the United States Code applies)”.

23 (b) Section 28 (b) of that Act (33 U.S.C. 928 (b))
24 is amended by changing “fee,” to read “fee (other than a

1 fee to which subchapter IV of chapter 5 of title 5 of the
2 United States Code applies),”.

3 SEC. 11. Section 5 (i) of the Railroad Unemployment
4 Insurance Act (45 U.S.C. 355 (i)) is amended by striking
5 the second sentence and inserting: “Any such claimant or
6 other properly interested person may be represented by
7 counsel or other duly authorized agent, in any proceeding
8 before the Board or its representatives or a court. Sub-
9 chapter IV of chapter 5 of title 5 of the United States Code
10 applies to attorneys’ fees in connection with any claim
11 before the Board or its representatives or a court under
12 this Act. With respect to any fee, charge, or compensation
13 to which that subchapter does not apply, no such counsel
14 or agent for a claimant shall either charge or receive for
15 such services more than an amount approved by the Board
16 or by the court before whom the proceedings of the Board
17 are reviewed.”

18 SEC. 12. Section 20 of the Trading with the Enemy
19 Act (50 App. U.S.C. 20) is amended to read:

20 “SEC. 20. Subchapter IV of chapter 5 of title 5 of the
21 United States Code applies to fees for attorneys in connec-
22 tion with any claim under this Act. No property or interest
23 or proceeds shall be returned under this Act, nor shall any
24 payment be made or judgment awarded in respect of any

1 property or interest vested in or transferred to any officer
2 or agency of the United States under this Act unless satis-
3 factory evidence is furnished to the President or such officer
4 or agency as he may designate, or the court, as the case may
5 be, that the aggregate of the fees (other than fees to which
6 subchapter IV of chapter 5 of title 5 of the United States
7 Code applies) to be paid to all agents, attorneys in fact, or
8 representatives, for services rendered in connection with
9 such return or payment or judgment does not exceed 10 per
10 centum of the value of such property or interest or proceeds
11 or of such payment. Any agent, attorney in fact, or repre-
12 sentative, believing that the aggregate of the fees (other
13 than fees to which subchapter IV of chapter 5 of title 5 of
14 the United States Code applies) should be in excess of such
15 10 per centum may in the case of any return of, or the
16 making of any payment in respect of, such property or in-
17 terest or proceeds by the President or such officer or agency
18 as he may designate, petition the district court of the United
19 States for the district in which he resides for an order au-
20 thorizing fees (other than fees to which subchapter IV of
21 chapter 5 of title 5 of the United States Code applies) in
22 excess of 10 per centum and shall name such officer or
23 agency as respondent. The court hearing such petition, or
24 a court awarding any judgment in respect of any such prop-
25 erty or interest or proceeds, as the case may be, shall approve

1 an aggregate of fees (other than fees to which subchapter
2 IV of chapter 5 of title 5 of the United States Code applies)
3 in excess of 10 per centum of the value of such property or
4 interest or proceeds only upon a finding that there exist spe-
5 cial circumstances of unusual hardship which require the
6 payment of such excess. Except in the case of fees to which
7 subchapter IV of chapter 5 of title 5 of the United States
8 Code applies, any person accepting any fee in excess of an
9 amount approved hereunder, or retaining for more than
10 thirty days any portion of a fee, accepted prior to approval
11 hereunder, in excess of the fee as approved, shall be guilty
12 of a violation of this Act."

Mr. ASHMORE. Our first witness will be Mr. Valentine B. Deale, Esq., chairman of the American Bar Association Committee on Federal Limitations on Attorneys' Fees.

STATEMENT OF VALENTINE B. DEALE, ESQ., CHAIRMAN, AMERICAN BAR ASSOCIATION, COMMITTEE ON FEDERAL LIMITATIONS ON ATTORNEYS' FEES; ACCOMPANIED BY WALTER A. SLOWINSKI, ESQ., BAKER & MCKENZIE, WASHINGTON, D.C.

Mr. DEALE. I would like to introduce my colleague on the committee, Mr. Walter A. Slowinski. Mr. Slowinski is a resident partner of Baker & McKenzie, a firm which practices international law. Mr. Slowinski is admitted to practice in the District of Columbia and in Illinois, he is a member of the faculty of the Georgetown Graduate Law School and the University of Virginia Law School in Charlottesville.

Mr. ASHMORE. We are glad to have him with us.

Mr. SLOWINSKI. Thank you, sir.

Mr. DEALE. Mr. Chairman and members of the subcommittee, my name is Valentine B. Deale. I am a lawyer and have been engaged in the private practice of law in the District of Columbia since 1953. My offices are located at 1001 Connecticut Avenue in the District.

I was admitted to the Ohio bar in 1942, and the District of Columbia bar in 1948.

I testify before you today on behalf of the American Bar Association as the chairman of that association's special committee on Federal limitations on attorneys' fees.

AUTHORITY FOR TESTIMONY

At the outset of this testimony, I believe it is in order to recite my authority for speaking on behalf of the American Bar Association. At the association's annual meeting in August of 1965, its house of delegates, which is the legislative body of the association, adopted the following resolution:

Resolved, That the American Bar Association supports legislation and administrative regulations which would remove arbitrary and unreasonable limitations upon attorneys' fees for services rendered in proceedings before federal courts and administrative agencies, S. 1522, 89th Congress, being an example of such legislation.

Be it further resolved, That the American Bar Association opposes any legislation or administrative regulation which would impose arbitrary and unreasonable limitations upon attorneys' fees for services rendered in proceedings before federal courts and administrative agencies; and

Be it further resolved, That the Special Committee on Federal Limitations on Attorneys' Fees be authorized to present the views of the American Bar Association to the appropriate committees of Congress and to administrative agencies on any such proposed legislation or regulation.

Pursuant to this resolution, I presented testimony to your subcommittee on August 11 last year when it held hearings on S. 1522. You will recall that S. 1522 was an act unanimously passed by the Senate in the second session of the 89th Congress. Its stated purpose was "to remove arbitrary limitations upon attorneys' fees for services in proceedings before administrative agencies of the United States, and for other purposes."

Time ran out on the 89th Congress before your subcommittee was able to formulate a position on the legislation. But all was not lost,

for the attention which your subcommittee gave to S. 1522 paved the way for more precise legislation this year. By comparison to S. 1522, the present legislation is more tautly drafted and, because of its specific treatment of the subject matter, the legislation is not vulnerable to the criticism of being too general in nature. Further, the new legislation gives better coverage of the subject matter and meets serious administrative objections raised against S. 1522.

PHILOSOPHY OF LEGISLATION

By way of explaining the American Bar Association's general endorsement of H.R. 10216, I believe it is best to comment first on the underlying philosophy of the new legislation.

Basically, the legislation before us today calls for a balancing of various interests. These are the interests of the Government, the interests of the beneficiaries of certain legal services, and the interests of the lawyers performing those services.

At one end of the spectrum of possibilities for handling attorney fees in particular Federal matters is the viewpoint that the Government has no business whatsoever in the fee which an attorney charges or receives for handling a claim of a client against the Government. This view is marked by an unwillingness to recognize any legitimate Government interest in protecting beneficiaries under certain Federal programs against excessive legal charges. Under this approach, one would reject the congressional policy of providing protection to veterans, unemployed and aged, to persons sustaining work injuries, and to others against fee arrangements which would unreasonably cut into funds being made available to them under Federal programs. I am pleased to say that this reactionary viewpoint finds no support in the American Bar Association's position on H.R. 10216. The American Bar Association's position does not quarrel with the premise that as a matter of policy the Government may seek to protect beneficiaries of certain Federal programs against inordinate legal charges.

The other end of the spectrum of possibilities for handling attorney fees in Federal matters is the viewpoint that the Government, whether through the Congress or a particular Government agency, should be accepted as the omniscient, omnipotent setter of attorney fees in order to secure against undue legal charges. This premise underlies existing fee-limitation statutes of varying kinds. The premise is rejected as hurtful to the interests of all the parties concerned; that is, to the Government, to the individual, and to his lawyer.

A middle road is sought and is believed to be well defined in H.R. 10216. Aside from the proposed repeal of part of the Federal Tort Claims Act, which will be discussed later, the subject legislation is designed, on the one hand, to accommodate the interests of the Government in protecting beneficiaries of certain Federal programs against unfair attorney fees, and, on the other hand, to allow attorney fees arising under such programs to be determined in the normal course of attorney-client relationships. The Government's present indefensible role as a dictator of attorneys' fees, however well intentioned it might be, is done away with; instead, the Government's role is redefined in a manner consonant with the interests of all parties concerned.

The philosophy of the subject legislation pertaining to fees in agency matters is summarized as follows:

First, the Government's interest in protecting against unreasonable legal charges in specified instances is a policy matter within the province of Congress to which there is no objection.

Second, fee arrangements in Federal matters, just as in non-Federal matters, are properly determined in the normal course of attorney-client relationships subject only to the Government's policy interest of assuring against excessive legal charges in specified instances.

Third, the Government's interest is effectively secured by enabling the cognizant agencies to set up fee guidelines, to be privy to actual fee arrangements, and to reduce fees considered to be out of line.

Fourth, any impasse which an attorney may have with an agency as to the reasonableness of a fee is properly the subject of court resolution upon the initiative of the attorney.

ARBITRARY AND UNREASONABLE FEE LIMITATIONS VERSUS PUBLIC INTERESTS

Let us consider briefly just how the existing system of arbitrary and unreasonable fee limitations is hurtful to the interests of the Government, an individual claimant, and his lawyer. First, the interests of the Government.

Arbitrary and unreasonable limitations on fees are inherent deductions from the attainment of legislative objectives in that claimants do not have fair opportunity to have their causes supported by a full professional effort when needed. While it may be true that the vast majority of claims of relevance here can be handled in a routine fashion without significant legal activity, nevertheless no one will deny that sometimes a claimant's rights are buried in murky facts and complex refinements of law and regulation. Though there is no gainsay that agency personnel will do their best with such cases, the advantage to the claimant in an out-of-the-routine matter of having his personal lawyer at his side is clear. And whether we like it or not, the choice in such a situation between a properly paid lawyer and an underpaid lawyer or no lawyer at all is obvious. Yet to the extent that claims are lost because of lack of effective professional support, legislative objectives are thwarted.

The existing system of arbitrary limitations on attorneys' fees also tends to penalize private parties as claimants. The right or privilege of being represented by counsel in a Federal administrative proceeding becomes hollow, indeed, if the private party is prohibited from paying his attorney other than a subnormal fee. Retaining one's own counsel is a private right which deserves safeguarding in fact as well as in theory. Though many, many claimants in the sort of cases presently under discussion have neither the interest nor the need to have counsel of their own, there are some who want and need counsel; yet their liberty to pursue their own course, even though they might be quite capable of doing so, is notably impaired. They are hampered if not foreclosed from being represented by counsel of their own choosing; representation by agency staff personnel is, in effect, imposed upon them. In principle, it is difficult to escape the notion of Government paternalism to the detriment of individuals having a free voice in their own affairs. In our view, the title of H.R. 10216

is apt; that is, "A bill to restore to persons having claims against the United States their right to be represented by legal counsel of their own choosing."

STRUCTURE OF BILL

A summary of the provisions of the bill itself is now in order. H.R. 10216 contains 12 sections and though the bill appears complicated upon a first reading, its organization is straightforward and logical. The length and numerous cross-references therein reflect the complexity of existing statutory limitations on attorneys' fees which the present legislation would overhaul. An excellent section-by-section analysis of H.R. 10216 was submitted by Chairman Ashmore to the House of Representatives when he introduced the bill on May 23, 1967. The following summary of the bill, supplemented by commentary of our own, borrows from this analysis.

Section 1. Amendment of Tort Claims Act

Section 1 of the bill amends the tort claim provisions of the Judicial Code by repealing the section which now sets a limitation of 25 percent of the judgment in tort claims taken to court and 20 percent in the case of those settled administratively. The rationale for the proposed amendment is that attorney fees in Federal tort claim cases should be determined in the same manner as in cases brought against private parties. There is no real distinction between the Government as a party defendant in a Federal tort claim case and a private litigant in a comparable tort suit which warrants a differentiation in the handling of attorney fees. There is no group or class which calls for special protection as in the cases of veterans, unemployed, aged persons, or others. In substance, the Government has no justifiable reason for injecting itself into routine attorney-client relationships simply because it happens to be a defendant in a tort claim suit.

Section 2. Establishment of statutory system for safeguarding against unreasonable attorneys' fees.

Section 2 of the bill amends title 5 of the United States Code to set up a single statutory system for safeguarding against unreasonable attorneys' fees for services in connection with specified types of cases involving administrative agencies or departments. The proposed unified approach would supersede a variety of statutory limitations on attorney fees of varying degrees of arbitrariness and unreasonableness. The new statutory system would apply to fees for attorneys for services in connection with the following:

1. Claims before the Secretary of Health, Education, and Welfare under titles II or XVIII of the Social Security Act. This covers claims for medicare as well as monetary benefits.
2. Claims before the Administrator of Veterans' Affairs under title 38 of the United States Code. This covers insurance claims as well as those for pensions and other benefits.
3. Claims before the Foreign Claims Settlement Commission under any provision of law administered by that Commission.
4. Claims before the Secretary of Labor under chapter 81 of title 5 of the United States Code. Chapter 81 contains the provisions of law relating to Federal employees' compensation for on-the-job injuries.

5. Claims before the Secretary of Labor or a deputy commissioner under the Longshoremen's and Harbor Workers' Compensation Act. That act governs all workmen's compensation in the District of Columbia as well as the subject matter indicated by its title.

6. Claims before the Railroad Retirement Board under the Railroad Unemployment Insurance Act.

7. Claims before the President or his delegate under the Trading With the Enemy Act.

Under section 2 an attorney is defined as one who is both engaged in the practice of law and a member in good standing of the highest court of the jurisdiction within which he is practicing. The term "fee" is defined to include any amount of compensation—other than reimbursement for expenses actually incurred—which is charged or requested to be paid regardless of whether payment is actually made. Services with respect to any claim shall be considered to have been performed in connection with a claim before an agency if the claim is presented to the agency for administrative determination, regardless of when or before what forum the services were performed. An attorney's fee for services in connection with a judicial appeal from an administrative determination would be within the compass of the proposed new system for safeguarding against excessive legal charges.

In setting up this system, section 2 provides that the agencies concerned shall prescribe rules for the determination of reasonable fees, and it sets out recommended criteria therefor, following canon 12 of the canons of professional ethics of the American Bar Association. Section 2 specifies that the rules for the determination of reasonable fees may take into account different levels of professional charges prevailing in different geographical areas, and further that the rules—and I quote—"shall in no event be so restrictive as ordinarily to discourage the retention of attorneys of recognized professional stature in connection with any claim before the agency."

By way of supplementing the rules under which an appropriate fee may be determined on an individual basis with respect to any given matter, section 2 also gives the agencies authority to specify so-called standard fees. The establishment of these fees would simplify the administration of the fee safeguard system in routine cases. Thus when an attorney charges a standard fee, there normally would be no further need for agency consideration thereof, the general reasonableness of the fee for the work involved having already been determined by the agency.

The heart of the system for safeguarding against excessive attorney fees is the requirement in section 2 that every applicable attorney fee shall be reported to the agency concerned in such manner and form as the agency by rule shall prescribe, and further, that the agency may by rule require the reporting of such information as deemed necessary to permit the determination of the amount of a reasonable fee in accordance with its own published rules pursuant to the previously referred to statutory criteria. Obviously, any fee which is within the applicable standard fee range would not be expected to involve the same reporting and review requirements as a fee in excess of a standard fee or a fee for services for which there is no standard fee. A fee shall in every case be reported no later than 31 days after the termination of the services for which it is charged.

Now what happens after the attorney's fee is reported to the agency? First, if within 21 days after the fee filing the agency does nothing, the propriety of the fee is no longer open to challenge by the agency. The matter is closed. On the other hand, if the agency finds that the reported fee is in excess of what it regards as reasonable, the agency shall determine the amount of a reasonable fee in accordance with its rules and serve notice to this effect upon the attorney within the 21-day period. Such notice shall be accompanied by an explanation of how the agency's determination was reached. Unless the attorney requests a conference or files additional material pertaining to his fee within 21 days after the agency's notice, the agency's determination thereafter becomes effective as its final determination.

If an attorney requests a conference, his request for a conference shall be granted if practicable, but no conference may be held more than 28 days after the latest date on which a request for it could be filed; that is, 7 weeks after the agency's notice to the attorney. Following the attorney's request for a conference or his submission of additional material, the agency may make a final determination of the amount of a reasonable fee. But if it fails to do so within the period within which a conference could be held, the determination of the agency as set forth in its notice to the attorney becomes effective as its final determination upon the expiration of such period.

The enforcement of the foregoing system for safeguarding against excessive attorney fees is secured by various statutory sanctions upon attorneys, with criminal penalties being spelled out for failing to report fees as required, for reporting false information, and for not honoring an agency's determination of what a fee ought to be while such determination is effective.

H.R. 10216 is drafted on the basis of the underlying assumption that the sole justification for Federal intervention in the attorney-client relationship is to assure that the intended beneficiaries of the veterans', social security, and other Federal programs will not be burdened with excessive legal fees when there are disputes as to the benefits due. Accordingly, section 2 of the bill includes an exemption of legal fees from regulation as to amount in situations where the amount of the fee is of no concern to the beneficiary, or can in no way be considered as impairing or offsetting his Federal benefits. These special situations are set forth in the bill as those in which a fee is (1) paid as salary to an attorney who is an employee; (2) paid as a retainer fee for general legal services and which is not increased by reason of the services for which the fee is reported; or (3) neither paid by, nor a legal or equitable liability of, the claimant or a parent, spouse, or child of the claimant.

Section 2 also includes a provision relating to the method of service of the various statutory notices covered therein. In general, service of notice by registered or certified mail is provided for wherever available; otherwise, the use of ordinary mail is permissible.

Section 3. Judicial review and enforcement

The next section of the bill—section 3—provides for judicial review of a final agency determination as to the amount of a reasonable fee in a given situation. It also includes additional sanctions for enforcing the proposed new system of safeguarding against excessive legal charges. The section would add a new subchapter to chapter 7 of title

5 of the United States Code, which now governs judicial review of administrative action under chapter 5.

Under section 3, the venue of an action is the judicial district in which the attorney maintains his office, or if there is no such district, the judicial district in which he resides. If the attorney maintains offices in more than one district, the venue is any such district wherein the services for the fee in question were performed in substantial part.

The section provides authority for an attorney whose fee is reduced by a final agency determination to bring an action against the United States to set aside the determination within 60 days after it becomes effective. The action may be brought only on one or both of the following grounds; namely—

(1) That the agency erroneously applied its rules for the determination of reasonable fees; and

(2) That the rules in question are not in conformity with law.

With respect to the latter consideration, note is again made of the proposed statutory requirement providing that the rules for determining reasonableness of fee "shall in no event be so restrictive as ordinarily to discourage the retention of attorneys of recognized professional stature in connection with any claim before the agency."

In a proceeding of judicial review provided by section 3 of the bill, evidence may be taken orally or by deposition, or, in the discretion of the court, by affidavit. If affidavits are admitted, either party has the right to propound written interrogatories to the affiants and to file answering affidavits. This section is intended to facilitate expeditious handling of cases. In an action brought to review a final agency determination respecting an attorney's fee, any bar association of which at least 10 percent of the attorneys within the district wherein the action is brought are members may appear as a party on its own motion and as of right.

If the court does not sustain the agency's determination, it does not send the matter back to the agency for determination, but rather proceeds directly to fix the allowable amount of the fee in question. In so doing, however, the court is directed to apply the rules of law made applicable to the agency by statute, and also to apply the substantive rules of the agency except to the extent that it finds them not in conformity with law. If the attorney has already received payment of a fee larger than that finally allowed by the court, the court must order him to repay the excess.

A criminal penalty of a fine not exceeding \$1,000, or imprisonment not exceeding 1 year, or both, is provided for any attorney who willfully and knowingly accepts payment of any fee in excess of the amount fixed by a court order which has not been modified or set aside.

The following civil liability is also provided for. Where an attorney's fee is reduced by a final determination for which he does not seek judicial review, and he has actually received payment in excess of the amount set forth in the final determination, he becomes liable to the claimant in an amount equal to twice the amount of the excess, or in the amount of \$200, whichever is greater. Of course, this provision of civil liability has no application if the attorney makes a timely refund to his client in accordance with the agency determination or if the attorney appeals the determination to court.

Sections 4 through 12. Conforming amendments to existing law

We come now to the last nine sections of the bill—sections 4 through 12—which may be treated as a group. The various statutes establishing or governing the agencies affected by the bill contain provisions governing fees for services rendered in connection with claims before those agencies. To the extent that such provisions relate to attorneys' fees as defined in the bill, they are inconsistent with the bill; accordingly, the bill provides for conforming amendments, leaving the existing provisions in effect as they relate to fees for services by persons other than attorneys.

In this manner, section 4 amends the Social Security Act; sections 5, 6, and 7 amend statutes pertaining to veterans' benefits; section 8 amends the International Claims Settlement Act of 1949; section 9 amends the Federal Employees Compensation Act; section 10, the Longshoremen's and Harbor Workers' Compensation Act; section 11, the Railroad Unemployment Insurance Act; and section 12, the Trading With the Enemy Act.

CONCLUSION

The existing system of arbitrary limitations on attorneys' fees moves in the direction of breaching normal attorney-client relationships, of penalizing both private parties and their attorneys, and of discounting legislative objectives in cases which require special legal attention.

As a matter of affirmative policy, H.R. 10216 is designed to correct this situation. The bill would afford effective protection against excessive legal charges in those proceedings where Congress has deemed protection necessary, and, in accomplishing this objective, the bill would give just due both to the total public interest and to the specific interests of the individual parties concerned.

We recommend that your subcommittee report favorably on H.R. 10216 and seek its passage by the House of Representatives during the present session of the Congress.

I thank you for the opportunity to present the views of the American Bar Association on H.R. 10216.

Mr. ASHMORE. Thank you very much, Mr. Deale, for your very thorough and analytical statement.

I also wish to thank you and the bar association for all of the fine work you have done in helping us to get this bill into final shape. You have done a good job.

Mr. TENZER. I agree with the chairman. This has been a very interesting summary.

I would like to ask this question since both sides of the table now are represented by attorneys. Is there anything in the canons of ethics of the American Bar Association which you deem to be inconsistent with the terms of this bill?

Mr. DEALE. Do you have anything specific in mind when you ask the question, Mr. Tenzer?

Mr. TENZER. This is not a question with any such intent. I am asking the question for the purpose of clearing the record.

Mr. SLOWINSKI. On the contrary, the canons of ethics of the American Bar Association are in agreement, not specifically, but certainly in tradition; for example, fees in probate matters usually go before a

court for a judge to prescribe what he feels to be a reasonable legal fee. This seems to be consistent with H.R. 10216.

Mr. TENZER. And in some jurisdictions, as we have in the State of New York, there is governmental control in some manner of fees of attorneys in certain types of legal matters.

Mr. SLOWINSKI. That is correct.

Mr. DEALE. I even understand that is true in negligence cases.

Mr. TENZER. In negligence cases specifically.

Also, I want the record to show that the reasonableness of an attorney's fee is always a matter of jurisdiction of the court upon the application of a defendant who feels aggrieved.

Mr. DEALE. That is correct, sir.

Mr. TENZER. So there is nothing inconsistent in the language of H.R. 10216 introduced by our chairman, Mr. Ashmore, with the canons of ethics of the American Bar Association?

Mr. DEALE. That is correct, sir.

Mr. TENZER. I would then take it if there is no conflict between the language of the bill and the provisions of the canons of ethics of the American Bar Association, this would also be true of the bylaws or canons of any local bar association.

Mr. DEALE. Yes, that, in a sense, sets the pattern for individual canons of ethics in various geographical areas.

Mr. TENZER. It also would be reasonable to state that the canons of ethics, if any exist, of any local bar association, they pretty generally would follow those of the American Bar Association.

Mr. DEALE. That is certainly so.

Mr. TENZER. Thank you. I have no further questions.

Mr. MESKILL. I will play the devil's advocate here for a minute. Was any consideration given by the ABA under this 21-day rule as to whether or not the client should have a right to file an objection?

I will give you a hypothetical situation. Let us assume the standard fee in a particular cases was \$1,200. Let us assume that this was a rehearing of a claim where the file might be extensive to look at but the actual issue in the case was a fairly narrow one. The standard fee being \$1,200 and the attorney puts in for a fee of \$1,400. On the basis merely of a quick review of the tremendous file that was built over a long period of time, the agency says, "This is a little above the standard fee but we think it is in line, and the agency will not object to it."

The client might say, "Look, \$1,200 is the top, \$1,400 is too high." Shouldn't he have a right to object?

Mr. DEALE. I think, Mr. Meskill, the situation there is that the attorney and the client would be left in a normal attorney-client relationship where the attorney and the client have a disagreement or difference with respect to a fee. The thrust of the bill is to look after, as it were, the Government's interests in this fee situation.

Now, the Government's interest, I think, is adequately taken care of with respect to the client's difference with respect to the fee. The client is in the posture, as really all clients are, when they disagree with an attorney about his fee. I would think that if the client does not have the Government as an ally in the particular situation as you have outlined, he is really in the same situation any other client would be.

Mr. MESKILL. I wonder if there should be a provision that within the 21 days it might be called to the attention of the agency. It might affect the agency's determination as to whether to leave the thing alone or go back and say, "\$1,200 is not enough, but \$1,400 is too high; therefore, we suggest \$1,300."

Mr. SLOWINSKI. We might say in the statute that the contents of the statute in no way preclude the filing of a protest on the part of the claimant with the agency with regard to the legal fee.

Mr. MESKILL. Within the 21-day period?

Mr. SLOWINSKI. Yes.

Mr. MESKILL. The agency would be on notice.

Mr. DEALE. That the client had an objection to the particular fee arrangement that the agency had already approved.

Mr. TENZER. Would it not be helpful in order to reduce the number and perhaps a multiplicity of suits if there were a requirement in the bill that, in all such instances where a written retainer is required or is in existence, that a copy of the retainer be filed with the agency at the outset, such as we do in the courts of New York? Then you wouldn't have to wait for the 21 days during which time there might be a recess or a vacation and an individual might lose his rights. There would be no extensions if you fixed the time by statute. There would be no authority to grant an extension of time over 21 days if it were fixed by statute.

Do you think that the filing of a written retainer at the outset would place the agency on notice; the client would feel protected and the agency might say: "We think a 75-percent retainer in this case is excessive."

Mr. DEALE. Certainly there is no objection to having any requirement for the filing of an initial retainer but sometimes, as you probably well know, the arrangement is not necessarily on the basis of an initial retainer or agreement. For example, the people are going forward and they are not quite sure where this is going to lead and all of a sudden there is a court appeal and so forth which originally was not contemplated.

Mr. TENZER. To file the original retainer and amendment thereto?

Mr. DEALE. That is right.

Mr. TENZER. Usually you might file a retainer and this can be handled by letter. In that case, because your fee is specified, you do not have to make a court appearance. If you do have to go to court it will be so much and so much per day for your appearances.

Mr. DEALE. That is right.

Mr. TENZER. You know the situation.

Mr. DEALE. Surely. If one is in existence, certainly, I think probably one of the considerations that I have focused too much in my own mind in thinking of an answer to your question is that of, let us say, a written retainer agreement may not be in existence. That is the situation.

Mr. TENZER. My first reaction——

Mr. DEALE. If it is in existence there is no problem about having a written retained agreement or whatever the arrangement might be filed.

Mr. TENZER. My first reaction to that is that it would appear that if we want to avoid unnecessary litigation between attorneys and clients

and to make the agency the arbitor, or mediator, or the adjuster of fees between attorneys and clients, it might be well to consider a requirement that in all matters involving Federal agencies there be a written retainer and that such written retainer be filed with the agency at the initial instance.

That would protect the client. That would protect the agency and place the agency on notice and would protect the attorney.

Mr. DEALE. Also, to support the point that you are making, Mr. Tenzer, I think it is generally good practice anyway for an attorney and a client to have a firm understanding, a written understanding if you will, at the outset of an attorney taking on a case.

What I am saying is that I think this is quite consonant with good practice.

Mr. TENZER. In my 38 years at the bar I never represented anybody in any matter of any kind without a written retainer made right at the outset when my services were retained. I have never had any dispute with clients because of that.

Mr. DEALE. That is right.

Mr. TENZER. I thank the gentleman for yielding.

Mr. SLOWINSKI. May I comment on this matter of a retainer?

Mr. ASHMORE. Yes.

Mr. SLOWINSKI. With regard to the Foreign Claims Settlement Commission, I think the statute is clear and a typical small case is one you might like to consider. In the Foreign Claims Settlement Commission we have the Polish program. People who feel there has been a taking of property in Poland—for example, their home, or their farm, perhaps in the amount of \$10,000—might ask an attorney to take the case.

They may have no records of any kind and the marshaling of evidence might have to be in Polish.

The presentation of the claim must be in English with Polish documents attached.

For the attorney this may involve a substantial investment of time and money. After his basic research he feels the claimants have a claim in an amount of perhaps \$10,000. Assuming a total recovery, the statutory fee limitation is 10 percent or \$1,000. Assume the attorney must spend \$552 in marshaling the evidence to see what the claim looks like.

Mr. TENZER. These were disbursements?

Mr. SLOWINSKI. No; the \$552 were for Polish-speaking attorneys assigned to the case. These legal services might also include the translations and marshaling of evidence. In such Foreign Claims Settlement Commission cases, a set retainer in advance might not be the regular practice.

Also, now we have Cuban claims being filed with the Foreign Claims Settlement Commission. There is no money to pay these Cuban claims but they all had to be filed before May 1, 1967.

Mr. TENZER. Does the attorney receive a fee in advance?

Mr. SLOWINSKI. Usually not, sir.

Mr. TENZER. None at all?

Mr. SLOWINSKI. None at all.

Mr. TENZER. It is a contingent retainer?

Mr. SLOWINSKI. It is no retainer at all. It is legal services performed for a reasonable fee to be determined later.

Mr. TENZER. How does he get paid?

Mr. SLOWINSKI. On the reasonableness of the statement he submits for his services.

Mr. TENZER. Are you saying, sir, that he does not have a discussion with the client at the outset as to the percentage of the recovery that would be paid?

Mr. SLOWINSKI. Yes, sir.

Mr. TENZER. Or that a reasonable fee based upon time would be charged?

Mr. SLOWINSKI. A reasonable fee based upon time would be charged unless there is a retainer.

Mr. TENZER. Then it ought to be a written retainer to that effect. That is what I am saying. There is no difficulty with that?

Mr. DEALE. I think the difference here may be the content of the statement.

Mr. SLOWINSKI. Yes.

Mr. DEALE. I think perhaps Mr. Slowinski is suggesting that it cannot be defined exactly initially. But the basis, the principle on which the fee will be arrived at, can certainly be agreed upon in discussion.

Mr. TENZER. Or even a retainer saying:

I authorize you to handle this matter in my behalf before any Government agency where you might require this. I agree to reimburse you for all out-of-pocket expenses and traveling expenses as I may authorize or as you may deem necessary.

Mr. DEALE. That is right.

Mr. TENZER (continuing):

I agree to pay you a reasonable fee based upon the time, services, and results obtained.

Whatever the guidelines might be.

Mr. DEALE. That is no problem.

Mr. TENZER. I do not say the retainer should fix the dollar amount. There ought to be a retainer in every case.

Mr. DEALE. Yes.

Mr. TENZER. The Government agency ought to know what the nature of your retainer is.

Mr. DEALE. No problem about that.

Mr. ASHMORE. Thank you, sir.

Mr. Meskill.

Mr. MESKILL. No questions.

Mr. ASHMORE. Mr. Sandman.

Mr. SANDMAN. No questions.

Mr. ASHMORE. Mr. Slowinski, would you like to make an additional statement?

Mr. SLOWINSKI. No, thank you.

Mr. TENZER. I might say in view of the discussion on fees, Mr. Chairman, if the gentleman from the bar association would like to draft a proposed amendment on that score, and submit it to the counsel, we would be very glad to consider it, so we do have the language consistent with your canons of ethics.

Mr. SLOWINSKI. It may follow the pattern in other countries of authorizing you by power of attorney to perform certain services. It is a combination statement.

Mr. TENZER. Give it consideration and submit your proposal.

Mr. DEALE. Actually in some of the agencies you have to file your authority to represent the client. What we are simply saying is that you file your authority to represent the client and also the general arrangements in which the fee is to be determined. I might also add that H.R. 10216 provides that whenever the fee is not within the range of a standard fee the agency may require the reporting of such information as it may specify as necessary to permit the determination of a reasonable fee. Such information might well include any retainer on fee agreement between the attorney and his client.

Mr. TENZER. While we are considering this it may be of great service to the bar if we make it uniform throughout all Government agencies.

Mr. ASHMORE. Counsel has been making notes but I am sure that he and the committee will be delighted if you would help us prepare something along that line.

Mr. DEALE. Very good. Thank you, sir.

Mr. ASHMORE. The next witness is Mr. Abraham Markhoff, president of the New York State Association of Trial Lawyers.

Mr. TENZER. Mr. Chairman, may I say that Mr. Abraham Markhoff and I were associated for many years as industry members of a union welfare fund in the construction industry. We had some very interesting associations in those years.

Mr. MARKHOFF. Both coemployers and trustees.

Mr. TENZER. That is right.

Mr. ASHMORE. Glad to have you with us; proceed.

Mr. MARKHOFF. Thank you, sir.

STATEMENT OF ABRAHAM MARKHOFF, ESQ., PRESIDENT, NEW YORK STATE ASSOCIATION OF TRIAL LAWYERS, NEW YORK, N.Y.

Mr. MARKHOFF. Mr. Chairman and members of the subcommittee, thank you for the opportunity to present the position and views of the American Trial Lawyers Association with respect to the bill under consideration by this distinguished subcommittee.

My name is Abraham Markhoff. I have practiced law for over 36 years in New York City.

I am currently a member of the board of governors of our association, which comprises some 25,000 trial lawyers from all of our States; I am also president of the New York State Association of Trial Lawyers, with a statewide membership of some 4,000 trial lawyers.

I should like, with your permission, to address myself first to the proposed repeal of the section of the Federal Tort Claims Act which places a limitation on attorneys' fees in suits against the United States.

As the distinguished members of this committee well know, such matters are undertaken purely on a contingent-fee basis. This type of litigation deals mainly with claims for property damage, injuries to persons, and actions for wrongful death.

An overwhelming number of such plaintiffs do not possess the financial means to engage an attorney on a retainer basis to prosecute such litigation.

Whence came the contingent-fee system, more aptly termed "the poor man's key to the courthouse door."

Under such an arrangement, a client and his attorney may bargain or contract as to the terms of the contingent retainer.

In all such cases, the attorney's conduct is guided by the canons of ethics as promulgated by the American Bar Association. The instances of alleged overreaching are almost infinitesimal. The bar as a whole has comported itself in the highest traditions of the profession in discharging its professional obligations to the public it represents.

The original fee restrictions on attorneys' fees in the Federal Tort Claims Act were unduly harsh and oppressive, and in many instances litigants were unable to secure the services of competent attorneys to prosecute their claims. The 1966 amendments, while commendable in their intent, did little in their modifications of the percentages of attorneys' fees to ameliorate the situation.

The proposed complete abolition of provisions dealing with attorneys' fees will do much to assist the American public in securing the services of the most competent attorneys in their tort problems.

The American bar is fully conscious of its obligation to represent injured persons, and has always discharged that responsibility in the highest traditions of the profession.

To those who might urge the false theme that our citizens should be protected from themselves in their dealings with their attorneys, let me state that I have been for 7 years a member of a grievance committee of a large county bar association, and never once have I heard of a single complaint of alleged overreaching in a tort matter.

To conclude, the Government should be concerned with its obligation to respond in damages to those who have suffered injury, death, or damage as a result of the tortious conduct of Federal employees, and should have no concern with what fees will be paid to those attorneys who are retained to effect just recovery as a result thereof.

I now address myself to the proposed changes as they would affect attorneys' fees in matters before certain administrative agencies.

My views are based upon representation of injured claimants in over 39,000 workmen's compensation cases, many of which have been adjudicated by Federal administrative agencies.

When compensation acts were originally passed, they were described as being a simple, efficient method of compensating the injured workman. Voluminous litigation was not anticipated. "Slot machine justice" would eliminate controversy. Instead, workmen's compensation became "deceptively simple and litigiously prolific."

The need for competent attorneys to represent the injured claimant in a contest became readily apparent. The remuneration he has received has not matched the necessity for his professional skill.

Professor Larson has discussed this problem as follows:

The problem of the claimant's attorneys' fee is an important and serious one. Some legislatures, in their zeal to save the claimant from diminution of his net benefits through legal fees, carry restrictions on fees to the point where they may well injure claimants as a class both by preventing the growth of an able compensation bar and by making it economically impossible for claimants' lawyers to give the necessary time to the preparation of each case (Larson, *Workmen's Compensation*, vol. 2, sec. 83.15, p. 348).

May I say, parenthetically, in New York State 88 percent of 700,000 claimants injured every year in industry are not represented by counsel.

Mr. ASHMORE. Eighty-eight percent?

Mr. MARKHOFF. Eighty-eight percent, Mr. Chairman, are not represented by counsel. This is a statement furnished to us by the late Angelo Parisi, former chairman of the workmen's compensation board.

In a total lawyer population of some 65,000 in our State, there are no more than 100 lawyers who specialize in this type of work. I speak as a past president of the New York Workmen's Compensation Bar Association and as a former national chairman of the Workmen's Compensation Committee of America Trial Lawyers Association.

Mr. ASHMORE. What is the reason for this? You must be doing all right. You are representing 39,000.

Mr. MARKHOFF. Judge—forgive me. Mr. Chairman, they often say—

Mr. TENZER. He is a good judge, too.

Mr. MARKHOFF (continuing). You often lost money in each case, but you make it up by doing volume.

That is a statement that does not bear support when the facts are scrutinized. May I say, too, sirs, that the average fee in workmen's compensation in New York is about 3 percent across the board, which does not embrace recovery of medical benefits.

We just recovered, in a case that went to the court of appeals, over \$23,000 in medical bills for a lady who was a paraplegic as a result of an industrial accident. On that we received a munificent fee of \$1,250.

The average death case in the State of New York which may carry a recovery of \$20,000, \$30,000, or \$40,000 or \$45,000, depending on the age of the children, may bring in the highly contested case no more than \$1,200 to \$1,500. One death case, *Lewis Mathiez*, which was tried twice by myself—a death case and was taken to the appellate division by the carrier, and I appealed—a fee of \$300 was allowed to me for trying the case twice and obtaining a recovery of \$20,000.

The appellate division said, "In our opinion the action of the board was not so arbitrary and capricious as to justify setting aside."

This is the reason why there are fewer than 100 lawyers out of 65,000 in New York State representing injured claimants. That is the problem that affects not the bar. I speak not for the bar when I say this, but it affects the injured public who need representation.

On February 28, 1966, the distinguished Attorney General, Ramsey Clark, stated that his Department agreed with the general approach of S. 1522, a predecessor bill, in its abolition of across-the-board limitations on attorneys' fees and services rendered in proceedings before Federal administrative agencies.

In connection with fixing a reasonable attorney's fee in appearing before the Social Security Board, a highly placed counsel for that agency admitted that a reasonable hourly rate is never considered in fixing a fee, nor did this official possess any figures on the overhead cost of operating a lawyer's office. Yet this official was responsible for fixing the attorney's fee.

It has been brought to my attention a recent survey by a highly skilled specialist indicates that for a lawyer to write a letter of some thought and content costs net to his firm or office \$15. Just to write a single letter in connection with a case that he is handling.

Proceedings before the Veterans' Administration are even more mystifying.

On the whole, that agency has executed its duties in a very satisfactory manner. However, its severe restrictions on attorneys' fees are almost incredible of belief.

Section 3404, title 38, United States Code, allows a maximum fee of \$10 for filing a successful application for original benefits.

It costs \$15 to write one letter in 1967.

Assume that thereafter an application is filed for an increase in benefits. If successful in his efforts, the attorney is literally punished by the allowance to him of an additional fee of \$2—yes, \$2.

So that we have the situation where the original application could be pro forma. You gather some medical documents, file the application, and file them with the VA and there is no quarrel on it. Assuming that that particular veteran suffers a change in physical condition to entitle him to make a claim for additional benefits, this requires your starting way out in left field with matching medical evidence to persuade the agency that your client is entitled to more. If you win, you get \$2.

That munificent fee was not thought to be unreasonable by an Assistant General Counsel of the Veterans' Administration. He testified last year in connection with the predecessor Senate bill, S. 1522.

It appears that some 24 veterans organizations are recognized officially in the presentation of claims.

Office space and office facilities are furnished free to such organizations.

To demonstrate, in every regional office there is at least one VFW department service officer. Generally he is not a lawyer.

The VFW director of national legislative service has suggested that the Veterans' Administration has never recommended that the maximum fee of \$10 be amended or removed.

I would state this for the record in addition to my formal statement. The bar in general has been so disgusted over the years with the situation, and has thrown up its hands in abject despair, that finally a ray of hope appears before this distinguished committee today in connection with passing some legislation that will entitle a veteran who wants his own attorney to represent him to have such right.

Yet that same high official, who thought a \$2 fee was reasonable, has admitted that:

When the claim is denied, the situation changes.

Proper development and presentation of a case becomes vital.

The value of competent representation is increased accordingly.

Under these circumstances, if a veteran desires his own attorney, rather than a representative of a veterans organization, the current fee limitation could severely hamper his ability to obtain a competent attorney.

Contrast this with the statement by the national service director of the Disabled American Veterans that:

* * * if a veteran claimant should elect not to take advantage of service offered by that Association, but to seek assistance from a private attorney, then that attorney is entitled to a reasonable fee for services rendered.

May I respectfully read from pages 34 and 35 of the report of the subcommittee of the Senate that was issued following the hearing last year.

The statement is made here by Mr. Bronaugh—I hope I pronounce his name correctly, Your Honors:

Some claims, however, are submitted through attorneys and many more would be if the present limitation was removed. It would therefore appear that there would be a greater number of applicants who would be able to retain the services of a private attorney.

If, on the other hand, attorneys fees could be administered by a method whereby the type of representation would be placed in categorical groupings with a specified fee considered to be reasonable for each category, subject to the consideration of the attorney's request for a higher fee, if it is believed such to be in order, we believe that such a procedure could be administered feasibly and in our agency.

May I respectfully attempt to answer Mr. Tenzer's question as to advising the client. I think Mr. Meskill asked the same question, assuming for the moment the devil's advocate. Under the New York workmen's compensation system, any fee requested in excess of \$150 requires a written form. This is all done before the referee informally. If the attorney decides to appeal to the board for an increase in the fee, he must by board rule send a copy of his application to the injured claimant so that the client is aware of the request and has full right to set forth his objections, if any.

By like token, under our rule a claimant may appeal to our appellate board of the workmen's compensation board should he feel aggrieved with respect to the amount of the fee being fixed.

I might say to this distinguished committee, following Mr. Tenzer's question, also, that a copy of a retainer must be filed before the New York Workmen's Compensation Board as well as with the longshoremen and harbor workers administration and the deputy commissioner as well.

One more problem.

I represented a post office worker whose claim for a heart attack was denied. I was able to amass considerable and sufficient evidence to persuade them that the initial determination was wrong. They reversed themselves and allowed the claim. The man is now being paid for life. They fixed to me a fee of \$500. I have not received 500 cents because I do not intend to sue a client.

On the other hand, I have refused to take, without exaggeration, in the last 10 years, at least 500 post office workers' cases where I felt that injustices were done but I could not afford to represent the man for nothing.

The answer is very simple. The law should provide that if a fee is fixed by the agency it shall become a lien upon the benefits payable to be paid in such installments as would not seriously hamper or embarrass the applicant financially.

We have pension cases, as we call them, where we receive as low as \$2 a week, payment in multiples of \$50 or \$100. Two dollars a week. Our bookkeeper is kept busy with that situation.

I think that the bar, Your Honors, is entitled to some protection where the agency finally fixes the fee to insure that the fee would be paid.

May I say this: If the claimant dies prior to the completion of the payment on the installment plan, that is the end of the case. Nobody has a right to file a claim against the estate of the deceased applicant for the balance of the fee. I think, in conclusion, that I would say and

urge that a method of a lien system should be seriously considered by this committee.

May I express to you, sirs, my appreciation for this great privilege of appearing and setting forth our views of the 25,000 lawyers who practice this every day in the week.

Mr. ASHMORE. Thank you very much, Mr. Markhoff. We appreciate your fine statement and your suggestions. I think they have merit.

Maybe some of the other members would like to ask some questions.

Mr. Tenzer.

Mr. TENZER. I would like to ask this. I thank you for your contribution to the committee's work. On pages 4 and 5 you have some quotes there. May I ask where these quotes are from?

Mr. MARKHOFF. Yes, sir.

Mr. TENZER. In the record?

Mr. MARKHOFF. They are all taken from the——

Mr. TENZER. Record of the hearings?

Mr. MARKHOFF (continuing). Record of the hearings before the Senate.

Mr. TENZER. Then we will have them.

Mr. MARKHOFF. I hope that I have not taken them out of context. We hope with the cooperation of all the Federal agencies involved that this problem affecting not just the bar but the clients in general——

Mr. TENZER. I would like to ask you also, your appearance here today is in your capacity as a practicing attorney and also on behalf of the American Trial Lawyers Association?

Mr. MARKHOFF. The American Trial Lawyers and New York State Lawyers Association and the New York Workmen's Compensation Bar Association.

Mr. TENZER. Have these organizations endorsed this legislation?

Mr. MARKHOFF. Yes; wholeheartedly.

Mr. TENZER. The proposal or suggestion that you made for an amendment with respect to protection of attorneys in the collection of their fees, would you want to with the aid of your associations and with their approval submit a proposed amendment and the language that you suggest, that we might have it for consideration?

Mr. MARKHOFF. Right.

Mr. TENZER. Submit that to the committee counsel.

Mr. MARKHOFF. Right.

(The material subsequently submitted is as follows:)

MARKHOFF, GOTTLIB, LAZARUS, D'AURIA, TAYLOR & MALDONADO,
New York, N.Y., July 20, 1967.

Re H.R. 10216.

HON. HERBERT TENZER,
House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN TENZER: Permit me to extend to you my thanks and gratitude for the treatment that both you and the Sub-Committee accorded to me in my appearance on July 12, 1967.

I was most impressed with the Committee's understanding of the problems involved.

You will recollect that you had requested that I submit to you a proposed amendment covering payment of an attorney's fee in installments where sufficient sums are not immediately available to pay the entire fee allowed.

The pertinent portion of Section 24 of the New York Workmen's Compensation Law is as follows:

"Claims of attorneys and counselors-at-laws for legal services in connection with any claim arising under this chapter shall not be enforceable unless approved by the board. If so approved, such claim or claims shall become a lien upon the compensation awarded, and upon any moneys ordered paid under an award by the board into the special funds provided for in section fifteen, subdivision nine, and section twenty-five-a, and any other section of this chapter, but shall be paid therefrom only in the manner fixed by the board."

Many of our cases are pension cases where the fee fixed could not possibly be paid at one time. Under those circumstances, the Referee or the Board orders the fee paid in installments commensurate with the claimant's financial condition and the amount involved.

In the event of the death of a claimant prior to the completion of the payments of the attorney's fee, the balance is never paid and no claim is ever made against the estate of a deceased claimant for such payment.

Please extend my regards to Chairman Ashmore as well as his counsel.

Please advise him that I am writing to you directly in view of our long-standing friendship.

Respectfully and sincerely yours,

ABRAHAM MARKHOFF,

President, New York State Association of Trial Lawyers.

Mr. MARKHOFF. I thank you very much.

Mr. ASHMORE. Mr. Meskill.

Mr. MESKILL. No questions. Thank you.

Mr. ASHMORE. Mr. Sandman.

Mr. SANDMAN. No questions.

Mr. ASHMORE. Thank you very much.

Mr. MARKHOFF. Thank you, Mr. Chairman.

Mr. ASHMORE. Now we have Mr. Nussbaum, an attorney from Washington. Is he here today?

(No response.)

Mr. ASHMORE. If he is not present we will go on to the different agencies represented.

Veterans' Administration, Mr. Alfred T. Bronaugh, assistant general counsel for the Veterans' Administration.

Do you have some of your associates with you? Give the names of these gentlemen for the reporter.

STATEMENT OF ALFRED T. BRONAUGH, ASSISTANT GENERAL COUNSEL, VETERANS' ADMINISTRATION; ACCOMPANIED BY J. C. PECKARSKY, DIRECTOR, COMPENSATION, PENSION, AND EDUCATION SERVICE, DVB; AND L. R. PIERCE, JR., VICE CHAIRMAN, BOARD OF VETERANS' APPEALS

Mr. BRONAUGH. I would like to introduce my colleagues. On my left is Mr. J. C. Peckarsky, who is Director of the Compensation, Pension, and Education Service of the Veterans' Administration.

On my right is Mr. Larry Pierce, the vice chairman of the Board of Veterans' Appeals.

For the record, I am A. T. Bronaugh, assistant general counsel of the Veterans' Administration.

Mr. ASHMORE. Glad to have these gentlemen with you.

Mr. BRONAUGH. Thank you, sir.

Mr. Chairman and members of the subcommittee, we appreciate the opportunity to appear today to discuss H.R. 10216, which deals with the regulation of attorney fees associated with claims asserted against

the United States. The views of the Administrator of Veterans' Affairs are contained in the report of the Veterans' Administration. With your permission, I offer a copy of that report for the record and will briefly summarize the VA position.

I might say a copy of the VA report has been attached to the copies of my testimony which are before you, sir.

Mr. ASHMORE. Thank you, sir.

(The report follows:)

VETERANS' ADMINISTRATION,
OFFICE OF THE ADMINISTRATOR OF VETERANS AFFAIRS,
Washington, D.C., July 12, 1967.

HON. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for a report by the Veterans Administration on H.R. 10216, 90th Congress, a bill "To restore to persons having claims against the United States their right to be represented by legal counsel of their own choosing."

This bill deals with the regulation of attorney fees associated with claims asserted against the United States.

In a statement contained in the Congressional Record at the time of its introduction, the sponsor noted that H. R. 10216 was drafted in cooperation with the American Bar Association and was designed to meet certain objections raised during consideration of S. 1522, 89th Congress, which had the same general purpose as the current bill. (We reported to your Committee on S. 1522 in the form passed by the Senate, on August 15, 1966).

H.R. 10216 affects two broad categories of claims against the government. It would repeal the provisions of section 2678 of title 28, United States Code, prescribing limitations in connection with claims under the Federal Tort Claims Act. The repeal would be effective, however, only with respect to claims which accrue after the date of the bill's enactment. (In passing, we note that the 10 per cent attorney fee limitation in connection with claims under the Military Personnel and Civilian Employees Claims Act of 1964 (31 USC 240-243), added by the amendment to that Act made by Public Law 89-185, is not nullified by H.R. 10216, possibly by inadvertence).

The other broad category of attorney fee limitations within the scope of H.R. 10216 relates to claims under laws administered by a number of different agencies, including the Veterans' Administration. The two provisions of the laws which we administer which would be affected are: chapter 59 of title 38, United States Code, relating to representation with respect to claims for veterans' benefits generally, and section 784 of that title prescribing a 10 percent limitation on attorneys' fees in connection with suits in the Federal District Courts with respect to veteran insurance matters.

Section 3404 of title 38, United States Code, provides that the Administrator shall determine and pay fees to agents or attorneys in allowed claims for veterans' benefits, subject to a maximum of \$10.00 for any one claim. Under the authority provided by this section regulations have been promulgated limiting the fee to \$2.00 where the claim involved is for increased benefits, as opposed to an original claim (38 CFR 14.655). Agents or attorneys charging or receiving a fee in excess of the authorized amount, are subject to a fine of \$500.00 or imprisonment at hard labor for up to two years, or both (38 USC 3405). For your information and convenience, there is enclosed a copy of chapter 59 of title 38, United States Code, containing the full text of the aforementioned agent or attorney fee limitations, and the penalty provisions associated therewith. Also enclosed for your information is a brief summary of the history of this fee limitation.

In lieu of the current monetary limitation of \$10.00 upon attorney fees, H.R. 10216 would establish a three-stage procedure designed to permit a reconciliation of the basically conflicting policies of protecting veterans, their widows and orphans against agreeing to pay a disproportionate amount of their benefits for attorney fees, and the right of attorneys who represent claimants before the Veterans Administration to receive reasonable compensation for their services.

The agency would be authorized to establish a schedule of standard fees which would take into account one or more of the following factors: (1) the type of claim, (2) the administrative level at which it is acted upon, and (3) the amount awarded or other action taken thereon. If the attorney charged a fee equal to or less than the applicable standard fee he need take no action, other than to report the amount of the fee to the agency. If, however, the attorney believed he was entitled to an amount in excess of the standard fee, he could request the agency to determine a reasonable fee based upon the facts in the individual case. The agency's determination would be based upon criteria which it established, by regulation, taking into account certain factors presented by the bill, such as the time and professional skill required, the value of the resulting benefits, and the degree of certainty or contingency about the payment of the fee. Finally, if negotiation between the attorney and the agency fail to reach a determination acceptable to the attorney, he would have the right to go into the Federal District Court, where the agency determination would either be upheld or an appropriate fee determined.

The current stringent limitation has obviously not represented a Congressional determination of a "reasonable" attorneys' fee, in every case, for many years, if ever. To the contrary, it can only be viewed as an indication of a Congressional belief that claimants under the veterans laws receive proper representation without cost to them through resources other than attorneys.

Representation has been provided without cost by the various accredited service organizations for many years. These organizations have well trained representatives who are thoroughly familiar with the laws and Veterans Administration regulations relating to veterans benefits. Moreover, most states have departments whose sole responsibility is to furnish aid and assistance to veterans and their dependents. In addition, claimants have the benefit and assistance of Veterans Administration contact representatives, located throughout the country, who advise them of their rights and assist them in preparing and filing necessary papers.

If the long standing policy strictly limiting fees payable to attorneys in veterans claims matters is to be reversed, H.R. 10216 does have an advantage over prior bills in that it spells out in detail the various factors to be considered in determining the amount an attorney may charge.

The last sentence of the proposed section 583 of title 5 states that the "rules may take into account differing levels of professional charges prevailing in different geographical areas, but shall in no event be so restrictive as ordinarily to discourage the retention of attorneys of recognized professional stature in connection with any claim before the agency." We view this language, as a mandate that, in establishing a reasonable fee where the attorney proposes to charge an amount in excess of the standard fee, the agency should set a fee which would not be less than the minimum fees established for administrative practice by the Bar Association of the locality where such recommended fees have been established.

From a practical standpoint, this would mean that the "standard fee" which the agency would establish under the proposed section 584 of title 5, would also need to reflect the Bar Associations' recommended fees. To do otherwise would be unrealistic. Accordingly, unless there is clear indication of a contrary legislative intent we would propose to establish both reasonable and standard fees in accordance with this understanding. Of course, the attorney would be responsible for making his own arrangements for collecting his fee since the Veterans Administration would continue to make payments of the award directly to the claimant, as required by our basic laws.

If it is not the Congressional intent that the minimum fees recommended by a Bar Association fee schedule should be the controlling factor in the establishment of fees for veterans' claims, we would confront the problem of attempting to strike a balance between the concept that the claimant should be protected from excessive fees in his particular circumstances of disability and/or poverty and the attorney's right to receive reasonable compensation for his services. This is illustrated by those cases where the benefits awarded are small (e.g. \$21 per month for a 10% service-connected disability), and in cases, such as pension for non-service-connected disability, or death, where eligibility for the benefit is based on need as measured by income and assets. In cases of this type, since the claimant would have little or no income, even a small attorney's fee could impose a financial burden and, thus, defeat the purpose of the benefits the government has provided.

Section 5 of the bill proposes an amendment which removes the 10 per cent fee limitation now set forth in 38 USC 784(g), applicable to insurance claims litigated in Federal District Courts.

Existing law provides that the court, as a part of its judgment in a government insurance case, shall determine and allow reasonable fees for the attorneys of the successful party, not to exceed 10 per centum of the amount recovered, and it is required that such fee be paid by the Veterans Administration out of the payments to be made under the judgment at a rate not exceeding one tenth of each such payments until paid (many of the judgments involve life annuity payments).

Under the procedure proposed by the bill, the Veterans Administration would establish a schedule of standard fees and criteria for establishing reasonable fees in insurance litigation, in a manner identical with that which would be required for administrative claims before the agency. If the attorney is not satisfied with the "standard" fee prescribed, he would negotiate with the agency for a determination of a "reasonable" fee under the circumstances of the particular case. The final decision, however, would be made by the district court. It should be pointed out that, unlike the situation involving veterans' claims before the agency, the bill would require that the Veterans Administration pay the attorney's fee "in whole or part" out of the insurance payments to be made under the judgment or decree.

In light of the above, although the procedure proposed by H.R. 10216 is definitely an improvement from that proposed by S. 1522, 89th Congress, we cannot recommend its enactment insofar as it relates to veterans claims matters.

We are advised by the Bureau of the Budget that there is no objection from the standpoint of the Administration's program to the presentation of this report to your Committee.

Sincerely,

W. J. DRIVER, *Administrator.*

HISTORY OF THE AGENT AND ATTORNEY FEE LIMITATION WITH RESPECT TO VETERANS' BENEFIT CLAIMS

(a) As early as July 14, 1962, Congress limited the fees of agents or attorneys who assisted a claimant in establishing a claim for a pension, bounty or other allowance before the Pension Office (12 Stat. 566). The basic fee authorized was \$5.00, with additional small amounts authorized under certain conditions.

(b) This 1862 Act was amended in 1868, raising the authorized fee to \$10.00 (13 Stat. 387).

(c) In 1866, a Joint Resolution was adopted involving, "Bounties to Colored Soldiers, and the Pensions, Bounties and Allowances to their Heirs." It contained an agent or attorney fee limitation which ranged from \$5.00 to \$10.00, depending upon the amount of the claim collected (14 Stat. 367).

(d) The fee limitation applicable to claims for pensions or bounty land, was again changed in 1870 to provide that a fee up to \$25.00 could be authorized upon approval by the Commissioner of Pensions. No fee in excess of \$10.00, however, could be paid without such approval (16 Stat. 193).

(e) The 1870 provision was repeated in the Pension Law consolidation of 1873 (17 Stat. 586).

(f) In 1878, this fee limitation was changed in pension cases to again limit the authorized fee to \$10.00 (20 Stat. 243).

(g) The 1878 Act was repealed in 1884 and Congress again reverted to the \$10.00 to \$25.00 fee limitation (23 Stat. 98).

(h) In 1890, pensions were granted to soldiers and sailors who were incapacitated for the performance of manual labor, and the Act granting such pensions limited the agent or attorney fees for assisting a claimant under that Act to \$10.00 (26 Stat. 182).

(i) In 1892, an Act granting pensions to Army nurses prohibited the payment of any agent or attorney fee (27 Stat. 348). Similar prohibitions were contained in a 1901 Act relating to pensions to remarried widows (31 Stat. 1445), and a 1907 Act granting pensions to certain enlisted men, soldiers and officers, who served in the Civil War and the War with Mexico (34 Stat. 879).

(j) In 1912 and 1916, Acts increasing certain pension benefits, included a prohibition against the payment of any agent or attorney fees except where an original claim was involved, and then such fee was limited to \$10,000 (37 Stat. 112 and 39 Stat. 844).

(k) In 1917, a 1914 Act establishing the War Risk Insurance Program was amended by providing a new section limiting agent and attorney fees to litigated cases, and even then restricting the fee to 10% of the amount recovered. No fees were authorized unless litigation was involved (40 Stat. 102).

(l) This Act was amended in 1918 and agent and attorney fees were authorized in non-litigated cases up to \$3.00 for assisting in preparing necessary claim papers (40 Stat. 555).

(m) In 1918, pensions were granted to widows and minor children of officers and enlisted men who served in the War with Spain, the Philippine Insurrection, or in China. Fees were limited to \$10.00 (40 Stat. 903).

(n) Pension benefits were extended to soldiers and sailors of the conflicts listed in subparagraph (m) in 1920 and an agent or attorney fee of up to \$20.00 was authorized where the agent or attorney assisted in processing the claim (41 Stat. 982).

(o) In 1922, pension benefits as a result of service set forth in subparagraph (m) were extended to certain new classes of individuals. Agent or attorney fees were limited, however, to those cases involving original claims for pension, and then not to exceed \$10.00 (42 Stat. 834).

(p) In 1924, an Act providing adjusted compensation to veterans of the World War prohibited the payment of any agent or attorney fees (43 Stat. 121).

(q) Also in 1924, laws granting compensation, pension, disability allowance and other similar benefits were repealed, and the benefits provided thereby were consolidated into a new World War Veterans' Act. Agent or attorney fees were limited to \$10.00 for assistance in the preparation of a claim, and to 5% of the amount recovered in litigated insurance cases (43 Stat. 607).

(r) This Act was amended in 1925 to increase the amount of the agent or attorney fees authorized in litigated insurance cases from 5% to 10% of the amount recovered (43 Stat. 1302).

(s) In 1926, pensions were granted and increased to certain soldiers, sailors, and marines (and their widows) of the Civil and Mexican Wars, and to widows of the War of 1812, and to Army nurses. Attorney fees were limited to \$10.00 for assistance in filing original claims (44 Stat. 206).

(t) In 1926, an Act amending the World War Adjustment Compensation Act, prohibited the payment of any attorney fee (44 Stat. 826).

(u) Pension benefits were extended or increased again in 1927 to certain soldiers who served in the Indian Wars from 1817 to 1898. A \$10.00 fee limitation (applicable to original claims only) was included (44 Stat. 1361).

(v) In 1928, an Act granting pensions and increase of pensions to widows and former widows of Civil War veterans, prohibited the payment of any attorney fee (45 Stat. 714).

(w) Pensions were again increased or extended in 1930 to certain soldiers, sailors and nurses of the War of Spain, the Philippine Insurrection or the Chinese Relief Expedition. Agent or attorney fees were limited to \$10.00 for original claims (46 Stat. 492). Another 1930 Act increasing pensions as a result of Civil War service contained a similar provision (46 Stat. 529).

(x) As a result of the Consolidation Act of 1930, the Pension Bureau, United Veterans Bureau and the National Homes for Disabled Volunteer Soldiers were merged into the Veterans Administration. No change was made with respect to the various provisions then in effect involving agent or attorney fee limitations. In 1936, however, a law was enacted which made a \$10.00 fee limitation applicable to all claims under statutes administered by the Veterans Administration (PL 844, 74th Congress; 38 USC 102).

(y) The laws administered by the Veterans Administration were consolidated in 1957 (PL 85-56), and recodified in 1958 (PL 85-857). The \$10.00 fee limitation previously applicable to all VA benefit claims (except those involving litigated insurance matters), previously located in 38 USC 102, was recodified and placed in 38 USC 3404 where it is presently located.

CHAPTER 59—AGENTS AND ATTORNEYS

Sec.

- 3401. Prohibition against acting as claims agent or attorney.
- 3402. Recognition of representatives of organizations.
- 3403. Recognition with respect to particular claims.
- 3404. Recognition of agents and attorneys generally.
- 3405. Penalty for certain acts.

§ 3401. Prohibition against acting as claims agent or attorney

No individual may act as an agent or attorney in the preparation, presentation, or prosecution of any claim under laws administered by the Veterans' Administration unless he has been recognized for such purposes by the Administrator.

§ 3402. Recognition of representatives of organizations

(a) (1) The Administrator may recognize representatives of the American National Red Cross, the American Legion, the Disabled American Veterans, the United Spanish War Veterans, the Veterans of Foreign Wars, and such other organizations as he may approve, in the preparation, presentation, and prosecution of claims under laws administered by the Veterans' Administration.

(2) The Administrator may, in his discretion, furnish, if available, space and office facilities for the use of paid full-time representatives of national organizations so recognized.

(b) No individual shall be recognized under this section—

(1) unless he has certified to the Administrator that no fee or compensation of any nature will be charged any individual for services rendered in connection with any claim; and

(2) unless, with respect to each claim, such individual has filed with the Administrator a power of attorney, executed in such manner and form as the Administrator may prescribe.

(c) Service rendered in connection with any such claim, while not on active duty, by any retired officer, warrant officer, or enlisted man of the Armed Forces recognized under this section shall not be a violation of section 281 or 283 of title 18, or a violation of section 99 of title 5.

§ 3403. Recognition with respect to particular claims

The Administrator may recognize any individual for the preparation, presentation, and prosecution of any particular claim for benefits under any of the laws administered by the Veterans' Administration if—

(1) such individual has certified to the Administrator that no fee or compensation of any nature will be charged any individual for services rendered in connection with such claim; and

(2) such individual has filed with the Administrator a power of attorney, executed in such manner and in such form as the Administrator may prescribe.

§ 3404. Recognition of agents and attorneys generally

(a) The Administrator may recognize any individual as an agent or attorney for the preparation, presentation, and prosecution of claims under laws administered by the Veterans' Administration. The Administrator may require the individuals, before being recognized under this section, show that they are of good moral character and in good repute, are qualified to render claimants valuable service, and otherwise are competent to assist claimants in presenting claims.

(b) The Administrator, after notice and opportunity for a hearing, may suspend or exclude from further practice before the Veterans' Administration any agent or attorney recognized under this section if he finds that such agent or attorney—

(1) has engaged in any unlawful, unprofessional, or dishonest practice;

(2) has been guilty of disreputable conduct;

(3) is incompetent;

(4) has violated or refused to comply with any of the laws administered by the Veterans' Administration, or with any of the regulations or instructions governing practice before the Veterans' Administration; or

(5) has in any manner deceived, misled, or threatened any actual or prospective claimant.

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

(1) shall be determined and paid as prescribed by the Administrator;

(2) shall not exceed \$10 with respect to any one claim; and

(3) shall be deducted from monetary benefits claimed and allowed.

§ 3405. Penalty for certain acts

Whoever (1) directly or indirectly solicits, contracts for, charges, or receives, or attempts to solicit, contract for, charge, or receive, any fee or compensation

except as provided in sections 3404 or 784 of this title, or (2) wrongfully withholds from any claimant or beneficiary any part of a benefit or claim allowed and due him, shall be fined not more than \$500 or imprisoned at hard labor for not more than two years, or both.

Mr. BRONAUGH. I would also like to discuss some of the comments contained in that report with respect to the mechanics of this bill, after which my colleagues and I will endeavor to answer any questions you may have.

H.R. 10216 is similar in purpose to S. 1522, which your subcommittee considered last year. We recognize, however, that the current bill has been carefully developed to meet some of the problems which were present in the earlier bill.

This bill would effect attorney fee limitations associated with two broad categories of claims against the Government. First, it would repeal the limitation applicable to claims under the Federal Tort Claims Act. The repeal would be effective, however, only with respect to claims which accrue after the date of the bill's enactment. There is now a 20-percent limitation upon the fee which may be charged in connection with the administrative settlement of tort claims under that act which accrue after January 18, 1967. This fee limitation was increased from 10 percent to 20 percent just last year by the enactment of Public Law 89-506. While the Veterans' Administration considers a number of administrative claims annually under this law, it is, of course, applicable also to all Federal agencies, and we have no special remarks to make with respect to those provisions of the bill which would be applicable thereto.

We note the bill does not appear to eliminate the 10-percent attorney fee limitation in connection with claims under the Military Personnel and Civilian Employees Claims Act of 1964. When originally enacted, this act did not contain an attorney fee limitation. The existing limitation was added by Public Law 89-185, and is applicable to all claims under that act accruing after September 15, 1965. In the context of H.R. 10216, the failure to repeal this fee limitation may be an inadvertence.

The second general category of attorney fee limitations which would be affected by this bill are those applicable to claims administered by a number of different agencies, including the Veterans' Administration. I will confine the rest of my remarks to the effect H.R. 10216 would have on the two provisions of the laws we administer which would be specifically affected; namely, the provisions of chapter 59 of title 38, United States Code, relating to claims for veterans benefits generally, and the provisions of section 784 of title 38 prescribing a 10-percent limitation on attorney fees in connection with suits in the Federal courts with respect to veterans insurance matters.

Briefly, section 3404(c) of title 38 limits the fee in allowed claims for veterans benefits to a maximum of \$10 for any one claim. Any fee in excess of this amount could result in a fine of \$500, or imprisonment at hard labor for up to 2 years, or both.

This fee limitation, although it has varied from time to time, has been in existence for approximately 100 years. I might say there have been approximately 25 laws dealing with this in the last 105 years. Most recent was the codification in 1959.

It seems clear to us that a \$10 fee limitation has not represented a congressional determination of a reasonable attorney's fee for many years, if it were ever so regarded.

Parenthetically I might say I have never, in spite of the remarks of the last witness, viewed it as a reasonable fee. My thrust was it is no more reasonable today than it ever was. It cannot be a reasonable fee in any case.

To the contrary, it can only be viewed as an indication of a congressional belief that claimants under the veterans laws receive proper representation without cost to them through resources other than attorneys.

The various accredited service organizations have well-trained representatives who are thoroughly familiar with the laws and Veterans' Administration regulations relating to veterans benefits. Their services are not limited to their own members, but are available to all who request them. Moreover, most States have departments whose sole responsibility is to furnish aid and assistance to veterans and their dependents. In addition, claimants have the benefit and assistance of Veterans' Administration contact representatives, located throughout the country, who advise them of their rights and assist them in preparing and filing necessary papers.

During fiscal year 1967, the Veterans' Administration will make approximately 2 million decisions relating to an individual's right to compensation, pension, or insurance, or determining the rate of the benefits payable. In addition to those, there will be approximately 2 million decisions relating to an individual's right to vocational rehabilitation and educational assistance, or determining the rate of the benefits payable. Apparently all of these 4 million adjudications will come within the scope of the procedure contemplated by the bill.

Representation activities by attorneys with respect to these claims could vary from the mere preparation of an application or the writing of a letter, to the development and preparation of a claim which could involve considerable research, correspondence, and representation in person. Ordinarily this latter type of representation would be associated with the presentation of an appellate action before the Board of Veterans' Appeals. For example, approximately 1,000 formal hearings are conducted by the Board each year. In the great majority of these cases the claimant is represented by either an attorney or an accredited service organization.

Parenthetically, Mr. Pierce told me that in approximately 80 percent of their cases they are represented by accredited service representatives. Other representatives come close to 1 percent of the cases.

The existing procedure with respect to representation before this agency has worked well. We certainly, however, would not attempt to take the position that there could not be cases in which a claimant would not gain some benefit if he or she were represented by a competent attorney, particularly at the appellate level. On balance, however, and after considering all facets of the situation, the Administrator concluded that there was no basis for recommending a reversal of the longstanding congressional policy limiting attorney fees in this area to \$10, and thus he felt he could not recommend the favorable consideration of this bill.

In addition to the policy considerations I have just discussed, there are also some practical aspects of this bill which I would like to discuss before I close. In essence, this bill would establish a three-stage procedure for establishing proper fees. The first stage provides for the establishment of a schedule of standard fees based upon the type of claim involved, the administrative level at which it is acted upon, and the result achieved. If this fee is not acceptable to the attorney, he can ask the agency to determine a "reasonable fee" based upon the circumstances of the particular case. Finally, if agreement on a fee is not reached, the attorney can go to the Federal district court for a final determination.

There is one specific provision in the bill setting forth criteria for determining a reasonable fee in an individual case which I would like to call to the attention of the committee. If we have misinterpreted its intent, we hope the matter can be clarified. I refer to the language at the bottom of page 4 which states that the "rules may take into account differing levels of professional charges prevailing in different geographical areas, but shall in no event be so restrictive as ordinarily to discourage the retention of attorneys of recognized professional stature in connection with any claim before the agency."

We view this language as a mandate that, in establishing a reasonable fee where the attorney proposes to charge an amount in excess of the standard fee, the agency should set a fee which would not be less than the minimum fees established for administrative practice by the bar association of the locality where such recommended fees have been established.

From a practical standpoint, this would mean that the "standard fee" which the agency would establish under the proposed section 584 of title 5, would also need to reflect the bar associations' recommended fees. To do otherwise would be unrealistic. Accordingly, unless there is clear indication of a contrary legislative intent, we would propose to establish both reasonable and standard fees in accordance with this understanding. Of course, the attorney would be responsible for making his own arrangements for collecting his fee since the Veterans' Administration would continue to make payments of the award directly to the claimant, as required by our basic laws.

I might add that veterans' payments are generally exempt from the claims of creditors by statute.

If it is not the congressional intent that the minimum fees recommended by a bar association fee schedule should be the controlling factor in the establishment of fees for veterans' claims, we would confront the problem of attempting to strike a balance between the concept that the claimant should be protected from excessive fees in his particular circumstances of disability and/or poverty and the attorney's right to receive reasonable compensation for his services. This is illustrated by those cases where the benefits awarded are small—for example, \$21 per month for a 10-percent service-connected disability—and in cases such as pension for a non-service-connected disability, or death, where eligibility for the benefit is based on need as measured by income and assets.

In service-connected death, a man with less than \$600 income, the payment of fee is less than \$12 a month. Going to a veteran who has income less than \$600, the benefit payment is \$100 a month. Of course,

it is contingent upon that. The amounts we are dealing with are quite small at present.

In cases of this type, since the claimant would have little or no income, even a small attorney's fee could impose a financial burden and thus defeat the purpose of the benefits the Government has provided.

In many cases it is impossible to determine the total amount the claimant will receive since the award could be changed by any number of circumstances, such as the dependency of a parent or the income of the claimant. As a result, any fee based on a contingency factor would be most difficult to determine. The question would arise as to whether the fee should be based upon the monthly amount received or whether it should be based on the total amount payable over the claimant's lifetime.

Using the previous example of \$21 per month for a 10-percent service-connected disability, the total payment could conceivably be as high as \$10,000. If the bill is to be favorably considered, any additional guidelines which can be provided in the committee report thereon as to congressional intent on such matters would be most welcome.

The final section of the bill with which we are concerned is section 5 which proposes an amendment to remove the 10 percent fee limitation now set forth in 38 USC 784(g), applicable to insurance claims litigated in Federal district courts.

Existing law provides that the court, as a part of its judgment in a Government insurance case, shall determine and allow reasonable fees for the attorneys of the successful party, not to exceed 10 percent of the amount recovered, and it is required that such fee be paid by the Veterans' Administration out of the payments to be made under the judgment at a rate not exceeding one tenth of each such payments until paid—many of the judgments involve life annuity payments.

Under the procedure proposed by the bill, the Veterans' Administration would establish a schedule of standard fees and criteria for establishing reasonable fees in insurance litigation, in a manner identical with that which would be required for administrative claims before the agency. If the attorney is not satisfied with the "standard" fee prescribed, he would negotiate with the agency for a determination of a "reasonable" fee under the circumstances of the particular case. The final decision, however, would be made by the district court. It should be pointed out that, unlike the situation involving veterans' claims before the agency, the bill would require that the Veterans' Administration pay the attorney's fee "in whole or part" out of the insurance payments to be made under the judgment or decree.

Since this provision of the bill would place new duties on the Federal district courts, particularly since the idea of a court requiring a man to go back to the agency to negotiate for the fee is nullable, at least in our experience. It may be the subcommittee may wish to obtain the views of the Judicial Conference with respect to this provision if you have not already done so.

Thank you, Mr. Chairman. As I said at the beginning of the statement, my colleagues and I would be pleased to answer any questions that you may have to the extent of our ability.

Mr. ASHMORE. Thank you, sir.

On page 7 a question arises at the top of the paragraph:

In many cases, it is impossible to determine the total amount the claimant will receive since the award could be changed by any number of circumstances, such as the dependency of a parent or the income of the claimant. As a result, any fee based on a contingency factor would be most difficult to determine. The question would arise as to whether the fee should be based upon the monthly amount received, or whether it should be based on the total amount payable over the claimant's lifetime. Using the previous example of \$21 per month for a 10 percent service-connected disability, the total payment could conceivably be as high as \$10,000. If the bill is to be favorably considered, any additional guidelines which can be provided in the committee report thereon, as to congressional intent on such matters, would be most welcome.

What would you suggest?

Mr. BRONAUGH. Of course, this is the American Bar Association bill. I do not know what they have in mind. We are thinking particularly in cases where the man may have \$1,200 the first year. If his income goes up slightly it might be reduced to 50. What we would particularly be interested to know is the philosophy. We would want to know whether the amount should be based on the current value of award of this amount, whether it should be so much a month while he is receiving the payments, and whether it is to be an amount which would be due the attorney independent of whether the individual dies, where it cuts it.

Some of these points I believe the gentleman before me was speaking of, the problem he faces and just what is the view of the committee in these areas, as to what you want us to do. It may be that, and I recognize, this on balance is what bothers me and it is a very difficult situation, particularly when you are dealing with so small amounts.

The Government bounty will actually be \$100 a month for a man who has less than \$50 a month outside income. That is not a great deal, certainly not even marginal living today. When you come into a fee such as for example \$1,500, his whole income for a year is gone. Whatever help you can give us would certainly be welcome.

Mr. ASHMORE. Well, I am sure the courts would consider that. A fee of \$10,000 I don't think was ever thought of.

Mr. BRONAUGH. No, but actually a fee of \$500 or \$1,000 based on the time in developing a case—and most of the attorneys would not be familiar with our regulations so it would have to be developed—to develop a case you could run up a fee in a considerable amount legitimately. I don't mean it would be exorbitant at all. It is in comparison to the amount of money the Government gives the man that it becomes a very substantial part.

Mr. ASHMORE. I can understand that. A man receiving only a small sum, any reduction thereof is substantial.

Any questions?

Mr. TENZER. On that subject we are discussing right now, generally speaking if a claim is made and an attorney is retained, it would be after the agency has denied the claim?

Mr. BRONAUGH. The actual time where it would be useful to him, that would be true. I don't know what the situation would be in fact. I think that if you take entire representation together in the agencies of original jurisdiction—the Veterans' Administration, the State

agencies and our own people—about 70 percent get help in the original filing.

Mr. TENZER. Let us take the 30 percent where the application on behalf of the veteran made direct to the agency is denied and where he elects to engage an attorney to represent him after denial by the Veterans' Administration of his claim and his claim is in fact established. In that type of instance, in the 30 percent, the attorney has in fact enabled the veteran to obtain the benefits the Government has provided.

Mr. BRONAUGH. I did not mean to imply in the 30 percent of cases we had turned him down.

Mr. TENZER. Let us say in a case where the veteran's claim has been rejected for various reasons—misunderstanding, lack of evidence, or whatever the reason may be. We have in our Claims Subcommittee many cases involving claims against the Government, and we have had cases that involved voluminous records, where, even if the full amount given the claimant were allowed as the attorney's fee, it would be inadequate compensation for the attorney. These are exceptional cases and perhaps it is only the exceptional cases that come before our committee. I am not quoting from any personal experience, but what I am saying is you are not arguing against the proposition of the right of an attorney to collect a reasonable fee where he has in fact established a veteran's right to a claim against the Government?

Mr. BRONAUGH. In appellate cases there will be some where a competent attorney would be of great help to an individual. Where he has gone through and won the case, the case may be won where no money is involved, just the right to obtain hospitalization or veteran's preference in civil service. On the other hand, the great bulk of our cases involve small amounts such as a pension. The bill goes to all such cases. It is not limited to the appellate stage. In a great bulk of cases all they have to do is file the form. In the 2 million school cases all a man has to do is to show his service, that he has an honorable discharge, and he is entitled to schooling without any question.

Mr. TENZER. I would agree that if an attorney writes a letter and the benefits are awarded, it would not be reasonable for the attorney to receive the same fee he would be entitled to if, on the other hand, he goes through several years of correspondence, represents claimant before an agency, goes through the appeals and comes before our committee to establish a claim of \$867.

Mr. BRONAUGH. I guess you are the court of last resort on that.

Mr. ASHMORE. Wouldn't you say even if this bill were passed as is that still the great proportion of the claimants, of the veteran claimants, would continue to be represented by organizations such as the DAV, the American Legion and so on until it gets to the point that they have done all they can for them and it comes to a matter of appealing where it is so technical that an attorney is needed?

Mr. BRONAUGH. In the great bulk of cases, certainly those before the board of original jurisdiction, I think they could be handled by the service officers as today. The problem would be cases where some attorneys—not the type the American Bar Association think of as the high level attorneys—could draw interest by having a number of these cases and getting a mild reputation and get quite a practice where debts would be due the attorney from claimants who would be receiving, as an example, about \$12 a month. There will be areas where there

will be complaints and criticism and where our best efforts to strike a balance will mean we cannot do it satisfactorily because it is an impossible situation to fix a fee that will be adequate in these small amounts that would still not result in complaints that it is a hardship to the veteran.

I happened to be talking to a member of a veterans' association and he said that inevitably the entire veterans' compensation structure will have to go up. You are dealing with people near the subsistence level where fees really less than could be defended as reasonable will be the basis for a feeling of hardship and that there has been an injustice. That is where the problem comes.

Mr. TENZER. Some of the veterans receiving benefits are not existing at subsistence levels.

Mr. BRONAUGH. That is right.

Mr. TENZER. A man may have a responsible job and he may want to engage an attorney and pay him for his time and services to establish a claim that has previously been denied. That man would not be living at a subsistence level.

Mr. BRONAUGH. That is right, except there is a substantial number at that level.

Mr. TENZER. It was suggested, for example, that if as a result of the attorney's efforts a veteran's claim is established for a \$50 a month allowance, and let us say a reasonable fee for the attorney in that case was \$500 and the veteran does not have funds outside his pension income with which to pay, the attorney might be willing to take \$5 per month. So if a man had a claim established for \$50 a month that had previously been denied and he paid \$5 to the attorney per month he would have \$45 left until that \$500 fee were paid, with the understanding if the veteran died before the full amount were paid no further amount would be due. Would that be reasonable? I think Mr. Markoff said \$2 per month on benefits of \$21 per month.

Mr. BRONAUGH. I moved it down to \$1.20 per month on \$12 per month. If that is the kind of thing the committee would feel reasonable it is the kind of thing I had in mind when I asked if you could indicate your intent in the committee report so that we could know your desires in situations such as this, because we are dealing in an area where it becomes rather touchy. You can't come out with a satisfactory answer in a great number of cases. We are all attorneys and temperamentally by training we realize the force of the bar association's position, but as long-time employees of the Veterans' Administration and having watched cases and having read complaints we know what we are getting into.

Mr. TENZER. You have the skill and knowledge required in the handling of cases but when another attorney is employed he has to do all the research.

Mr. BRONAUGH. That is another problem. Our cases are not, as a whole, sufficiently lucrative or challenging to develop a real competent veterans' bar, so those who are in it are those not interested in the really high quality cases. There are individual cases that will be taken because people think there is an injustice.

Mr. TENZER. Are the representatives of these veteran organizations attorneys?

Mr. BRONAUGH. Some are attorneys, and some are doctors because there are medical questions involved. In one organization there was a 6-month course under the GI bill for the basic training and a 2-year on-the-job training where they worked around the Veterans' Administration offices to become familiar with it.

Mr. TENZER. Do they also handle cases in the appellate section of the Veterans' Administration?

Mr. PIERCE. In the Board of Veterans' Appeals we handle 24,000 to 25,000 cases a year and 85 percent of this appellate load is handled by representatives of one of the veterans service organizations. These service organizations, primarily the American Legion, the Veterans of Foreign Wars, the Disabled American Veterans, and the American Red Cross is in this group also, have 22 full-time representatives who handle cases before the Board of Veterans' Appeals.

Mr. TENZER. Are they all attorneys?

Mr. PIERCE. No. Three of them are doctors. I don't know how many are attorneys. There will be one or two in the group.

Mr. TENZER. Has the question been raised about practicing law without a license?

Mr. PIERCE. No, sir.

Mr. BRONAUGH. I might say title 38, chapter 59, does recognize accredited representatives of organizations to appear and it has provision for agents to appear. Agents and attorneys under the veterans' laws have been permitted to appear for years. The difference is an accredited representative can come in and review the files in a case, whereas an attorney can only be furnished information from the file. The law recognizes an attorney as an agent in handling the case.

Mr. MESKILL. On the bottom of page 4 and the top of page 5 of your statement you say:

On balance, however, and after considering all facets of the situation, the Administrator concluded that there was no basis for recommending a reversal of the long-standing Congressional policy limiting attorney fees in this area to \$10 and, thus he felt he could not recommend the favorable consideration of this bill.

In effect are you saying that at this level a person really has no reason to go to an attorney, that he is adequately represented by the service representatives?

Mr. BRONAUGH. We think the service representatives at that level have performed—well, I think in most cases they can give more assistance than the average attorney. For practically 105 years the Congress has had this limitation.

Mr. MESKILL. I happen to be familiar with some of the people who do this work and I agree with you they do an excellent job. My question is, do you feel a veteran should have a right to counsel if he so chooses at this level? Hypothetically, suppose a man is a full-time employee of a city. As a veteran he presents his case to a service representative and rather than fill out the form the service representative tells him, "I can tell you are not eligible for any benefits. If you want me, I will fill out the form but I can tell you that you are not eligible for benefits."

The veterans say, "I don't want this man to fill out the form. I think I am eligible. I want to employ an attorney. If it costs every cent of my benefits, I want to know my rights." Shouldn't he have a right to hire an attorney.

Mr. BRONAUGH. Mr. Meskill, in the great bulk of cases the man might end up losing money he doesn't have. There are cases at the appellate level where an attorney might be helpful.

Mr. MESKILL. Shouldn't he have a right to have an attorney to help him in the initial stage if he so desires?

Mr. BRONAUGH. You ask a question that is strictly a matter of policy as to which way is better.

Mr. MESKILL. I don't want to argue with you but I am not talking about policy, I am talking about a man's right to be represented by counsel to perfect a claim he believes he has.

Mr. TENZER. Rather than go through the service organizations?

Mr. MESKILL. That is right. Shouldn't he have this right?

Mr. BRONAUGH. Over 100 years Congress has felt that the other policy of trying to prevent a man from dissipating the funds he does not have overrode that right.

Mr. MESKILL. Are you saying Congress as a matter of policy has said the veteran is not competent to determine if he has that right? Certainly the congressional intent recognized the right at one time?

Mr. BRONAUGH. If that \$10 fee ever represented an adequate amount in the last 50 or 100 years I just don't believe it.

Mr. MESKILL. I don't believe it either, but they talk about an attorney's fee so they recognize the right of a veteran to have an attorney. Forget the amount of the fee. You can't say the congressional intent was that the veteran not have an attorney because if that were the case they would not have put in a fee for an attorney.

Mr. BRONAUGH. It is our belief that this limitation, so tight and so small, is in effect a bar against a man having an attorney or paying an attorney.

Mr. MESKILL. It is a practical bar because he cannot hire an attorney at this fee, and he cannot hire an attorney at a higher fee without violating the law and the attorney would be violating the law too.

Mr. TENZER. It is a prohibition.

Mr. BRONAUGH. The practical thing is why we believe it can only be a decision of Congress that they should go to the other means of representation without cost. We can't view it as merely a reasonable limitation. Starting back in July 1862, it went to \$5, to \$10, then to \$25 by 1870, then they dropped it back immediately to \$10. In 25 laws enacted over 105 years they have come back to \$10 and never went over \$25. That is a rather firm policy over the years and we don't have any basis for saying on balance that that is not the correct policy. We think it has worked. On individual cases I would certainly agree with you that a man has a right to go to an attorney. It is just in dealing with these small amounts, what is the congressional policy and what works best. And as far as the question of your right to an attorney, certainly I believe you have that right. I am an attorney myself and by temperament all of us are attorneys, but the question is what is best for the veteran as a whole dealing with millions, and on balance we think this is the best answer, certainly in the case of the agency of original jurisdiction where it is just a question of filing the form. On the appellate level I will agree there are complicated cases where an attorney could help the man.

Mr. MESKILL. Don't you agree that if a matter gets to the appellate level would be better to have had it properly handled from the be-

ginning so the claimant does not have to explain subsequently why he signed an affidavit that is 180 degrees from the position he then takes?

Mr. PECKARSKY. May I explain our procedure? At the original jurisdiction level our proceedings are ex parte and evidentiary rules are not usually dealt with. We have very loose rules.

Mr. MESKILL. Is the original application notarized?

Mr. PECKARSKY. No. They are not evaluated on the basis of form. So even in the controversial cases that are overruled after previous denials, it is not due to the fact there has been a new legal point developed, but because new evidence has been brought to light that changes the preponderance of the evidence. This is what I think Congress had in mind when they set up the right of representation and set up the service organizations to fulfill that representation and inhibited the attorney by limiting the fee and not giving him access to claim folders.

Mr. MESKILL. The attorney is denied access to claim folders?

Mr. PECKARSKY. Yes, sir; under the law.

Mr. MESKILL. Can the claimant himself see the claim folder?

Mr. PECKARSKY. No, sir. The claimant is given the same right given to the attorney and that is to be given information from the claim folder but not the right of examination of the folder itself.

Mr. MESKILL. The \$10 limitation was put in the law 100 years ago?

Mr. PECKARSKY. Yes, and reexamined and reexamined and left there.

Mr. ASHMORE. Any further questions?

Mr. MESKILL. It would not be a question but an argument. I would hardly think congressional lack of action to change something can be taken as congressional policy. The fact the fee was set at \$10 100 years ago, certainly it would be 10 times that much today.

Mr. PECKARSKY. No question about that.

Mr. MESKILL. There is another thing I would like to get your view on. The Supreme Court, in its great concern over the rights of criminals, has gone beyond the right of a criminal to counsel and has said he is entitled to a lawyer if he needs one. In this case if we leave the law as it is we are saying the claimant is denied the right to counsel even if he can afford it, because the lawyer can't afford to take the case for the fee specified. I don't think it was the congressional intent to say the veteran had less right than a criminal.

Mr. BRONAUGH. I would agree that, practically, he cannot get it. This is not something that was enacted 100 years ago and left alone. There have been 25 enactments since then and they always come back to the same fee.

Mr. ASHMORE. Any further questions?

Mr. TENZER. Just to clarify something in my own mind, did I understand you to say if you received a claim in the first instance from an attorney on behalf of a veteran you would return it and say you could not handle it?

Mr. BRONAUGH. No, sir. He can go to an attorney if a \$10 fee—

Mr. TENZER. Leave the fee out of it. The question is, Does the veteran have the choice within the law? If I want to render the service free, do I have a right to do it and does the veteran have the right to employ me?

Mr. BRONAUGH. Yes.

Mr. TENZER. In other words, the veteran has the right, within the law, to engage an attorney in the first instance?

Mr. BRONAUGH. I don't regard it as a practical choice.

Mr. TENZER. That is not the question. The question is, does the veteran have the right to engage an attorney at the outset? The question of choice was Congressman Meskill's first question and your answer is the veteran does have the choice and you would not refuse to recognize the attorney in the first instance?

Mr. BRONAUGH. Absolutely not.

Mr. MESKILL. The gentleman qualified it by saying as a practical matter the choice is removed.

Mr. TENZER. Then you have the right to ask the lawyer if he has received more than \$10 or expects to get more than \$10. But that is a different thing. I want the record to show that you have not said that the veteran does not have the right, nor would the agency refuse to recognize a claim filed by an attorney in the first instance if that was the veteran's choice?

Mr. BRONAUGH. That is correct.

Mr. MESKILL. Let me ask this question: If the veteran chooses to be represented by an attorney rather than by a service representative, he then has a representative who is entitled to less access to information than if he chooses not to be represented by an attorney?

Mr. BRONAUGH. Yes. That is by law and not by regulation.

Mr. ASHMORE. What is that law?

Mr. BRONAUGH. 38 U.S.C. 3301 (1).

Mr. ASHMORE. Will you read it?

Mr. BRONAUGH. Yes:

All files, records, reports, and other papers and documents pertaining to any claim under any of the laws administered by the Veterans' Administration shall be confidential and privileged, and no disclosure thereof shall be made except as follows:

(1) To a claimant or his duly authorized agent or representative as to matters concerning himself alone when, * * *

Mr. MESKILL. That is the attorney?

Mr. BRONAUGH. That is the first, that pertains to information, then when we get to (7) it provides:

(7) The Administrator in his discretion may authorize an inspection of Veterans' Administration records by duly authorized representatives of recognized organizations.

So there is a distinction between what can be given to the claimant or his attorney, which is just information, and the inspection of the records themselves by authorized representatives of recognized organizations.

Mr. ASHMORE. I know a veteran has to give a power of attorney to the representative of a service organization before he can see the files, but do you say that file can be given to the service organization agent but not to the veteran's own attorney?

Mr. BRONAUGH. Actually a power of attorney is not required since you enacted a law 1½ years ago, but he can name an attorney and we can give him information from the file but a representative of a service organization can actually get the file and go through the entire file. In an appellate case, under a law enacted in 1962, if the man or his representative appeals we are required by law to furnish him a so-

called statement of the case which gives the facts upon which the decision was made and gives the laws and regulations we have relied upon. That goes to whether it is an accredited representative or an attorney or whether he is making an appeal on his own.

Mr. ASHMORE. Mr. Sandman.

Mr. SANDMAN. I have no questions.

Mr. TENZER. How many employees are there in the Veterans' Administration here in Washington?

Mr. BRONAUGH. Around 3,000. May I give a precise figure for the record?

Mr. TENZER. Yes. And how many handle claims?

Mr. PECKARSKY. Claims are largely handled in our 57 field stations. There are approximately 4,250 engaged in the adjudication of claims for benefits, compensation, pensions, and education. We have additional staff of approximately 130 in the central office independent of the Board of Veterans' Appeals.

Mr. PIERCE. We have 291 in the Board of Veterans' Appeals, most of whom are lawyers and doctors.

Mr. ASHMORE. Thank you very much, gentlemen. We will now hear from the Department of Health, Education, and Welfare. Mr. James H. Nease, Deputy Director of the Bureau of Hearings and Appeals, is here, and I believe he is accompanied by Mr. Harold P. Packer, Assistant General Counsel of the Old Age Survivors Insurance Division.

STATEMENT OF JAMES H. NEASE, DEPUTY DIRECTOR, BUREAU OF HEARINGS AND APPEALS; ACCOMPANIED BY HAROLD P. PACKER, ASSISTANT GENERAL COUNSEL, OLD AGE AND SURVIVORS INSURANCE DIVISION, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Mr. NEASE. Mr. Chairman, I am James H. Nease, Deputy Director of the Bureau of Hearings and Appeals of the Department of Health, Education, and Welfare. Mr. Harold P. Packer, Assistant General Counsel, Old Age Survivors Insurance Division, will offer a brief résumé of our statement.

Mr. PACKER. At the outset, Mr. Chairman, I would say to this committee that we believe this bill is considerably better than the bill we considered a year ago as S. 1522. It is a marked improvement over it. We had hoped the Department of Health, Education, and Welfare would not be required to appear here at all today because last February we communicated with the representatives of the American Bar Association, who appeared here today, and offered to meet with them at their convenience to discuss the whole problem of regulating or determining attorneys' fees under the social security program, with a view to arriving at a mutually agreed upon policy for enactment by the committee. We never heard from them so we are here today not very seriously objecting to this bill but merely to indicate that there are some few points with respect to it that might be tightened and really improved.

We accept fully the premise on which the bill is based; that is, it calls for a balancing of the interests of the Government, of the beneficiaries, and of the lawyers.

Lawyers are recognized by the Department. They have a full right to appear in all proceedings and they have full access to the claims folders. There is only one limitation we place on the release of information to a claimant and that is if it contains medical evidence that could conceivably be detrimental to him if he knew about it, we release it only to his attorney and physician and allow him to see it only if his physician consents.

We do not have an arbitrary limitation on fees and the chart which we attach to our report indicates we have been far from niggardly in the allowance of fees to attorneys in social security cases.

If I might cite some figures: For the first 5 months of 1967, the Bureau of Hearings and Appeals has acted on 434 fee petitions. The requests were from \$50 to about \$5,000, and the fees allowed ranged from \$50 to \$2,500, and fees of \$500 or more were approved in about one-third of the cases in which petitions for fees were filed.

Mr. ASHMORE. When petitions for fees are filed there is a request for greater fees than you allowed?

Mr. PACKER. No, sir. That is initially. Upon completion of a case counsel files a request for a fee. At the end of the initial level he would file it with the Bureau of Survivors Insurance or the Bureau of Disability Insurance.

The areas with which we have some concern about this bill are, first, the criteria used in the bill. The bill limits consideration of an attorney's fee to the use of three criteria. We think it should be expanded to include the criteria mentioned in our report, which are all criteria in canon 12 of the Canons of Professional Ethics of the American Bar Association, and also the criteria the courts have recognized should be considered in fixing attorneys' fees.

The additional criteria we recommend in addition is that consideration be given to the complexity of the case, the amount of time spent, the amount of skill required in rendering the service, and the results achieved. We do not believe overemphasis should be placed on the amount of the benefits ultimately granted because, as Chief Judge Haynsworth, speaking for the Court of Appeals for the Fourth Circuit in *McKittrick v. Gardner*, pointed out:

The rate of accrual of benefits varies without any relation to the merits of the claim. It is fixed by such things as the claimant's prior earnings and the number of his dependents. The issue in the usual case is entitlement to benefits; their computation is rarely in question. Unlike personal injury actions, therefore, the amount of the recovery bears no relation to the lawyer's skill, effort or effectiveness.

Second, we believe that the point that was previously made here should be contained in the bill; namely, that the claimant should be allowed to indicate at the outset whether he agrees with the fee the lawyer intends to charge. It is his claim and he should have some say as to what should or should not be paid.

Third, we believe that where it has been finally determined, either by the courts or administratively, that the fee that has been charged is more than should have been charged—because under this bill apparently the attorney can charge a fee in the first instance without any qualifications whatsoever—that where it is determined this has taken place, that the department have some right to try to recover the amount, and it should not be left to the claimant to recover the money

because many of our claimants cannot afford to engage another lawyer and get into a lawsuit.

Mr. ASHMORE. If he signs an agreement as to the fee in the first place, wouldn't that remedy that?

Mr. PACKER. We have found, Mr. Chairman, that many of these agreements could be contingency arrangements and the claimants in some instances come back and say that they feel still that would be excessive and they should be given a further opportunity to contest the fee. I am merely saying that where it has already been determined by a court or administratively that what was charged in the first instance was excessive, that in those instances the department, in addition to the claimant, should be given the right to go in court to recover the amount.

Mr. TENZER. If the claimant is the one who pays the fee, what right would the department have to step in and institute suit against the attorney? Where is the Government's right?

Mr. PACKER. Under this bill that fee could be reviewed.

Mr. TENZER. If a written retainer agreement were filed in the first instance and it called for an exorbitant fee based upon the recovery, and since you said the recovery bore no relationship to the skill of the attorney, why couldn't you call the attorney in then and say, "We believe this is excessive"? Why wait until all this is done?

Mr. PACKER. There will be instances where we may not have the information in the first instance.

Mr. TENZER. If the man comes from North Dakota or South Dakota or Carolina or New York and he pays an excessive fee to his attorney, let him go into his local court. Why should the Government have to get in that situation?

Mr. PACKER. I am afraid that then this individual will not be getting anything back.

Mr. TENZER. Let the Government witnesses come in and testify.

Mr. PACKER. That would be a costly thing.

Mr. TENZER. Wouldn't you have to do it if you brought a suit against the attorney?

Mr. PACKER. No. I would suggest there it would be determined more summarily by a Federal court because it would be a Federal court that would be fixing the fee.

Mr. SHATTUCK. There is a provision that the claimant can proceed.

Mr. PACKER. And actually recover the fee.

Mr. SHATTUCK. It is my recollection that there are provisions in other areas of Federal law where a claimant has the right to proceed against, let us say, an employer in violation of a minimum wage statute, or he can obtain the assistance of the Government in presenting his claim because we are talking about his claim. Is this the nature of what you are proposing here?

Mr. PACKER. Yes.

Mr. NEASE. Mr. Chairman, it seems to us that this is the one area in which the regulation of perhaps the improper conduct of an attorney is not adequately covered by the bill. Everywhere else where he might overreach a claimant is adequately covered in the procedures, but not in this particular instance where he, through foresight or good management, manages to get a fee which is ultimately determined not to have been a proper fee. There is no penalty other than for the claim-

ant to institute civil action and recover punitive damages, that effectively corrects the situation and it is our opinion that with respect to a large number of the claimants in social security cases, just as the Veterans' Administration individual stated, these are people who are on subsistence levels and that is not a realistic manner in which to expect them to secure the right.

Mr. TENZER. Mr. Chairman, of course, I have no desire, nor do I think any member of this committee would have any desire to protect an attorney who is guilty of improper conduct. If an attorney has collected an excessive fee within the framework of any law and he has been brought to court by a claimant to recover that excessive fee, or for any penalties as may be provided, certainly I think the Government agency has a stronger weapon in such case than to go to court and institute the action to recover the \$500 excessive fee.

I am just trying to avoid the Government going into court more than is absolutely necessary. If that attorney has been guilty of improper conduct in a case appearing before the agency, I think the agency ought to have a way of handling it.

Mr. PACKER. Mr. Chairman, I think it would be a very simple situation to handle because the problem would come before the very court that determines what the fee should be. It could issue a very summary order to the attorney to pay and to repay the money. That, I think, would be far more of a—well, I would say a “threat” and far more expeditious than leaving it to a claimant to proceed and to then try to get the money back in a civil court.

In fact, an appellate court or a trial court, the Federal district court, could make that a part of its original judgment if permitted to do so by the bill.

Mr. SHATTUCK. You feel under the present bill this would not be possible?

Mr. PACKER. Because of the single remedy pointed out, there would be great reluctance because of pointing to the statute and saying if Congress provides one remedy the question of giving the court additional power is questionable.

Some courts might take it upon themselves to do so under their general equitable policy.

Mr. TENZER. The court could retain jurisdiction in all matters where there is an excessive fee for the purpose of taking any appropriate action for any violation of the court order.

Mr. PACKER. I think we would strengthen the hand of the Government if we were able to suggest that to the court as part of the fee, and point to a specific part of the statute that at least authorizes it.

Mr. TENZER. In other words, you believe that in any final order fixing the fee there should be a provision retaining jurisdiction to collect or adjust any excessive fee already paid by the claimant?

Mr. PACKER. Yes, sir.

Now, the other point that I think needs clarification, because the bill is not clear on it, is as to whether agencies would have the power also to consider and determine fees for services in court. We firmly believe that the agency should not have that authority, that that should be left clearly and purely and simply to the courts. They are in the best position to know what an attorney's services are worth, the serv-

ices before it, and the agencies should not in any way have anything to do with that.

Mr. ASHMORE. The bill doesn't give the agency any authority there, does it?

Mr. PACKER. We merely say it is not abundantly clear.

Mr. TENZER. That is a good point.

Mr. SHATTUCK. I believe the witness on behalf of the American Bar Association made this point in his discussion.

Mr. MESKILL. In the case where the final determination is not made by the court, let us assume that the attorney reports the fee which is charged, and the agency within the 21-day period reduces the amount. The attorney has already been paid by the client in the larger amount. He just does not take an appeal. He just does nothing. How would you propose that the fee be collected then?

Mr. PACKER. That is one of the points that the Government agency would provide—the bill provides the client could go into court and collect twice the amount. We would suggest the bill further contain a provision to allow the Government agency to petition the U.S. district court in the district where this attorney practices law to issue a summary order requiring repayment of the amount.

Mr. MESKILL. Would you have a time limit there, too?

Mr. PACKER. Yes, there could be a time limitation within 30 days. That could be.

The other thing we have some question about is the arbitrariness of the 21-day period. Perhaps further flexibility should be allowed. At least 21 days or within some reasonable period of time thereafter. Maybe to extend the 21 days to 30 days or 60 days, whatever is deemed reasonable, but not to make it so short a time.

The Bureau of Hearings and Appeals alone has 20,000 appeals, hearings, a year. When we take into account medicare, we have now well over 8 million claims being filed a year. To act within a 21-day period where fees are involved is a little too short a period of time.

Mr. ASHMORE. It is merely a matter of changing the 21 days to some other period.

Mr. NEASE. I would suggest 60 days, Mr. Chairman, and I have some personal knowledge about these problems which arise. This is not to suggest that we don't try to get them out much sooner than that, because we do.

Mr. PACKER. We give high priority to applications for attorneys' fees. In fact it, is the first order of business as soon as a claim is disposed of.

Mr. TENZER. I certainly share the view that time is rather short. I have had the experience of correspondence coming out of Freeport, N.Y., then it is sent down to Baltimore and then goes to Washington and is circulated around and it would be unfair for either the claimant or the attorney to lose a valuable right because of a period of 21 days. "A reasonable time" would be too flexible. I would even go to 90 days, but to be certain this would be disposed of in 90 days would be very reasonable. We should take this up in executive session, Mr. Chairman.

Mr. ASHMORE. Thank you for your suggestion. I think it is very good.

Mr. PACKER. Those, Mr. Chairman and gentlemen of the committee, are about our comments on the bill and again I would like to

repeat that we should be willing to meet at any time with the representatives of the American Bar Association under the auspices of this committee or its counsel and to discuss any of these points with them and see if we can't arrive at a satisfactory method of determining fees in social security cases.

I was a little disappointed with the American bar in not getting in touch with us.

Mr. TENZER. Have you taken a copy of their statement with you?

Mr. PACKER. Yes, we have.

Mr. TENZER. Suppose you take it along and review it and we will have counsel send them a copy of your statement for them to review and then if either wants to get in touch with you, they will do so.

Mr. ASHMORE. Thank you very much, gentlemen. We appreciate your coming down and assisting us.

We will take this bill up in executive session at a later date.

(Whereupon, at 12:25 o'clock p.m., the subcommittee was adjourned.)

(The following material was subsequently received for the record:)

THE COLORADO BAR ASSOCIATION,
Denver, Colo., September 28, 1967.

Re H.R. 10216—Bill to regulate attorneys' fees in claims against the Government.

HON. ROBERT T. ASHMORE,
House of Representatives,
Washington, D.C.

DEAR REPRESENTATIVE ASHMORE: The Board of Governors of the Colorado Bar Association at a recent meeting unanimously adopted a resolution endorsing the approval and passage of the subject bill, which was introduced by you before the House of Representatives on May 23, 1967. A copy of this resolution is enclosed. We wanted you to be aware of the support of this association for your bill and of your actions in introducing and advancing the cause of the bill in the House of Representatives. The Board of Governors is very appreciative of your work on this significant legislation.

I have also written to the four Colorado members of the House of Representatives requesting their assistance in the passage of the bill and trust that their efforts will be helpful in this regard.

Sincerely,

CHARLES C. NICOLA, *President.*

[Enclosure.]

RESOLUTION ADOPTED BY BOARD OF GOVERNORS, COLORADO BAR ASSOCIATION,
SEPTEMBER 9, 1967

Whereas, on May 23, 1967, there was introduced before the House of Representatives of the United States by Representative R. T. Ashmore a bill numbered H.R. 10216, being a bill to regulate attorneys fees where claims are asserted against the United States, which bill is presently the subject of consideration by Subcommittee No. 2 of the House Judiciary Committee of which Representative Ashmore is Chairman; and

Whereas, H.R. 10216 would repeal existing limitations on attorneys' fees in connection with tort claims against the federal government and, in the case of claims before the administrative agencies affected by the bill, H.R. 10216 would create a uniform statutory system to assure the availability of counsel at rates of compensation which would be fair and reasonable in accordance with standards set forth in the bill; and

Whereas, in the judgment of the Board of Governors of the Colorado Bar Association the favorable consideration and the passage of H.R. 10216 would be in the public interest by more nearly assuring the payment of reasonable attorneys' fees in situations governed by the bill and by alleviating against certain conditions existing under present law which make it difficult or im-

possible, with respect to some categories of claims, for claimants to obtain competent counsel except as a matter of charity or indulgence;

Resolved, That the Board of Governors of the Colorado Bar Association hereby endorses the approval and passage of H.R. 10216 and directs the President of this Association to advise Representative Ashmore and the Colorado members of the House of Representatives of this action by the Board.

CHATTANOOGA BAR ASSOCIATION,
Chattanooga, Tenn., July 26, 1967.

In re H.R. 10216—A bill to regulate attorneys fees in claims against the Government.

Hon. ROBERT T. ASHMORE,
Chairman, House Judiciary Committee, House of Representatives, Rayburn Office Building, Washington, D.C.

DEAR CONGRESSMAN ASHMORE: Our Association has been keenly aware of previous efforts to eliminate an unjust imposition upon the relationship between attorney and client in the litigation covered by the above-captioned, for many years.

Previously, the Honorable Albert L. Hodge, President of this Association 1965-66, duly informed the Honorable Edward V. Long, United States Senate, with regard to Senate Bill 1522, which was likewise designed to remove the arbitrary limitation upon attorneys fees in proceedings before administrative agencies.

With regard to your bill, now under study, let us go on record as being wholeheartedly and unqualifiedly in favor of the removal of any and all restrictions upon any type of litigation authorized by virtue of federal statutes and either against the United States as a party defendant, or brought exclusively under its created jurisdiction.

Likewise enclosed you will find copy of a letter previously directed to the American Bar Association by Mr. William T. Roper, chairman of our study committee during this current year.

We are taking the liberty of furnishing copies of this endorsement of this legislation to the other members of your committee, as well as the chairman of the special committee of the American Bar Association.

Respectfully yours,

JOHN K. MORGAN, *President.*

[Enclosure.]

CHATTANOOGA, TENN., July 13, 1967.

Mr. JOHN P. TRACEY,
Assistant Director,
American Bar Association, Washington, D.C.

DEAR MR. TRACEY: This letter will acknowledge your's of June 27, 1967. Your letter was originally sent to my old office address at the James Building, and therefore I did not receive your letter until July 12, 1967.

I have reviewed the section by section analysis of HR10216 and I believe the provisions of this bill will be of great benefit both to practicing attorneys and to the general public.

The reason I had been interested in legislation regarding Federal limitations on attorneys' fees in claims against the Federal Government, was because a few years ago, when I was chairman of the Public Relations Committee of the Chattanooga Bar Association, it had been brought to my attention that many of the attorneys in this area were very reluctant to represent clients in claims against the Federal Government; particularly in cases involving social security and V.A. claims due to the fact the attorneys did not feel that the government rules and regulations allowed them a reasonable attorney's fee for advising and representing clients on claims against the Government.

I felt at that time and I still strongly feel that the average individual realizes that he can not ordinarily expect to receive capable legal representation from a qualified attorney unless the attorney is paid a reasonable attorney's fee.

Restrictions and rules and regulations which limit an attorney's fee preclude a client from retaining attorneys of recognized professional stature. Such restrictions and rules and regulations, in effect, limit an individual's right to proper

representation on his claim. By limiting an individual's right to legal representation, it seems to me that an individual is, in effect, denied a basic right and it certainly does not promote good public relations between the Government and its citizens.

For the above reasons, when I was chairman of the Public Relations Committee of the Chattanooga Bar Association I did my best to support legislation which would provide reasonable compensation for attorneys who represent individuals in claims against the Federal Government.

I am convinced that the average individual who has a claim against the Federal Government wants to see his attorney receive a reasonable attorney's fee for the services and work performed by the attorney.

I assure you, you can count on my support.

Yours very truly,

WILLIAM T. ROPER,
Attorney and Counselor at Law.

THE CHICAGO BAR ASSOCIATION,
Chicago, Ill., October 6, 1967.

HON. EMANUEL CELLER,
Chairman, House Judiciary Committee, House Office Building, Washington, D.C.

DEAR MR. CELLER: The Board of Managers of the Chicago Bar Association have requested that I notify you that it has adopted the enclosed resolution in support of H.R. 10216, a bill to regulate attorneys' fees in claims against the Government.

We would sincerely appreciate it if you would present the association's position in support of this bill to your committee for their consideration.

Yours very truly,

JACQUES G. FULLER,
Executive Director.

THE DENVER BAR ASSOCIATION,
Denver, Colo., September 29, 1967.

HON. ROBERT T. ASHMORE,
Chairman, Subcommittee No. 2, House Judiciary Committee, House of Representatives, Washington, D.C.

DEAR MR. ASHMORE: It has long been the feeling of the Denver Bar Association that restrictions on attorneys' fees imposed by statute and regulations of any branch of the government represent an unwarranted interference in the normal relationship between attorney and client, and that such restrictions may often operate to deprive clients of effective representation by counsel of their own choice in claims against the federal government. So feeling, the Denver Bar Association in February of 1966 endorsed and urged support of Senate Bill 1522 then pending, which would have removed such arbitrary limitations. That bill failed of passage.

H.R. 10216 now before the Congress, and having the same objectives as S. 1522, which was before the 89th Congress, is in the opinion of our Association desirable legislation; and we urge its favorable consideration and passage by the Congress. Specifically, we urge favorable action by your Subcommittee and by the full House Judiciary Committee.

I am directed to communicate these views to you, to Senators Allott and Dominick, and to Representative Byron G. Rogers by action of the Board of Trustees of the Denver Bar Association unanimously taken at a meeting on September 27, 1967.

Very truly yours,

RICHARD P. BROWN, *President.*

THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA,
Washington, D.C., July 24, 1967.

Re H.R. 10216—A bill to restore to persons having claims against the United States their right to be represented by counsel of their own choosing.

HON. ROBERT T. ASHMORE,
*Chairman, Subcommittee No. 2,
 Committee on Judiciary, Washington, D.C.*

DEAR CONGRESSMAN ASHMORE: On behalf of the many members of the Bar Association of the District of Columbia whose practice is largely devoted to claims against Federal agencies and departments, I take pleasure in endorsing the above-captioned bill.

The Association has long been concerned with arbitrary limitations on attorneys' fees imposed by statute and agency regulations which, in addition, to interfering with normal attorney-client relationships, in many instances result in a denial of effective legal representation to those in need of counsel. H.R. 10216 appears to represent an effective step in the direction of removing these barriers and restoring to claimants their right to counsel of their own choice.

On behalf of the Association, I congratulate you on your sponsorship of this important legislation and express the hope that it will be enacted.

Sincerely,

JOHN E. POWELL, *President.*

BAR ASSOCIATION OF HAWAII,
Honolulu, Hawaii, October 5, 1967.

Re H.R. 10216—A bill to regulate attorneys' fees in claims against the Government.

HON. ROBERT T. ASHMORE,
Chairman, Subcommittee No. 2, House Judiciary Committee, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN ASHMORE: With reference to the captioned matter, this will advise you that the Executive Board of the Bar Association of Hawaii took the following action during their regular monthly meeting on July 20, 1967:

"COMMUNICATIONS: Letter of July 10 from Valentine B. Deale, ABA Special Committee on Federal Limitations on Attorneys' Fees, recommending support of H.R. 10216 which would repeal existing limitations on attorneys' fees in tort claims against the government and would provide fair and reasonable rates of compensation for counsel in claims before certain administrative agencies. It was Moved, Seconded And Carried that our Association go on record as supporting H.R. 10216."

Very truly yours,

BETTY M. VITOUSEK,
Executive Director.

BOARD OF COMMISSIONERS
 OF THE IDAHO STATE BAR,
July 20, 1967.

Representative ROBERT T. ASHMORE,
*Chairman, Subcommittee No. 2,
 House Judiciary Committee, Washington, D.C.*

DEAR REPRESENTATIVE ASHMORE: The Commissioners of the Idaho State Bar have asked me to write and advise you that the attorneys in Idaho have long supported the type of legislation proposed in H.R. 10216 and in this connection I am enclosing a copy of Resolution No. 3 adopted at the annual meeting of the Idaho State Bar in 1962. The Commissioners feel that this continues to represent the attitude and opinion of the attorneys in Idaho and urge you to do anything possible to eliminate the arbitrary and unreasonable fee limits imposed by the Federal law and regulation.

Thank you for your assistance.

Yours very truly,

FRANK T. ELAM, *Secretary.*

RESOLUTION No. 3

Whereas the Advisory Fee Schedule Committee of Idaho State Bar has found and reported that fees set or regulated by Federal law or authority in such areas as Federal Employees' Compensation Act cases, social security claims, tort claims actions, and in connection with foreclosures of GI loan mortgages, frequently constitute unreasonably low fees which impose such a hardship on retained counsel as to preclude representation of such parties in many meritorious matters, and that the same constitutes an injustice to such parties seeking the aid and counseling of an attorney, in many instances rendering such parties helpless to enforce their rights for lack of counsel; and

Whereas it is the opinion of this bar that the committee's criticism of existing Federal law is well taken; Now, therefore, be it

Resolved, That the commissioners are authorized and directed to communicate the said findings and criticism of this bar to the congressional delegation of the State of Idaho, and to the appropriate officials and committees of the American Bar Association, with the recommendation that a study be made of Federal control of attorneys' fees in Federal matters, and that appropriate changes in Federal law and regulations should be made consistent with the demands of justice in the premises as to permit such litigants and potential parties to retain the assistance and counseling of competent legal counsel for a reasonable fee.

IDAHO STATE BAR PROCEEDINGS, 1962

Mr. WARE. Are you ready for the question or any discussion? Again this will be by association.

Shoshone County Bar Association—Votes yes.

Clearwater Bar—Yes.

Third District Bar—Yes.

Fourth and Eleventh District Bar—Yes.

Fifth District Bar—Yes.

Sixth District Bar—Yes.

Seventh District Bar—Yes.

Eighth District Bar—Yes.

Ninth District Bar—Yes.

Twelfth District Bar—Yes.

Thirteenth District Bar—Yes.

The Chair declares Resolution No. 3 unanimously carried.

NEBRASKA STATE BAR ASSOCIATION,
Lincoln, Nebr., July 14, 1967.

Re H.R. 10216.

HON. ROBERT T. ASHMORE,
House of Representatives, Washington, D.C.

MY DEAR CONGRESSMAN: My attention has been called to the pendency of the above Bill before your Subcommittee of the House Judiciary Committee. Also, I have noted your remarks concerning this Bill as they appear in the Congressional Record under date of May 23, 1967.

When the Senate Bill No. 1522 was pending before the 89th Congress, I was authorized to speak on behalf of our Association in favor of that Bill. Our Association was disappointed that it failed of passage.

While I do not have the approval of the Association as such, at the time of this writing, to endorse H.R. 10216 officially on behalf of the Association, I am quite sure that such approval, from our membership, would be immediately and nearly unanimously forthcoming.

Personally, and as the President of our Association, I whole heartily endorse H.R. 10216 and sincerely approve of your remarks as referred to above in connection with the presentation of the Bill. I am taking occasion, therefore, to copy the Nebraska Congressional Delegation with a copy of these remarks in the hopes that they may see fit to render you and your Committee such assistance as is possible to secure the enactment of the pending Bill.

Respectfully yours,

MURL M. MAUPIN, *President.*

NEW JERSEY STATE BAR ASSOCIATION,
Trenton, N.J., January 5, 1968.

Hon. EMANUEL CELLER,
Chairman, House Judiciary Committee,
Washington, D.C.

DEAR CONGRESSMAN: This resolution is forwarded to you for your information and expresses the feelings of those present at the General Assembly of the New Jersey State Bar Association meeting.

Very truly yours,

FRANCIS J. BOLDOC,
Executive Director.

Whereas, there presently is pending before the Congress of the United States for consideration a bill, H.R. 10216 introduced by Rep. Robert T. Ashmore, of South Carolina, entitled Bill to Regulate Attorney's Fees Where Claims Are Asserted Against the United States, which includes claims under the Tort Claims Act and against various governmental agencies and departments, the general scope of which is to remove limitations on attorneys' fees in Tort Claims cases and to permit agreement between counsel and client as to fee, subject to protective measures to prevent unreasonable charges yet eliminating such restrictive limitations as have in the past frequently defeated an individual's desire to be represented by an attorney of his selection; permitting, also, an attorney to have Court review in the event of agent disagreement as to the amount of a proposed fee; and,

Whereas, this Association is in favor of the objects and purposes of this proposed bill;

Now, therefore, be it resolved, that the New Jersey State Bar Association at its Mid-Winter Meeting, held at Atlantic City on December 2, 1967, does support the objects and purposes of H.R. 10216 and urges its passage by the Congress of the United States.

Be it further resolved, That copies of this Resolution be forwarded by the Secretary of this Association to Representative Robert T. Ashmore, and to Senators Case and Williams and all members of the House of Representatives from New Jersey.

THE NORTH CAROLINA STATE BAR,
Raleigh, N.C., July 20, 1967.

Re H.R. 10216—A bill to regulate attorneys' fees in claims against the Government.

Hon. ROBERT G. ASHMORE,
U.S. Representative,
Washington, D.C.

DEAR MR. ASHMORE: This is to advise you that the Council took under consideration the above named bill which was introduced by you on May 23, 1967 and has authorized and directed that I advise you that The North Carolina State Bar goes on record in support of this bill and urges that Congress enact the said bill into legislation.

With warm personal regards, I am,

Very truly yours,

W. MARION ALLEN, *President.*

RESOLUTION OF THE NORTH CAROLINA STATE BAR

Whereas, The Executive Committee has advised the Council of The North Carolina State Bar that there is now pending in Congress H.R. 10216—A bill to regulate attorneys' fees in claims against the Government, said bill introduced by Representative Ashmore (D-S.C.);

And further, upon recommendation of The Executive Committee, the Council is of the opinion that this is a good bill in purpose; and the contents of this bill provide a more equitable solution to the federal limitations on attorney's fees in claims against the government. And upon motion duly made, and seconded, it is

Resolved, that the Council of The North Carolina State Bar supports H.R. 10216—A bill to regulate attorneys' fees in claims against the Government, and urges the enactment of this Bill into legislation.

Be it further resolved that the President of The North Carolina State Bar be authorized and directed to submit this resolution to Representative Ashmore and other proper officials expressing our views relative to this bill.

NORTH CAROLINA, WAKE COUNTY: I, B. E. James, certify that the above resolution was duly adopted at a regular quarterly meeting of the Council of The North Carolina State Bar on July 14, 1967.

Given over my hand and seal, this the 20th day of July, 1967.

B. E. JAMES,
Assistant Secretary Treasurer.

OREGON STATE BAR,
Portland, Oreg., July 26, 1967.

HON. ROBERT T. ASHMORE,
Chairman, Subcommittee No. 2, House Judiciary Committee, House of Representatives, Washington, D.C.

DEAR REPRESENTATIVE ASHMORE: The Oregon State Bar has long been opposed to arbitrary limitation of attorney fees in claims against the United States. It supported S 1522, and it supports your HR 10216.

We urge your continued efforts in support of the bill, and we are sending copies of this letter to all Oregon members of the United States House of Representatives.

Governmental arbitrary limitations on attorney fees in claims against the government are unwise, and do not accomplish the results intended. They interfere with a proper attorney-client relationship, and there is no question but that they deprive claimants against the government of effective representation by counsel of their choice. When it limits attorney fees, the government does not protect an individual claimant or the public, it protects only itself. It specifically prejudices the individual claimant and the public.

Very truly yours,

JOHN H. HOLLOWAY, *Secretary.*

THE BAR ASSOCIATION OF
METROPOLITAN ST. LOUIS,
St. Louis, Mo., July 24, 1967.

HON. ROBERT T. ASHMORE,
Chairman, Subcommittee No. 2, House Judiciary Committee, House of Representatives, Washington, D.C.

DEAR MR. ASHMORE: The Bar Association of Metropolitan St. Louis urges favorable consideration of HR 10216, a bill to regulate attorney's fees in claims against the Government.

The arbitrary fee limitations imposed upon attorneys representing claimants in cases which would be covered by the proposed bill have in the past deprived claimants of adequate counsel. Many of the fee limitations which now exist are so unreasonably low that an attorney undertaking the representation of a client knows in advance he is prohibited by law from compensation for the time required. He has the choice of donating his services to the claimant, for all practical purposes, or of sending the client away without representation. The client, on the other hand, has the choice of proceeding without representation which he often needs or of asking an attorney to represent him knowing that he cannot compensate the attorney adequately.

Although attorney's fees in claims covered by HR 10216 will be regulated, the bill provides sufficient flexibility to permit the allowance of reasonably adequate fees. We feel strongly that passage of the bill will do much to insure adequate representation for claimants. Many of these persons have just claims and are fully entitled to the assistance of counsel that they often need in the successful prosecution of those claims.

Respectfully yours,

ROBERT O. HETTLAGE, *President.*

SAVANNAH BAR ASSOCIATION,
Savannah, Ga., July 25, 1967.

HON. ROBERT T. ASHMORE,
Chairman of Subcommittee No. 2,
House Judiciary Committee,
Washington, D.C.

DEAR MR. ASHMORE: I am writing to urge your support of HR 10216. I have long felt a need for the removal of federal limitations on attorneys' fees in claims involving the federal government and have written our Congressman Elliott Hagan concerning this at other times.

As you know, this legislation has the full support of the American Bar Association.

Sincerely,

MICHAEL J. GANNAM.

UTAH STATE BAR,
Salt Lake City, Utah, August 23, 1967.

HON. ROBERT T. ASHMORE,
Chairman, Subcommittee No. 2, House Judiciary Committee, House of Representatives, Washington, D.C.

DEAR REPRESENTATIVE ASHMORE: The Utah State Bar went on record in the 89th Congress in support of S. 1522 and joined the American Bar Association in urging its approval by the Senate.

It is our understanding that H.R. 10216 is being considered by your subcommittee.

The Board of Commissioners of the Utah State Bar desires to go on record urging favorable consideration of H.R. 10216.

I have been directed by the Commission to advise you of the Utah State Bar position.

Respectfully yours,

DEAN W. SHEFFIELD,
Executive Secretary.

(The statement filed by the American Legion with reference to H.R. 10216 is as follows:)

STATEMENT BY JOHN J. CORCORAN, DIRECTOR, NATIONAL REHABILITATION
COMMISSION, THE AMERICAN LEGION

Mr. Chairman and members of the Subcommittee, we of the American Legion appreciate the opportunity given to express our views to the Subcommittee on H.R. 10216, a bill bearing the somewhat misleading title of "To restore to persons having claims against the United States their right to be represented by legal counsel of their own choosing." In reality, this bill rescinds those provisions of law, or any rule or regulation adopted by the several Federal administrative agencies designated, which impose a limitation upon attorney fees for services rendered claimants in proceedings before such agencies. In lieu of the statutory and agency limitation on fees, H.R. 10216 would amend chapter 5 of title 5 of the United States Code by adding a new subchapter IV—Attorneys' Fees.

In the case of claims before the Federal agencies affected by the bill, subchapter IV would provide that each agency designated shall prescribe rules for the determination of a reasonable amount for any fee. In the determination of any fee, the rules shall provide for the application of such of the following criteria as the agency may specify as being relevant in any situation—

(1) The time and professional skill required for investigation, evaluation, and presentation or prosecution of the claim.

(2) The value of the benefits resulting to the claimant from the service.

(3) The degree of certainty or contingency about payment of the fee.

Also, this subchapter would provide that while rules may take into account differing levels of professional charges prevailing in different geographical areas, in no event shall they be so restrictive as ordinarily to discourage the retention of attorneys or recognized professional stature in connection with any claim before the agency.

With respect to standard fees, subchapter IV would provide, in addition, that any of the administrative agencies affected may by rule specify a means of

determining a standard fee for legal services in connection with any claim solely on the basis of one or more of the following factors :

- (1) The type of claim.
- (2) The administrative level at which it is acted upon.
- (3) The amount of award or other action taken thereon.

Mr. Chairman, although the bill is concerned with two broad categories of attorneys' fees in claims against the Government—tort claims and those before administrative agencies—our views will be directed to those of its provisions that would strike the existing attorney fee limitations in claims represented before the Veterans Administration. Specifically, the concern of the American Legion is directed to Section 5 (to amend 38 USC 784(g) by removing the limitation of up to 10 percent of the amount recovered in claims for proceeds of government life insurance) and to Section 6 (to amend 38 USC 3404(c) to provide that the fee limitation of \$10 prescribed therein shall not pertain to any fee that falls within the application of subchapter IV of chapter 5 of title 5 of the United States Code).

In speaking to our opposition to the amendments proposed by these two sections, Mr. Chairman, let me speak briefly on the authority and purpose of the Veterans Administration. As we know it today, the Veterans Administration was established as an independent agency by Executive Order 5398 of July 21, 1930, in accordance with the Act of July 3, 1930. This Act authorized the President to consolidate and coordinate Federal agencies especially created for or concerned in the administration of laws providing benefits for veterans. As established, the Veterans Administration administers laws authorizing benefits principally for former members and dependents of deceased former members of the Armed Forces. Under this authority and purpose, the VA is the single instrument of Congress to administer, in a very liberal fashion from the standpoint of adjudication and administration, a program of benefits for veterans and their survivors.

A measure of the simplicity and liberality with which this tremendous program is administered may be gained from the Annual Report of the Administrator of Veterans' Affairs for fiscal year 1966. For this period, he reports that the Department of Veterans Benefits paid more than \$4.3 billion to veterans and their dependents. In the same period, the Department adjudicated more than 156,000 original claims for disability compensation or pension. Decisions were also made on 298,000 reopened claims and claims for increased benefits; 817,000 claims based on change in some and dependents; 133,000 claims for death compensation, dependency and indemnity compensation, and death pension; 44,000 insurance claims; and 244,000 burial claims. Other issues and reviews required 2.8 million miscellaneous actions. The Administrator's statistics given here, do not take into consideration those thousands and thousands of actions associated with claims for educational assistance; vocational rehabilitation; and guaranteed or direct loans. Nor do they take into consideration the huge program of benefits administered by the Department of Medicine and Surgery.

Notwithstanding this numerically large output of adjudication and administrative action by-products, VA costs of administering this extensive program of veterans' benefits were but 2.8 percent of its total budget for fiscal year 1966. In the analysis of the Administrator's report, not the least significant are those statistics on the appellate actions taken from this mass of adjudications and decisions on claims for benefits. According to his report, only 38,411 appeals were initiated by claimants or their representatives of which 20,766 finally required Board of Veterans Appeals action.

Although the same philosophy of ease of administering veterans' benefits did not prevail then, nevertheless, from the beginning of the General Pension Laws, the Act of July 14, 1862, Congress placed somewhat severe restrictions or limitations on attorney fees which may be charged for representing veterans and their dependents in claims matters. Originally set at \$5 it rose to as high as \$25 but, since 1878, it has remained at or near the \$10 limitation. In maintaining the attorney and claims agent fees at the \$10 limit, the Congress has not been unmindful of the abuse of fee limitations following the Civil War, particularly in that period following enactment of the Arrears Act of 1879. Although these abuses had made their unsavory appearance years before this Act, it gave rise to the period of liveliest abuse. In spite of the restrictive provisions enacted from time to time by the Congress to limit their fee, these agents and attorneys were skilled in evading them.

From its beginning, The American Legion recognized that the care of the disabled veteran, his widow, or his orphan was closely related to the speed with

which their claims for benefits were settled. Very much dissatisfied with the administration of benefits under the Bureau of War Risk Insurance, and later, the Veterans Bureau, The American Legion worked hard to obtain enactment of the World War Veterans Act of 1924. Under the provisions of Section 19 of this Act, The American Legion and certain other service organizations were extended recognition in the representation of veterans and their dependents before the Veterans Bureau in claims for compensation and treatment, insurance, and vocational rehabilitation. The Act of June 9, 1936, Public Law 844, 74th Congress, refined this recognition of service organization representatives by providing that it would be limited to those members who had been accredited by the Administrator of Veterans' Affairs. At present, the statutory authority for the Administrator's recognition of representatives in the preparation, presentation, and prosecution of claims under laws administered by the Veterans Administration rests in 38 USC 3402.

It has been the experience of The American Legion since 1924, that the attorney fee limitations imposed by 38 USC 784(g) and 3404(c) and related administrative regulations under 38 CFR, part 14, have not been detrimental to veterans and their dependents in the prosecution of claims before the Veterans Administration. Earlier in this statement, we quoted information from the Annual Report of the Administrator of Veterans' Affairs on the benefits paid, on the number of claims adjudicated, and on the number of appeals taken from either adverse decision or denial of part of a benefit sought. You may well ask what this has to do with attorney fee limitations and the right of a claimant to have representation in his claim by an individual who has expertise in these matters. To show that those who need or desire representation without cost may receive it, your attention is invited to the series of Committee on Veterans' Affairs, House of Representatives, prints on the Disposition of Claims by Regional Offices of the Veterans Administration. The latest of this series, Print No. 198 for the month of April 1966, shows that of 86,213 new compensation and pension claims received,

56,290 were assisted by an accredited representative (65 percent).

25,294 were unassisted (29.7 percent).

4,629 were assisted by a VA Contact Representative (5.3 percent).

As to those decisions adverse to the claimant, again the Annual Report of the Administrator of Veterans' Affairs gives us some information on the assistance received from accredited representatives of service organizations. The following is quoted from page 126 of his report on the activities of the Board of Veterans Appeals:

"Service organizations held power of attorney in 80 percent of the cases decided by the Board. Another 1.5 percent were represented by attorneys and agents. Representation by service organizations has steadily increased at the appellate level, from the 67 percent recorded in fiscal year 1957. Vigorous and competent representation greatly assists the claimant in perfecting his appeal and the Board in rendering reasoned decisions."

Let there be some question as to the expertness of service organization representatives in representing claimants before the Veterans Administration, or to the extent that claims are lost because of lack of effective professional support, and legislative objectives are thwarted, let me quote from some independent observers on the qualification and competence of service organization claims representatives:

The Attorney General's Committee on Administrative Procedure, Monograph No. 2, The Veterans Administration—page 83, Service Organizations:

"No complete picture of the organization or operation of the Veterans' Administration can be drawn without reference to the veterans' service organizations, which have assumed an important position in relation to the Administrator. It is provided by statute (49 Stat. 2031) that 'The Administrator of Veterans' Affairs is hereby authorized to recognize * * *', etc. In the administration of veterans' affairs, both in relation to individual claims and to the broader field of policy making, these organizations play a significant part.

"As already indicated, in a large proportion of cases in which hearings or arguments are requested, claimants are represented by service organizations. Formerly, representation was by private claims' agents. In the past decade, however, the function of representing claimants before the Veterans Administration has increasingly fallen to the various service organizations. These organizations cannot, by statute, charge fees for representation.

"Their representative staffs are ordinarily headed by a chief lawyer; there are also medical consultants on the service organization staff. Most of the actual

representation of claimants before the various Administration boards, however, is performed by nonlawyers, experienced in matters pertaining to veterans' affairs. The result has been a salutary one: Representation is expert, nontechnical and aware of the precise issues. The service organization representatives devote their full time to the task of serving claimants, and their performances, thus far observed, have been of the highest calibre. It is apparent that the individual case is thoroughly studied and the facts, no matter how detailed and medical in form, are well learned. Aided by intimate knowledge of the methods of the Administration, the service organization representatives have developed an able specialized bar.

"The service organizations, however, perform a role more important than that simply of advocates in a particular case. They have further become an integral part of the administration of the veterans' laws. Each organization maintains offices in the Veterans Administration itself. In many respects, they may act as a buffer for the Administration. In practice, they may winnow out the irrelevant; they can and do discourage unnecessary appeals and unnecessary production of witnesses. (Footnote 63: It is to be noted, however, that the service organizations follow the principle that the claimant 'has a right' to appeal, or to present any issues he wishes. Persuasion rather than refusal is the organizations' policy). Thus the service organizations may perform an important function of clarification and expedition."

The Trundle Engineering Company, in its report to the Commission on Organization of the Executive Branch of the Government ("Hoover Commission"), House Committee Print No 14, 81st Congress, 1st Session, March 24, 1949, at pages 23 and 24, said:

"The full-time representatives of these accredited organizations do valuable work in connection with cases that otherwise would have to be done by Veterans Administration personnel. As intermediary counsel and later as advocate, they save time for the contact officers, the rating boards, and adjudicators. The Veterans Administration provides adequate office space and facilities in its regional, branch, and central offices to such organizations as are set up to provide trained and ethical representation. There are at the present time approximately 3,600 accredited representatives stationed in the various offices."

At page 195 of the same report the following is found:

"6. Examination of this program indicates that it is sound both in intent and operation. The accredited representatives are responsible and mindful of their obligation. For the most part they have undergone a course of training before assuming the duties of service officers."

The Hoover Commission in its report to Congress in March 1955 said, at page 42 of the section dealing with Legal Services and Procedure:

"It (the task force) found that such organizations as The American Legion and the Veterans of Foreign Wars perform valued assistance to veterans in presenting their claims before the Veterans' Administration."

The management engineering firm of Booz, Allen & Hamilton also remarked upon the service provided by veterans' organizations. At page 424 of House Committee Print 322, 82nd Congress, 2d Session, it was stated:

"Veterans' organizations are organized to provide needed representation of veterans in all Veterans Administration offices. In this respect, they are performing a very worthwhile service and, therefore, such functions should be placed in their hands."

In considering those provisions of HR 10216 that would remove the limitations of attorney fees, we ask the subcommittee to weigh the cost of a reasonable fee against the benefits that may be payable on the successful prosecution of a claim against the Veterans Administration—

Burial benefit: Up to \$250.

Death pension, widow with income not more than \$600: \$64 monthly.

Disability evaluated at zero percent on establishing service connection: No benefit payable.

Waiver of recovery of an overpayment due the Government based on hardship or inability to pay.

These and many others exemplify the hardship that may be imposed on veterans or their dependents by the removal of the present fixed fees provided in 38 USC. We believe the purpose of the benefits provided would be defeated, particularly where the fee is high in relation to the monetary benefit payable, either on a monthly basis or in a lump sum.

From our experience, we know that many, many hours may be spent in the filing and development and presentation of a claim for benefit. For a fee to be reasonable, as far as the attorney is concerned, it must be realistically related to the time spent on the claim and the hourly billing for an adequate legal fee, plus the expenses incurred. For the subcommittee's information, we attach an article from Case and Comment, July-August 1967, by Billie Bethel, with the title of "Groundwork for, Establishment and Billing of Adequate Legal Fees."

To do justice to both the intent of the veterans' benefit programs as established by the Congress in behalf of a grateful nation to those who served in its Armed Forces, we urge the subcommittee to delete those provisions of the bill which pertain to title 38, United States Code.

Thank you again for this opportunity to present our views.

[From Case and Comment, July-August 1967]

GROUNDWORK FOR, ESTABLISHMENT AND BILLING OF ADEQUATE LEGAL FEES

(By Billie Bethel)

It has been truly stated that: "To be a successful lawyer you must first prove that you can run a successful business office." The keystone to a successful office is the fees which it receives, for fees are the lifeblood of any law practice.

In the matter of the groundwork for, establishment and billing of legal fees, you must remember at all times that you are a professional person. You are not a merchant bargaining in the market place. Your profession is an integral factor in the administration of justice in this country. By entering the legal profession you rejected gain as your sole objective—you voluntarily offered your capabilities and talents to the service of the public. Yet, no matter how dedicated you are to the profession, you cannot—nor should you be expected, to—work without proper tools and an adequate standard of living. To these things you are entitled and toward acquiring them you must turn a businesslike countenance. Without so doing, you perform an injustice to the public, the profession, your family and yourself.

Your motto—your goal—in the financial aspects of your practice of law should be "Plan Ahead".

The lawyer who is the competent, qualified and capable representative of his client; who is the leader of his bar; who contributes to the development of his profession is the lawyer who has, literally—Planned Ahead—financially. He finds that at the end he has adequately provided for his needs and can turn his attention fully to the problems of others.

The proper establishment of an adequate and fair legal fee does not begin and end with the billing of a client. It is a process which begins—properly or improperly undertaken—the first day the lawyer practices and continues for the duration of his career. If the lawyer has begun his practice using proper and effective techniques he will find his financial situation sound. If, on the other hand, his financial situation is not sound, he can, at any moment he so desires, break with his old methods and establish a proper foundation for the financial aspects of his law practice.

In bringing a proper legal fee into the office there are basically three elements to be developed: First: Groundwork—developing and being aware of the basis for the fee charge. Second: Establishment of a proper fee relationship with the client, and Third: Prompt and effective billing of the fee. Let's look at each of these three elements in turn.

GROUNDWORK—DEVELOPING AND BEING AWARE OF THE BASIS FOR THE FEE CHARGE

The determination of a legal fee is not something that can be done on a "hit-or-miss" basis. Fees must be established on an intelligent, well thoughtout, businesslike system. Charging what the traffic will bear is not what I mean by an intelligent, well thought-out businesslike system. Part of this so-called "intelligent, well thought-out businesslike system" is included in Canon 12 of the American Bar Association Canons of Ethics where the factors set forth as proper considerations in the establishment of legal fees include:

1. Time and Labor required. Novelty and difficulty of the question involved. Skill requisite to properly conduct the cause.
2. Whether acceptance of the employment in the particular case will preclude appearance for others in cases likely to arise from the transaction.

3. Customary charges of the bar (i.e., fee schedules).
4. Amount involved in the controversy and benefits resulting to the client.
5. Contingency or certainty of compensation, and
6. Character of employment—whether casual or for an established client.

Now, while Canon 12 sets for the ethical factors to be considered in establishing your fee, it does not tell you how to weigh the various factors, how the psychology of handling your client influences his willingness to pay and his satisfaction with your services. It does not assure that you will be able to meet the overhead and provide an adequate living for your family. These are factors whose consideration must precede Canon 12.

If you are practicing law, your goal is obviously to operate a successful law office. To do so you must first recognize the value of your time. In the legal profession you have nothing for which you may acquire compensation except the time which you devote to other peoples' affairs. Time, therefore, must be your basic unit in determining costs and charges. I cannot possibly stress to you how vital it is that you realize that your time is money—money to you or to someone else.

I can only say that after having edited each of the 1,565 survey questionnaires in the 1966 Economic Survey of the Tennessee Bar Association, that the top dollar lawyer almost without exception kept time records while those with lower incomes were more lax in the keeping of their time sheets. Results of our survey showed that the lawyer who always keeps time records averages—across the State—some \$6,000 more net income per year than does the non-timekeeper. And \$6,000 is a sizeable figure when you consider that a substantial portion of the lawyers in the State did not even make a total income of \$6,000 for the year.

Without any doubt, time is your most valuable asset. You must not allow it to slip away unnoticed. You must keep a complete, accurate set of records to account for the use of your time. In no other way can you efficiently and economically operate your office.

Your time, like any other asset of value is limited. But, have you ever considered how limited it is? How many chargeable hours do you have each year in which to pay the cost of maintaining your office and producing the income to which you believe you are entitled? Not really so many as you might think! You are only in your office 260 days per year. Chances are you don't work Saturday afternoons or Sundays—you take, at a bare minimum, 11 working days for vacation—on seven legal holidays you are absent from the office—and you will lose approximately nine days each year due to sickness, bar association activities, charitable work, etc. Please note—This does not provide time for an afternoon of golf.

In spite of the fact that you may be in your office eight or nine hours a day during the 260 days you work, if you are an average lawyer you will produce only about five chargeable hours of work per day. Time required to be spent on office routine, or reading advance sheets and keeping abreast of current trends all combine to limit your chargeable time to far less than the number of hours spent in the office. Five chargeable hours per day, times 260 days per year, gives you 1,300 hours of time each year for which you may expect to charge your clients.

An Accounting of Costs

Having realized that your income producing time is limited to only about 1,300 hours per year, you must next turn your attention to some cost accounting. The dollar amount which it costs you to render an hour's legal service is a figure of which you should be acutely aware!

A study and analysis of your office operating expenses will help you to determine the cost of an hour's services and the dollars sum which you must charge for an hour's work. Your expenses must be broken down into chargeable hour units. In this way you see the actual out-of-pocket expense incurred when you fail to charge for an hour of legal services rendered.

Such an analysis of costs will involve totaling expenses for the year, including: Rent, payroll expenses, salaries, utilities, office maintenance and equipment, library expenses, supplies, etc. This total, divided by your 1,300 chargeable hours will tell you your actual cost of maintaining the office for one chargeable hour's service.

Now, let's assume for our purposes that you wish to earn in 1967 a net personal income, after taxes, of \$20,000. If we can assume that your overhead costs

are a little less than national averages and come nearer to the averages of those of Tennessee lawyers, you can expect to expend $\frac{1}{3}$ of your gross receipts on items of overhead. You must then gross \$30,000. Your direct overhead expenses, for a net income of \$20,000, will then average in the neighborhood of \$7.70 per chargeable hour of work.—\$10,000 divided by 1,300 chargeable hours.

Return on Invested Capital

But the cost of rendering an hour's legal services is more than just the direct overhead expenses of maintaining an office. There is a second basic factor which we must not forget. To our \$7.70 of overhead costs, we must add an additional sum for what we will call Return on Invested Capital.

Everyone expects and is entitled to a return on his invested capital. Because you have invested in your education rather than in marketable securities is no reason for being denied a return on your capital. Furthermore, because of the exhaustible nature of your investment, you must, during the years of your practice, recoup not only a fair return on your investment, but also the original capital. The average lawyer will probably practice approximately 40 years and must plan on recovering his investment within that span of years.

Regardless of your original investment, the appreciated value of your legal education now—that education which was sufficient to allow you to secure your license to practice—is \$65,000. Regardless of your original investment, it is this appreciated value which you must use in your computations. At 6% interest and amortized over a 40 year period, you will have to devote \$4,300 per year or \$3.30 per chargeable hour to return on invested capital. Added to the \$7.70 of overhead costs we reach a figure of \$11.00.

It now becomes most apparent that an hour's legal services is a valuable asset. For every hour of legal services which you render and fail to make record you not only fail to produce any income for yourself, but you in effect throw eleven one dollar bills out of your office window. Your time is your money.

The \$11 per chargeable hour that it cost you to practice still provides you with no net income. To achieve your \$20,000 net income goal you must now add an additional \$15.40 per hour for personal income to the \$11.00 cost. Thus, we find that if you are a median lawyer in the State of Tennessee and you desire to earn a \$20,000 net income for the year of 1967, you must begin to plan ahead—now; to charge a minimum of \$26.40 for each hour of chargeable legal services you render, or come December you will find yourself short of your goal.

As you plan ahead for the year, it is essential that you make a realistic assessment of your worth and not the income you would like to have, but the income you are qualified and capable of earning. Factors of background, experience, and capabilities may make a \$20,000 income goal far too ambitious for you at this stage of your practice or may show that your income should far exceed our assumed figure of \$20,000. Regardless of which category represents your position, it is essential that at the beginning of the year you plan ahead, setting a realistic goal for yourself, determining what your charge per hour must be and working toward that goal. This is not to say that there will not be fluctuations from your goal, due to contingent fee cases, your putting in an extra heavy year of work and increasing your chargeable hours, or even a light year occurring. Nevertheless, it does provide you with a standard by which to guide your activities.

Establishment of Fees

With this background awareness and planning you are now ready to face a client—not for the purpose of billing him, but for the initial interview with him, for it is at that first meeting with the potential client that you begin the development and establishing of your legal fee in his case.

The profession is given a black eye all too often by the failure of the individual lawyer to consider the psychology of fee charging when working with his client. It is over the desk—in the interviews between an attorney and his client—that the best public relations work of the legal profession can be accomplished. It is over that same desk, between that same attorney and client that the worst public relations can develop—based most often on misunderstandings and failures to explain legal fees.

Make it your policy to always discuss your fee with the client during your first interview. Few of us shop for any item or request any service without establishing first the price. The user of legal services likewise wants—and needs—to know the financial obligation which he is incurring.

An in depth survey of layman attitude has shown that over 80% of your clients want to discuss costs of your services with you during the first interview and 88% feel that it is a topic which you should instigate.

Though some of us are hesitant to talk about money we should not be. The client knows that legal services are not free. He is much less suspicious and apprehensive if he knows what he is incurring—for few laymen know much about how a lawyer establishes his fee.

In broaching the subject of fees, it is not necessary to be blunt nor to appear mercenary. One good approach to the subject is to say, "Now, Mr. Jones, I know that you are wondering about the costs of having this work done." You may be sure that he will agree eagerly that he is interested!

As you discuss the fee, be sure that you make certain points clear to the client:

First: That he, the client—not you, the lawyer—must finance the costs of the investigation, court cost, etc. If you can make any rough estimates as to costs do so. It is not necessary to be exact, but give an approximate range. The client may not know if you are talking about \$100 or \$1,000 unless you are somewhat specific.

Second: Explain to the client how his fee will be computed. If you will use a contingent fee arrangement, explain how it will work. If you will do the work on an hourly basis, explain to him that the fee will depend upon the amount of work you must do in his behalf.

Bear in mind that the same survey which tells us that clients wish to discuss fees with lawyers also tells us that laymen want to pay for legal services on the basis of effort expended. While you, in your final fee computations, may consider other factors, make it clear to the client that effort expended is the basis for your charge.

Bear in mind also that the client is used to thinking of people working for \$4.20 or \$5.35 or \$6.40 an hour. His reaction is that these amounts are good hourly pay. He does not comprehend that in hiring you he hires not just you but your entire office facilities, staff and libraries. He does not readily comprehend hourly charges of \$25 or \$30 or even \$50 an hour. In the case of the usual individual lay client it is generally not advisable to detail your hourly rate.

Third: Give the client a fee range for your services.

In few, if any cases, can you—during the initial interview—sufficiently evaluate and assess the case to state a definite and flat fee. With some experience however, you should be able to give a range within which you believe the fee will fall.

Make a memo of this fee range and, at intervals during the handling of the case, check to see if the range quoted remains valid. Should the case have altered so from your first appraisal that the fee range originally quoted is no longer realistic—either too much or too little—call the client in and rediscuss the matter pointing out the changes and how it will effect his costs.

Fourth: Discuss payment methods with the client.

Suggest that he will probably wish to be billed monthly for costs and your out-of-pocket expenses. Such a periodic billing of expenses allows the client to pay the costs of the legal matter in smaller amounts rather than being faced with one large bill at the conclusion of the case. It keeps the client aware that work is continuing on his legal matter, it serves to reduce to a minimum the law office's tied up capital in out-of-pocket expenses and it serves as a method of helping keep the client from confusing costs with your fee.

Only in the case of a large corporate client or affluent individual should an exception be made to your policy of interim billing of costs and only then if they state that they do not want interim billings on the matter.

The individual client may find it easier to pay your fee on a monthly pay basis in which case, make arrangements that you will bill him for a specific amount each month with adjustments to be made at the conclusion of the matter.

Fifth—and finally—Be sure there is a clear and definite understanding regarding the fee between you and your client. Unbelievable ill-will can result if there has been no meeting of the minds.

Within the past two months I have received three calls from a client who is very unhappy with his lawyer, based purely on a case of misunderstanding. The lawyer asked for a \$200 retainer fee to handle the man's case. The client believed this was the full fee. At the successful conclusion of the matter, the lawyer billed for an additional \$300. The client is outraged! At last report the lawyer had received the settlement check from the insurance company

and was holding it until he received his fee. And, though the lawyer has handled the cause well and won it, because of misunderstanding and lack of communications, the client is angry, threatening law suits and will probably file a grievance with the Bar Association.

Having reached a satisfactory fee arrangement with the client, keep in mind that you will still have to earn that fee to the client's satisfaction. To do this fully, it is absolutely essential that you maintain full and complete time records so that you have a complete log of all your activities on the client's behalf. Record every telephone conversation, every letter written or received, every conference.

As the work on the case progresses, send copies of all letters, documents and memoranda to the client (This should be routine office procedure in all cases). This technique will save you untold time and worry. The cost and time expended in making an extra copy and mailing it to the client, stamped "For your information" or "For your File", is minimal. The avoidance in calls from the client asking about the status of his case or prodding to see if you are working on his case at all is a great timesaver and the extra ease of collection of your fee when the client has before him a complete file of the work which you have performed will greatly ease your fee collection burdens.

Billings

Once your work on the particular case is completed you must immediately begin the computation of your fee.

If your system of timekeeping records provides a running total of the time you have invested in the case it eases your burden of arriving at that figure. Multiply the number of hours by your pre-planned hourly rate to arrive at a basic fee figure. (Do this even if the matter is a contingent fee case in order to determine for yourself and your records just exactly the cost or value of that case to you in achieving your planned income. You may well be in for some surprises.)

The second step is to compare your basic fee—as determined from your time records—with a good, well-developed fee schedule. We do not have a statewide fee schedule which would be of greatest usefulness to you, but I would urge each local bar to develop a full recommended fee schedule and to attempt to correlate it with neighboring local bar associations.

The fee schedule is not—I repeat, is not—for the purposes of price fixing, setting minimum fees or establishing maximum ones. It is a chart, a graph, a guide—it assists you in comparing your performance with that of the average lawyer—it gives you an idea as to the average value of a case of your type. It cannot individualize for you but it is an excellent tool for the establishment of your fee.

Having established your basic fee and compared and reconciled it with the recommended fee in your up-to-date fee schedule, a consideration of the other elements of the case must be made before deciding upon the actual fee to the client. It may be necessary to increase your basic fee because you are particularly expert in the field—or perhaps the questions involved were novel or required some particular skill. It may be that the acceptance of the employment precluded your appearance in other cases which arose from the same transaction—or perhaps the amount involved or the benefit derived by the client was highly disproportionate with your basic charge.

You may then decide that the basic fee should not be increased quite as much as you judged—due to the certainty of compensation, the relatively small amount involved or the fact that the work was performed for an established client. The value to be placed on factors altering your actual fee from your basic fee can only be valued by you. Here you alone have the basic acquaintance with the case. Only your knowledge of the particular matter can act as the scale to make such judgments.

Once you have decided upon what you believe to be a fair, reasonable and adequate fee for your services—don't bill yet! Discuss that fee with one of your partners. It may well be that you have been overly modest in the evaluation of your own skills and endeavors and have failed to charge adequately. The partner may realize that your charges are not fair and reasonable in the light of the work you have performed. The more impersonal evaluation by a partner of a fee often results in a more realistic and usually higher charge than would otherwise have been made.

Finally, I would urge you to submit your bill for services promptly! And that bill should include an itemized account of all the work which you have performed on the case. Your client will soon forget the troubles he has experienced. His

thoughts become involved with other matters. His appreciation of your efforts in his behalf dwindle rapidly. The client is far more willing to pay your fee and does so much more readily while his problems are fresh in his memory.

A major step toward the "painless" and expedient collection of legal fees can be effected by the adoption of an office policy of regular billings. Your clients, as members of the American public and used to businesslike billing techniques, are not insulted by the receipt of a bill. They expect regular billing for goods and services received. This attitude is one which every law office should recognize and apply to its own advantage in so far as possible.

Your office billing policy should include the regular billing of all direct out-of-pocket expenses to the client on a 30 day periodic basis. A bill representing your legal fee should be rendered within 30 days of the completion of the matter. The ease and speed with which a fee is collected is at a maximum immediately upon termination of the matter. Do not lose the advantage of this timing by failure to bill promptly. If payment of your fee is not forthcoming within 30 days of the original billing you should make subsequent billings on a regular 30 day basis.

The type of bill which a client receives can vastly affect his attitude toward the charge. A bill merely stating, "For Legal Services Rendered" and quoting the fee does not tell the client what he is paying for—to him it appears arbitrary. He is unimpressed by what you have done and only the fee itself is in his mind.

Prepare your bill so that it gives first a brief synopsis of the matter. Include in the synopsis the type of case, length of time involved, time spent in Court, outcome of the case and amount involved. Following the synopsis present a detailed, chronological listing of all services rendered by you. This listing will include all conferences, telephone conversations, legal research and drafting, trial preparations, court appearances, etc. Your time records will easily supply this data and if you have kept ledger sheets on your time you may merely copy these sheets with a copy machine to expedite the matter.

Do not include in the listing of all services rendered the cost per hour. At the end of the bill place the total figure representing your fee for the entire matter. As clients frequently fail to distinguish between expenses and the lawyer's fee, it is essential that you bill expenses separately so that they are clearly distinguished in the client's mind from your fee.

The arrival at and collection of a proper legal fee is not difficult—it is the result of planning ahead—of researching the groundwork for your costs and charges—of establishing a fee basis clearly and understandably with the client—of using the most effective and self-explanatory billing techniques. With the new year upon us—with your records from last year's work at hand—now is the time to plan ahead.

(The letter received from the Disabled American Veterans on the bill is as follows:)

DISABLED AMERICAN VETERANS,
Washington, D.C., August 28, 1967.

HON. ROBERT T. ASHMORE,
Chairman, Subcommittee No. 2,
House Judiciary Committee,
Washington, D.C.

DEAR CONGRESSMAN ASHMORE: The Disabled American Veterans appreciate the opportunity to present its views in connection with H.R. 10216, a bill presently pending before your subcommittee. The bill has as its purpose the removal of arbitrary limitations upon attorneys' fees for services rendered in proceedings before administrative agencies of the United States and for other purposes.

As reported in our letter of February 25, 1966 in connection with consideration of S. 1522, 89th Congress, the Disabled American Veterans has no national convention mandate covering the subject matter of the bill and, accordingly, we have no official position on it. We continue, however, to have an interest in the proposed legislation.

The Disabled American Veterans is charged by its Constitution and By-laws with the advancement and betterment of the welfare of all disabled veterans. To do this, our organization maintains a corps of accredited representatives, sometimes referred to as National Service Officers or Attorneys-in-Fact, who are stationed in each Regional Office of the Veterans Administration. They are directly responsible to the National Service Headquarters staff of the DAV here in Washington, D.C., who in turn are responsible to the Congress. These Disabled

American Veterans representatives are accredited by the General Counsel of the Veterans Administration who may, if he sees fit, revoke this accreditation thereby making future representation impossible by the individual affected.

Our representatives serve hundreds of veterans and dependents daily and are not allowed by law to charge any fee whatsoever for their services. Their only compensation is that which they receive as salary from the National Organization plus the satisfaction of helping their fellow man. They are, in some instances, attorneys themselves having pursued their academic training beyond that received at American University where most were originally trained under the guidance of the Disabled American Veterans. These attorneys, who are National Service Officers, have been admitted to practice law by the Bar in their respective states.

We feel rather strongly that it was the original intent of Congress to pay directly to the claimant the entire amount of compensation or pension allowed which is so essential to his livelihood and it was not to be shared with anyone other than his family.

We merely want to insert into the record that reputable service is available to all disabled veterans by the Disabled American Veterans and other veterans organizations. However, if a veteran claimant should elect not to take advantage of this type service but to seek assistance from a private attorney then the attorney is entitled to a reasonable fee for services rendered.

We of the Disabled American Veterans have had harmonious relations with the legal profession in the past and look forward to a continuation of such relations. Members of the legal profession have, on many occasions, consulted with our national service officers seeking advice in connection with claims for Veterans Administration benefits. We certainly agree that any practicing attorney, representing a veteran's interest, is entitled to a reasonable fee for services rendered.

I am attaching to this statement a statistical summary of services rendered by our national service officers throughout the country for the period covering July 1, 1966 through June 30, 1967. We respectfully request that this document be entered into the record.

Again, Mr. Chairman, allow me to express our thanks for permitting us to express our sentiments on this matter.

Sincerely,

JOHN J. KELLER,
National Service Director.

RECAPITULATION OF SERVICE ACTIVITIES, JULY 1, 1966, THROUGH JUNE 30, 1967

All offices:

1. New service connections-----	4, 768
2. Compensation increased-----	26, 511
3. Compensation maintained and perpetuated-----	29, 891
4. Non-service-connected pension-----	6, 712
5. Non-service-connected pension increased-----	5, 821
6. Death compensation-----	1, 413
7. Death compensation increased-----	1, 288
8. Non-service-death pension-----	5, 877
9. Non-service-death pension increased-----	2, 396
10. Insurance death favorable-----	705
11. Accrued death benefits-----	1, 145
12. Burial allowances-----	6, 648
13. Vocational rehabilitation-----	78
14. Education and training-----	24
15. Miscellaneous-----	3, 670
16. Total awards-----	89, 421
17. Total monthly increases-----	\$10, 508, 124. 99
18. Total retroactive payments-----	\$124, 097, 353. 53
19. Full amount-----	\$134, 605, 478. 52
20. VA claims reviewed-----	239, 942
21. Rating board appearances-----	103, 465
22. Briefs prepared-----	53, 231
23. Membership-----	20, 557

(Letters from the Veterans of Foreign Wars concerning H.R. 10216 are as follows:)

VETERANS OF FOREIGN WARS OF THE UNITED STATES,
Washington, D.C., September 7, 1967.

HON. ROBERT T. ASHMORE,
Chairman, Subcommittee No. 2, Committee on the Judiciary,
House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your letter of July 26 concerning H.R. 10216.

You requested recommendations which could balance the interest of attorneys representing veterans while still taking into consideration the basic purposes of the laws providing for veterans benefits.

The legislative efforts of the Veterans of Foreign Wars are controlled almost entirely by the resolutions adopted at our National Conventions. It is noted that at our most recent National Convention, which was held in New Orleans, and concluded on August 25, 1967, that no resolutions were adopted relating to H.R. 10216, or the question of a limitation on the fee which may be charged by an attorney who represents a veteran or claimant, before the Veterans Administration. Consequently, this office has no official position concerning your bill.

Resolution No. 111 entitled "To Retain Limit on Attorney Fees", which was adopted at our New York National Convention in August, 1966, represents the latest expression by the delegates to our National Convention on this issue.

The Veterans of Foreign Wars is a nationwide service organization with trained service officers who are thoroughly familiar with the laws and Veterans Administration regulations. These service officers are stationed in every Veterans Administration Regional Office and some hospitals. As you know, our services are without cost to the claimant and are furnished without regard to whether the claimant is a member of our organization or entitled to membership.

Whether or not this well-established Service Officer system, which has served our Nation's veterans and their families so well, would be adversely affected by the removal of the \$10 attorney fee limitations, as presently provided by law, is the question which must be resolved. Inquiries within the Veterans of Foreign Wars provide many theories, with a great number predicting that the removal of the limitation could do irreparable harm to the Service Officer concept. The other side of the coin is that regardless of the fee charged, the Service Officers will continue to carry their share of the load. Increasing the fee limitation or eliminating it might well be the basis of increasing the representation of Service Officers rather than diminishing their workload, it is alleged by some.

Many veterans are not represented in their processing of claims before the Veterans Administration, and it is reasonable to assume that about the same measure of unrepresented claimants will continue, even if the fee limitation is greatly liberalized or repealed.

So far as the feelings of this organization are concerned, there are no facts which demonstrate the need for repealing the long-standing one-hundred year old policy of limiting attorneys fees to \$10 in their representation of claimants before the Veterans Administration.

One last thought on this issue—while the Veterans of Foreign Wars will continue to provide cost-free representation to all who may lack representation before the Veterans Administration, it would seem inconsistent that in one case a reasonable fee would be charged while in another case no fee would be charged. Recalling that the purpose of veterans monetary payments is to compensate for the loss of earning capacity in the case of compensation and to help a veteran or his widow with some of the basic necessities of life as it relates to the pension program, then, any substantial attorneys fee would be in derogation to the intent of Congress when it authorized these payments. To say it another way—there was no contemplation by Congress when it established the present compensation and pension rates that these payments would include any fees for representation before the Veterans Administration.

If, therefore, the attorneys fee limitation is repealed or greatly liberalized, it will have the effect of reducing the amount of compensation or pension which will finally be received by the veteran or his widow. In this respect, therefore, there could be a great effect on the present system because, as you know, when a claim is successfully accomplished before the Veterans Administration, the

entire amount of the recovery or of the award, which is granted, goes to the claimant.

It is hoped by the Veterans of Foreign Wars that this aspect of the present system will in no way be disturbed. If repealing the limitation on attorneys fees results in a reduction of veterans benefits, then it is undesirable so far as the Veterans of Foreign Wars is concerned. Like Pandora's box, no one seems certain what will happen if attorneys fees are repealed. It would appear, however, to be a foregone conclusion there would be a reduction in benefits, unless the Congress increased the compensation and pension payments to reflect the amount of the authorized attorneys fees.

These are some thoughts concerning this legislation which may be of some help in your consideration of H.R. 10216. As indicated in previous correspondence, the Veterans of Foreign Wars is officially opposed to this legislation as it relates to the limitation on attorneys fees of the Veterans Administration, and the delegates did not see fit to change that policy at our most recent Convention.

Thanking you for the opportunity to discuss this legislation and with all best wishes, I am

Sincerely,

FRANCIS W. STOVER.

Director, National Legislative Service.

VETERANS OF FOREIGN WARS OF THE UNITED STATES,
Washington, D.C., January 15, 1968.

HON. EMANUEL CELLER,
*Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.*

MY DEAR MR. CHAIRMAN: This is in reference to S. 1073, which would remove arbitrary limitations on attorneys fees for services rendered in proceedings before U.S. Government agencies, which passed the Senate on November 22, 1967 and has been referred to your Committee.

Because the Veterans Administration would be affected by this legislation, the V.F.W. has been watching this and similar legislation in the 89th Congress (H.R. 10216 and S. 1522) very closely.

Our official position is determined by the resolutions adopted at our National Conventions. At our 67th Convention, which was held in New York City in 1966, Resolution, identified as No. 111, was unanimously approved which related to S. 1522, 89th Congress, which was then pending before your Committee. A copy of that resolution is enclosed.

Pursuant thereto, it is respectfully, requested that an opportunity be provided to present our position on this legislation in the event a hearing or other formal action is taken on S. 1073 or similar bills.

With all best wishes, I am

Sincerely,

FRANCIS W. STOVER,

Director, National Legislative Service.

RESOLUTION No. 111—TO RETAIN LIMIT ON ATTORNEY FEES

Whereas the present system, instituted in 1878, fixing a \$10.00 limit on fees charged by attorneys representing claims before the Veterans Administration has been working equitably for the veteran and for the attorney; and

Whereas the veteran involved in a claim is in fact only seeking recognition and the certain privileges usually accorded by a grateful government for sacrifices made during military service in the interest of national welfare and national security; and

Whereas there is danger that a commercial aspect to such representation by the attorney would result from an increase in fees: Now, therefore, be it

Resolved, by the 67th National Convention of the Veterans of Foreign Wars of the United States, That we oppose any change in the present system of administering veterans' benefits, which has served our government and the veterans so well for so many years.

Adopted at the 67th National Convention of the Veterans of Foreign Wars of the United States, held at New York, New York, August 21 through 26, 1966.

(A letter from the American Veterans Committee concerning the bill is as follows:)

AMERICAN VETERANS COMMITTEE,
Washington, D.C., July 12, 1967.

HOUSE JUDICIARY COMMITTEE,
Subcommittee No. 2,
Rayburn House Office Building,
Washington, D.C.

DEAR SIR: The American Veterans Committee is interested in H.R. 10216, insofar as it relates to the practice of attorneys before the Veterans Administration. Our organization has assumed the responsibility of representing many veterans in their claims before the Veterans Administration and we shall continue to provide such representation. It is our belief, however, that there are many occasions in which it would be most useful for the veteran if he could select independent counsel rather than rely on a veterans organization.

The present law with regard to attorney fees for those representing veterans is so restrictive that it is almost impossible for a veteran to obtain independent counsel to represent him. We see no reason for this restriction. The provision in HR 10216 which limits the fee to the reasonable value of the services rendered will provide sufficient protection to the veteran and at the same time give attorneys the necessary incentive to represent such claims.

Our organization therefore supports HR 10216.

We would appreciate the incorporation of this letter into the record.

Sincerely yours,

ANDREW E. RICE, *Legislative Chairman.*

(The departmental reports are as follows:)

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., July 24, 1967.

HON. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice on H.R. 10216, a bill "To restore to persons having claims against the United States their right to be represented by legal counsel of their own choosing."

The legislation, which would provide a method for the regulation of attorneys' fees where claims are prosecuted against the United States, is so entitled because it is founded upon the premise that certain fee limitations imposed by existing statutes applicable to judicial and administrative proceedings are so stringent as to hinder a claimant in obtaining competent counsel of his choice. We believe that the title overstates the existing situation. However, we support the principal objective of the bill, which is to establish a realistic and flexible method of determining fair and equitable attorneys' fees based upon services rendered to the client.

The principal features of the bill may be summarized as follows: Section 1 of the bill would abolish all restrictions on attorney's fees in cases arising under the Federal Tort Claims Act, by repealing section 2678 of title 28, United States Code.

Section 2 would add a subchapter on attorneys' fees to chapter 5 of title 5, United States Code. Its provisions would apply to legal fees chargeable in proceedings before. The Secretary of Health, Education and Welfare under Titles II and XVIII of the Social Security Act; the Administrator of Veterans' Affairs; the Foreign Claims Settlement Commission; the Secretary of Labor under the Federal Employees' Compensation Act and the Longshoremen's and Harbor Workers' Compensation Act; the Railroad Retirement Board under the Railroad Unemployment Insurance Act; and the President or his delegate under the Trading With the Enemy Act.

Each of these agencies is directed to prescribe rules for the determination of reasonable attorneys' fees, taking into consideration criteria which shall include: (1) the time and professional skill required for investigation, evaluation, and presentation or prosecution of the claim, (2) the value of the benefits resulting

from the services, and (3) the degree of certainty or contingency about payment of the fee. (5) The agency may take into account differing levels of professional charges prevailing in different geographical areas, but the rules "shall in no event be so restrictive as ordinarily to discourage the retention of attorneys of recognized professional stature in connection with any claim before any agency."

The agency may also establish standard fees for certain services based upon: (1) the type of claim, (2) the administrative level at which it is acted upon, and (3) the amount awarded or action taken thereon.

Under the procedure detailed in the bill, an attorney who prosecutes a claim before a designated agency would report the fee charged to the agency concerned not later than 31 days after the termination of the services rendered. If the recorded fee exceeds the standard fee, or if there is no established standard fee, the agency may by rule require that the report contain such information as necessary to permit a determination of a reasonable fee. The failure to file a report, or the submission of a false or misleading report, is made a misdemeanor punishable by a fine of \$1,000 or imprisonment for not more than 1 year, or both.

If the agency should find that the fee reported is in excess of the applicable standard fee, or allowable reasonable fee, it shall within 21 days determine the amount of a reasonable fee in accordance with its rules, and serve notice upon the attorney of its determination. An attorney who, after the service of such notice on him, accepts a fee in excess of the maximum fee determined by the agency, is guilty of a misdemeanor. (The provisions relating to the determination of fees by the agency are not applicable where a fee is paid to an attorney who is an employee, or who is paid on a retainer basis, or who is not paid by the claimant or a parent, spouse or child of a claimant.) An attorney upon whom such notice has been served may, within 21 days, request a conference or submit additional materials in support of the fee he has claimed. However, if the agency does not make a new determination within 49 days, the fee determined in the agency's notice becomes effective as its final determination.

The agency must serve notice on the attorney of the date that this final determination became effective, and of its amount. Within 60 days of that date, the attorney may seek judicial review, or report to the agency that he has reduced his fee to an amount not exceeding the final determination, and has refunded any amount received in excess of that determination. If the attorney fails either to bring an action, or file such a report, the agency must also send a notice of its final determination to the claimant. Acceptance of a fee in excess of the amount determined by the agency while it has not been superseded by a court order, constitutes a misdemeanor.

Section 3 provides that an attorney whose fee is reduced by agency determination may, within 60 days after the determination became effective, bring an action in a U.S. district court. The action may be based on one or both of the grounds that (1) the agency erroneously applied its rules for the determination of reasonable fees, or (2) the rules in question are not in conformity with the law. A bar association representing at least 10 percent of the attorneys in the district in which the action is brought may appear as a party of its own motion and as of right. If the court does not sustain the agency's determination, it shall determine a reasonable fee, and order the attorney to refund any excess in the amount received by him over the amount approved or fixed by the court. Acceptance of payment in excess of this amount is a misdemeanor.

An attorney whose fee has been reduced by a final determination of an agency to less than the amount received by him, and who neither seeks, judicial review nor refunds to the claimant the excess, is liable to the claimant in a civil proceeding for an amount representing twice the amount of the excess, or \$200, whichever is greater.

The remaining sections of the bill would amend provisions of existing law which are inconsistent with its provisions.

When H.R. 10216 was introduced in the House of Representatives its sponsor, Congressman Ashmore, stated that the bill had been drafted in cooperation with the American Bar Association, and that it had been very painstakingly drawn to overcome the objections which were raised to S. 1522, a similar bill introduced in the 89th Congress. We believe the bill represents an improvement over the previous proposal in that it shifts the burden of establishing a reasonable fee, in the event of a controversy between an attorney and an agency, from the agency to the attorney. S. 1522 required that an agency institute judicial review to defend its action. However, we have several serious objections to H.R. 10216 as drafted.

First, as a matter of policy, we do not believe that it would be advisable at this time to remove all restrictions on attorneys' fees in administrative or judicial proceedings under the Federal Tort Claims Act. The statute which the bill would repeal, 28, United States Code, 2678, was amended only last year, at which time attorneys' fees were substantially liberalized. (Act of July 18, 1966, sec. 4, Public Law 89-506, 80 Stat. 307.) It now permits an attorney to claim a fee not in excess of 25 percent of a judgment rendered in a judicial action, and a fee not in excess of 20 percent of an award, compromise or settlement in an administrative determination of a claim. We have no information which leads us to believe that these fees are inadequate, and are aware of no reason which would require the reversal of a Congressional determination after so short an interval. Therefore, we recommend against the enactment of section 1 of H.R. 10216.

Second, we believe that the procedure specified in the bill is unnecessarily complicated and would impose an undue burden both upon the agencies called upon to administer it, and the attorneys practicing before them. Our description sets forth the many steps which it prescribes. Apart from the general complexity of the provisions, the most vulnerable point of the prescribed procedure is the stipulation that the fee reported by an attorney becomes final within 21 days after the filing, unless the agency finds that it is excessive and determines the amount of a reasonable fee. Considering the number of proceedings pending before some agencies, including, for example, some twenty thousand hearings which are conducted annually by the Department of Health, Education, and Welfare alone, it would seem that the examination of the attorney's report in so short a time would necessarily be perfunctory. If the procedure established in this bill is retained, we suggest that a longer period of time, such as 45 days, or more, be allowed at this stage.

In our view, however, the basic statutory plan could be simplified greatly without impairing its goal of assuring the award of equitable attorneys' fees through the application of a schedule for reasonable and standard fees established by agency rules, and the requirement that the fees be reported to the agency concerned to insure compliance. We think that the reporting requirement will eliminate the need for agency determination of fees in most cases. Where a reported fee is disallowed and differences between the attorney and the agency cannot be resolved informally, we think that the attorney who feels himself aggrieved by the agency's determination should have an immediate right of judicial review. We also think that an attorney who believes that the fees permitted by agency rules are inadequate to compensate him for work done in a specific case should be permitted to apply to the agency for the allowance of a higher fee, with the right of judicial review if the agency fails to approve the fee he seeks, or to act upon his request. We believe that the intricate procedure prescribed by the bill, which goes far beyond establishing a right of judicial review for resolving occasional differences between attorneys and agencies concerning a fee, is unduly cumbersome. We also object to the manner in which criminal sanctions are provided for failure to comply with each procedural step. The drafting of the bill produces an impression of underlying distrust in the relationship between Government agencies and members of the bar which we do not believe was intended.

The proposed uniform penalty for violations of this bill, a fine of \$1,000 or imprisonment for 1 year, or both, seems reasonable if the Congress should determine that criminal penalties are necessary. We are aware that similar penalties now exist for the violation of statutory prohibitions on charging excessive fees for prosecuting claims against the government. However, we suggest it may be preferable to substitute civil sanctions, such as a ban on further appearances before the agency in question, or the assessment of a civil penalty, or both. Violations could also be referred to an appropriate bar association for disciplinary measures.

The proposed section 758 of the new subchapter would make the attorney who overcharges his client liable to the claimant in a civil action for twice the amount of a surcharge, or \$200, whichever is greater, plus court costs and attorney's fees. We suggest that there might also be a provision to allow the suit to be brought by the Attorney General on behalf of the claimant. Or, a single action could be authorized to recover a refund for a claimant and a civil penalty assessed by the Government.

Also, in the matter of penalties, we note that the amended section 3405 of title 38, United States Code, reenacts a penal provision which prescribes a fine of not more than \$500, or imprisonment for not more than 2 years at hard labor, or both, for accepting fees in excess of those allowed under the title, but excepts

therefrom fees to which subchapter IV of chapter V of title 5 applies. We suggest that the last sentence of section 3405 of title 38, United States Code, be amended to conclude "shall be fined not more than \$1,000 or imprisoned for not more than 1 year, or both," if this penalty is adopted for violation of the provisions of the new subchapter, or that the entire section be repealed as superfluous.

Subject to the foregoing considerations, the Department of Justice has no objections to the enactment of the proposed legislation.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely,

RAMSEY CLARK, *Attorney General.*

VETERANS' ADMINISTRATION,
OFFICE OF THE ADMINISTRATOR OF VETERANS AFFAIRS,
Washington, D.C., July 12, 1967.

HON. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for a report by the Veterans' Administration on H.R. 10216, 90th Congress, a bill "To restore to persons having claims against the United States their right to be represented by legal counsel of their own choosing."

This bill deals with the regulation of attorney fees associated with claims asserted against the United States.

In a statement contained in the Congressional Record at the time of its introduction, the sponsor noted that H.R. 10216 was drafted in cooperation with the American Bar Association and was designed to meet certain objections raised during consideration of S. 1522, 89th Congress, which had the same general purpose as the current bill. (We reported to your committee on S. 1522 in the form passed by the Senate, on August 15, 1966.)

H.R. 10216 affects two broad categories of claims against the Government. It would repeal the provisions of section 2678 of title 28, United States Code, prescribing limitations in connection with claims under the Federal Tort Claims Act. The repeal would be effective, however, only with respect to claims which accrue after the date of the bill's enactment. (In passing, we note that the 10-percent attorney fee limitation in connection with claims under the Military Personnel and Civilian Employees Claims Act of 1964 (31 USC 240-243), added by the amendment to that act made by Public Law 89-185, is not nullified by H.R. 10216, possibly by inadvertence.)

The other broad category of attorney fee limitations within the scope of H.R. 10216 relates to claims under laws administered by a number of different agencies, including the Veterans' Administration. The two provisions of the laws which we administer which would be affected are: chapter 59 of title 38, United States Code, relating to representation with respect to claims for veterans' benefits generally, and section 784 of that title prescribing a 10 percent limitation on attorneys' fees in connection with suits in the Federal district courts with respect to veteran insurance matters.

Section 3404 of title 38, United States Code, provides that the Administrator shall determine and pay fees to agents or attorneys in allowed claims for veterans' benefits, subject to a maximum of \$10 for any one claim. Under the authority provided by this section regulations have been promulgated limiting the fee to \$2 where the claim involved is for increased benefits, as opposed to an original claim (38 CFR 14.655). Agents or attorneys charging or receiving a fee in excess of the authorized amount, are subject to a fine or \$500 or imprisonment at hard labor for up to 2 years, or both (38 U.S.C. 3405). For your information and convenience, there is enclosed a copy of chapter 59 of title 38, United States Code, containing the full text of the aforementioned agent or attorney fee limitations, and the penalty provisions associated therewith. Also enclosed for your information is a brief summary of the history of this fee limitation.

In lieu of the current monetary limitation of \$10 upon attorney fees, H.R. 10216 would establish a three-stage procedure designed to permit a reconciliation of the basically conflicting policies of protecting veterans, their widows and orphans against agreeing to pay a disproportionate amount of their benefits for attorney

fees, and the right of attorneys who represent claimants before the Veterans' Administration to receive reasonable compensation for their services.

The agency would be authorized to establish a schedule of standard fees which would take into account one or more of the following factors: (1) the type of claims, (2) the administrative level at which it is acted upon, and (3) the amount awarded or other action taken thereon. If the attorney charged a fee equal to or less than the applicable standard fee he need take no action, other than to report the amount of the fee to the agency. If, however, the attorney believed he was entitled to an amount in excess of the standard fee, he could request the agency to determine a reasonable fee based upon the facts in the individual case. The agency's determination would be based upon criteria which it established, by regulation, taking into account certain factors presented by the bill, such as the time and professional skill required, the value of the resulting benefits, and the degree of certainty or contingency about the payment of the fee. Finally, if negotiation between the attorney and the agency fail to reach a determination acceptable to the attorney, he would have the right to go into the Federal district court, where the agency determination would either be upheld or an appropriate fee determined.

The current stringent limitation has obviously not represented a congressional determination of a "reasonable" attorneys' fee, in every case, for many years, if ever. To the contrary, it can only be viewed as an indication of a congressional belief that claimants under the veterans laws receive proper representation without cost to them through resources other than attorneys.

Representation has been provided without cost by the various accredited service organizations for many years. These organizations have well-trained representatives who are thoroughly familiar with the laws and Veterans' Administration regulations relating to veterans benefits. Moreover, most States have departments whose sole responsibility is to furnish aid and assistance to veterans and their dependents. In addition, claimants have the benefit and assistance of Veterans' Administration contact representatives, located throughout the country, who advise them of their rights and assist them in preparing and filing necessary papers.

If the longstanding policy strictly limiting fees payable to attorneys in veterans claims matters is to be reversed, H.R. 10216 does have an advantage over prior bills in that it spells out in detail the various factors to be considered in determining the amount an attorney may charge.

The last sentence of the proposed section 583 of title 5 states that the "rules may take into account different levels of professional charges prevailing in different geographical areas, but shall in no event be so restrictive as ordinarily to discourage the retention of attorneys of recognized professional stature in connection with any claim before the agency." We view this language, as a mandate that, in establishing a reasonable fee where the attorney proposes to charge an amount in excess of the standard fee, the agency should set a fee which would not be less than the minimum fee established for administrative practice by the bar association of the locality where such recommended fees have been established.

From a practical standpoint, this would mean that the "standard fee" which the agency would establish under the proposed section 584 of title 5, would also need to reflect the bar association's recommended fees. To do otherwise would be unrealistic. Accordingly, unless there is clear indication of a contrary legislative intent we would propose to establish both reasonable and standard fees in accordance with this understanding. Of course, the attorney would be responsible for making his own arrangements for collecting his fee since the Veterans' Administration would continue to make payments of the award directly to the claimant, as required by our basic laws.

If it is not the congressional intent that the minimum fees recommended by a bar association fee schedule should be the controlling factor in the establishment of fees for veterans' claims, we would confront the problem of attempting to strike a balance between the concept that the claimant should be protected from excessive fees in his particular circumstances of disability and/or poverty and the attorney's right to receive reasonable compensation for his services. This is illustrated by those cases where the benefits awarded are small (e.g. \$21 per month for a 10-percent service-connected disability), and in cases, such as pension for a non-service-connected disability, or death, where eligibility for the benefit is based on need as measured by income and assets. In cases of this type, since the claimant would have little or no income, even a small attorney's fee could impose a

financial burden and, thus, defeat the purpose of the benefits the Government has provided.

Section 5 of the bill proposes an amendment which removes the 10-percent fee limitation now set forth in 38 U.S.C. 784(g), applicable to insurance claims litigated in Federal district courts.

Existing law provides that the court, as a part of its judgment in a Government insurance case, shall determine and allow reasonable fees for the attorneys of the successful party, not to exceed 10 percent of the amount recovered, and it is required that such fee be paid by the Veterans' Administration out of the payments to be made under the judgment at a rate not exceeding one-tenth of each such payments until paid (many of the judgments involve life annuity payments).

Under the procedure proposed by the bill, the Veterans' Administration would establish a schedule of standard fees and criteria for establishing reasonable fees in insurance litigation, in a manner identical with that which would be required for administrative claims before the agency. If the attorney is not satisfied with the "standard" fee prescribed, he would negotiate with the agency for a determination of a "reasonable" fee under the circumstances of the particular case. The final decision, however, would be made by the district court. It should be pointed out that, unlike the situation involving veterans' claims before the agency, the bill would require that the Veterans' Administration pay the attorney's fee "in whole or part" out of the insurance payments to be made under the judgment or decree.

In light of the above, although the procedure proposed by H.R. 10216 is definitely an improvement from that proposed by S. 1522, 89th Congress, we cannot recommend its enactment insofar as it relates to veterans claims matters.

We are advised by the Bureau of the Budget that there is no objection from the standpoint of the administration's program to the presentation of this report to your committee.

Sincerely,

W. J. DRIVER,
Administrator.

HISTORY OF THE AGENT AND ATTORNEY FEE LIMITATION WITH RESPECT TO VETERANS' BENEFIT CLAIMS

(a) As early as July 14, 1862, Congress limited the fees of agents or attorneys who assisted a claimant in establishing a claim for a pension, bounty or other allowance before the Pension Office (12 Stat. 566). The basic fee authorized was \$5, with additional small amounts authorized under certain conditions.

(b) This 1862 act was amended in 1868, raising the authorized fee to \$10 (13 Stat. 387).

(c) In 1866, a joint resolution was adopted involving, "Bounties to Colored Soldiers, and the Pensions, Bounties and Allowances to their Heirs." It contained an agent or attorney fee limitation which ranged from \$5 to \$10, depending upon the amount of the claim collected (14 Stat. 367).

(d) The fee limitation applicable to claims for pensions or bounty land, was again changed in 1870 to provide that a fee up to \$25 could be authorized upon approval by the Commissioner of Pensions. No fee in excess of \$10, however, could be paid without such approval (16 Stat. 193).

(e) The 1870 provision was repeated in the pension law consolidation of 1873 (17 Stat. 586).

(f) In 1878, this fee limitation was changed in pension cases to again limit the authorized fee to \$10 (20 Stat. 243).

(g) The 1878 act was repealed in 1884 and Congress again reverted to the \$10 to \$25 fee limitation (23 Stat. 98).

(h) In 1890, pensions were granted to soldiers and sailors who were incapacitated for the performance of manual labor, and the act granting such pensions limited the agent or attorney fees for assisting a claimant under that act to \$10 (26 Stat. 182).

(i) In 1892, an act granting pensions to Army nurses prohibited the payment of any agent or attorney fee (27 Stat. 348). Similar prohibitions were contained in a 1901 act relating to pensions to remarried widows (31 Stat. 1445), and a

1907 act granting pensions to certain enlisted men, soldiers and officers, who served in the Civil War and the war with Mexico (34 Stat. 879).

(j) In 1912 and 1916, acts increasing certain pension benefits, included a prohibition against the payment of any agent or attorney fees except where an original claim was involved, and then such fee was limited to \$10 (37 Stat. 112 and 39 Stat. 844).

(k) In 1917, a 1914 act establishing the war risk insurance program was amended by providing a new section limiting agent and attorney fees to litigated cases, and even then restricting the fee to 10 percent of the amount recovered. No fees were authorized unless litigation was involved (40 Stat. 102).

(l) This act was amended in 1918 and agent and attorney fees were authorized in nonlitigated cases up to \$3 for assisting in preparing necessary claim papers (40 Stat. 555).

(m) In 1918, pensions were granted to widows and minor children of officers and enlisted men who served in the war with Spain, the Philippine Insurrection or in China. Fees were limited to \$10 (40 Stat. 903).

(n) Pension benefits were extended to soldiers and sailors of the conflicts listed in subparagraph (m) in 1920 and an agent or attorney fee of up to \$20 was authorized where the agent or attorney assisted in processing the claim (41 Stat. 982).

(o) In 1922, pension benefits as a result of service set forth in subparagraph (m) were extended to certain new classes of individuals. Agents or attorney fees were limited, however, to those cases involving original claims for pension, and then not to exceed \$10 (42 Stat. 834).

(p) In 1924, an act providing adjusted compensation to veterans of the World War prohibited the payment of any agent or attorney fees (43 Stat. 121).

(q) Also in 1924, laws granting compensation, pension, disability allowance and other similar benefits were repealed, and the benefits provided thereby were consolidated into a new World War Veterans' Act. Agent or attorney fees were limited to \$10 for assistance in the preparation of a claim, and to 5 percent of the amount recovered in litigated insurance cases (43 Stat. 607).

(r) This act was amended in 1925 to increase the amount of the agent or attorney fees authorized in litigated insurance cases from 5 percent to 10 percent of the amount recovered (43 Stat. 1302).

(s) In 1926, pensions were granted and increased to certain soldiers, sailors, and marines (and their widows) of the Civil and Mexican Wars, and to widows of the War of 1812, and to Army nurses. Attorney fees were limited to \$10 for assistance in filing original claims (44 Stat. 206).

(t) In 1926, an act amending the World War Adjustment Compensation Act, prohibited the payment of any attorney fee (44 Stat. 826).

(u) Pension benefits were extended or increased again in 1927 to certain soldiers who served in the Indian Wars from 1817 to 1898. A \$10 fee limitation (applicable to original claims only) was included (44 Stat. 1361).

(v) In 1928, an act granting pensions and increase of pensions to widows and former widows of Civil War veterans, prohibited the payment of any attorney fee (45 Stat. 714).

(w) Pensions were again increased or extended in 1930 to certain soldiers, sailors, and nurses of the War of Spain, the Philippine Insurrection or the Chinese Relief Expedition. Agent or attorney fees were limited to \$10 for original claims (46 Stat. 492). Another 1930 act increasing pensions as a result of Civil War service contained a similar provision (46 Stat. 529).

(x) As a result of the Consolidation Act of 1930, the Pension Bureau, United Veterans Bureau and the National Homes for Disabled Volunteer Soldiers were merged into the Veterans' Administration. No change was made with respect to the various provisions then in effect involving agent or attorney fee limitations. In 1936, however, a law was enacted which made a \$10 fee limitation applicable to all claims under statutes administered by the Veterans' Administration (Public Law 844, 74th Congress; 38 U.S.C. 102).

(y) The laws administered by the Veterans' Administration were consolidated in 1957 (Public Law 85-56), and recodified in 1958 (Public Law 85-857). The \$10 fee limitation previously applicable to all VA benefit claims (except those involving litigated insurance matters), previously located in 38 U.S.C. 102, was recodified and placed in 38 U.S.C. 3404 where it is presently located.

CHAPTER 59—AGENTS AND ATTORNEYS

Sec.

- 3401. Prohibition against acting as claims agent or attorney.
- 3402. Recognition of representatives of organizations.
- 3403. Recognition with respect to particular claims.
- 3404. Recognition of agents and attorneys generally.
- 3405. Penalty for certain acts.

§ 3401. Prohibition against acting as claims agent or attorney

No individual may act as an agent or attorney in the preparation, presentation, or prosecution of any claim under laws administered by the Veterans' Administration unless he has been recognized for such purposes by the Administrator.

§ 3402. Recognition of representatives of organizations

(a) (1) The Administrator may recognize representatives of the American National Red Cross, the American Legion, the Disabled American Veterans, the United Spanish War Veterans, the Veterans of Foreign Wars, and such other organizations as he may approve, in the preparation, presentation, and prosecution of claims under laws administered by the Veterans' Administration.

(2) The Administrator may, in his discretion, furnish, if available, space and office facilities for the use of paid full-time representatives of national organizations so recognized.

(b) No individual shall be recognized under this section—

(1) unless he has certified to the Administrator that no fee or compensation of any nature will be charged any individual for services rendered in connection with any claim; and

(2) unless, with respect to each claim, such individual has filed with the Administrator a power of attorney, executed in such manner and form as the Administrator may prescribe.

(c) Service rendered in connection with any such claim, while not on active duty, by any retired officer, warrant officer, or enlisted man of the Armed Forces recognized under this section shall not be a violation of section 281 or 283 of title 18, or a violation of section 99 of title 5.

§ 3403. Recognition with respect to particular claims

The Administrator may recognize any individual for the preparation, presentation, and prosecution of any particular claim for benefits under any of the laws administered by the Veterans' Administration if—

(1) such individual has certified to the Administrator that no fee or compensation of any nature will be charged any individual for services rendered in connection with such claim; and

(2) such individual has filed with the Administrator a power of attorney, executed in such manner and in such form as the Administrator may prescribe.

§ 3404. Recognition of agents and attorneys generally

(a) The Administrator may recognize any individual as an agent or attorney for the preparation, presentation, and prosecution of claims under laws administered by the Veterans' Administration. The Administrator may require that individuals, before being recognized under this section, show that they are of good moral character and in good repute, are qualified to render claimants valuable service, and otherwise are competent to assist claimants in presenting claims.

(b) The Administrator, after notice and opportunity for a hearing, may suspend or exclude from further practice before the Veterans' Administration any agent or attorney recognized under this section if he finds that such agent or attorney—

(1) has engaged in any unlawful, unprofessional, or dishonest practice;

(2) has been guilty of disreputable conduct;

(3) is incompetent;

(4) has violated or refused to comply with any of the laws administered by the Veterans' Administration, or with any of the regulations or instructions governing practice before the Veterans' Administration; or

(5) has in any manner deceived, misled, or threatened any actual or prospective claimant.

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

(1) shall be determined and paid as prescribed by the Administrator;

(2) shall not exceed \$10 with respect to any one claim; and

(3) shall be deducted from monetary benefits claimed and allowed.

§ 3405. Penalty for certain acts

Whoever (1) directly or indirectly solicits, contracts for, charges, or receives, or attempts to solicit, contract for, charge, or receive, any fee or compensation except as provided in sections 3404 or 784 of this title, or (2) wrongfully withholds from any claimant or beneficiary any part of a benefit or claim allowed and due him, shall be fined not more than \$500 or imprisoned at hard labor for not more than two years, or both.

THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE,
Washington, July 11, 1967.

HON. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This letter is in response to your request of May 31, 1967, for a report on H.R. 10216, a bill to restore to persons having claims against the United States their right to be represented by legal counsel of their own choosing.

The Department believes that this bill is a considerable improvement over S. 1522, 89th Congress. On the other hand, it also believes that section 206 of the Social Security Act and the regulations of the Social Security Administration (recently and comprehensively revised) give full recognition to attorney-client relationships and offer more substantial protection to the legitimate interests of attorneys and claimants with respect to determining the fees attorneys may charge their clients in social security cases, than H.R. 10216.

The bill suggests three criteria that may be considered by an agency in determining the reasonableness of a fee. It is stated, moreover, in the explanation of this provision of this bill that these factors "are taken in substance from among those set out in canon 12 of the Canons of Professional Ethics of the American Bar Association." Congressional Record, May 23, 1967, H5974. To be sure the Department need not adopt all of these criteria in fixing a fee. Still two of the suggested criteria (there is no assurance they would not be used by courts in reviewing an agency determination even if the agency did not use them), namely, the value of the benefits resulting to the claimant from the services of the attorney, and the degree of certainty or contingency about payment of his fee, could, if so used, tend to unduly inflate the amount of an attorney's fee. In fact, our misgivings relative to the amount of the benefits as a factor in determining a fee in a social security case were best summarized by the Court of Appeals for the Fourth Circuit in *McKittrick v. Gardner*, — F. 2d — (4 Cir., May 30, 1967). In holding that the amount of the benefits should not be a determinative factor in fixing an attorney's fee in a social security case, Chief Judge Haynsworth, speaking for the court, said:

"The rate of accrual of benefits varies without any relation to the merits of the claim. It is fixed by such things as the claimant's prior earnings and the number of his dependents. The issue in the usual case is entitlement to benefits; their computation is rarely in question. Unlike personal injury actions, therefore, the amount of the recovery bears no relation to the lawyer's skill, effort, or effectiveness."

Similarly, our misgivings about the third criterion in the bill, the degree of certainty or contingency about the payment of the fee, can be summarized also by reference to *McKittrick*. Recognition undoubtedly need be given to the fact that where no benefit is payable, an attorney may not receive a fee for his services. Nonetheless, the determination of fees in social security cases, as Chief Judge Haynsworth said, should not be effected by "blind deference to contractual fee arrangements." It should be made clear in the bill, therefore, that this criterion, if used in social security cases, should not be so applied as to permit contingent fee arrangements to result in excessive fees to the detriment of claimants.

Much more realistic, in the Department's view, are fairer also to attorney and client are the criteria for determining a fee in the recently revised regulations of the Social Security Administration (32 F.R. 7750-7752, May 27, 1967), a copy of which is attached to this report. This is so because the factors these regulations list, section 404.976(b), follow essentially *all the basic criteria* for determining fees in canon 12 of the Canons of Professional Ethics: the nature of the services rendered, the complexity of the case, the amount of time spent on the case, the level of skill and competence required in the rendering of services, and

the results achieved. Moreover, the regulations further recognize as a factor in determining a fee what the Courts of Appeals for the Fourth, Sixth, and Seventh Circuits have said should be borne in mind in fixing any such fee, namely the purpose of the social security program "to provide a measure of economic security for the beneficiaries thereof." *Redden v. Celebrezze*, 370 F. 2d 373 (4 Cir., 1966); *Sims v. Gardner*, — F. 2d — (6 Cir., 1967); *Hopkins v. Gardner*, 374 F. 2d 726 (7 Cir., 1967). This consideration is wholly absent from H.R. 10216.

There is, in addition, no provision in H.R. 10216 which gives the claimant the right to the review of a fee charged by an attorney. This omission is equally critical. On the other hand, the fee petition form to be made available to attorneys under the recently revised regulations of the Department afford claimants as well as attorneys this important right. The Department also asks the attorney to indicate if he and his client have agreed upon a fee and, if so, the amount. The claimant, moreover, is advised that he has 10 days from the date he is informed of the attorney's request for a fee to submit any comments or information which he might wish to have considered. If, however, no such comments are received and the fee requested is not excessive, the fee is approved. Should the claimant protest the amount of the fee requested, the attorney then is furnished with a copy of the protest and he is afforded an opportunity to comment before the fee is authorized. After a fee has been authorized, administrative review of the agency's action is further available at the request of either the attorney or the claimant. H.R. 10216 should, if it is to be enacted, contain at least comparable provisions.

Further, not only does H.R. 10216 fail to provide claimants with the right to obtain review of fees they may question, but it also does not give the Department an adequate opportunity to assure claimants proper protection in this regard. Specifically, the amendment adding section 585 to title V of the United States Code appears to contemplate that an attorney may charge and collect a fee even before he reports it to the Department. If he charges and collects an excessive fee, the Department then has no authority under the bill to institute an action to recover the amount of the overcharge. The burden would be entirely on the claimant to try to recover this amount. Also, while the bill prescribes a penalty for an attorney who (a) fails to file a report of a fee, (b) falsifies facts in connection with a fee report, or (c) charges a fee after an agency has served notice of its determination of a lower fee, there is no penalty provided for an attorney who refuses to refund a fee which he collected before he was informed by the agency that he was entitled to a lower fee.

Likewise, the 21 days the bill gives the Department to judge the reasonableness of a fee may, in some cases, be entirely too short. Manpower considerations alone, in a program as vast in scope as social security (where, for instance, there are about 20,000 hearings a year), could make it highly difficult for the Department to review all such fees within the time prescribed by the bill. Thus, although the Department gives priority attention to all fee petitions, unavoidable delays arise from needs (a) to obtain additional pertinent information, and (b) to give a claimant the opportunity to present evidence if he questions the facts alleged in an attorney's petition. The bill should be revised to permit greater flexibility in this regard because an arbitrary time limit of such short duration might tend to force the Department to make hasty determinations based on incomplete evidence which could be unfair to both claimants and attorneys.

We also are concerned about section 2(a) of the bill which adds section 582(3) to title V of the United States Code. This section would appear to give the Department (although it is not clear how it relates to section 4(b) of the bill amending section 206(b) of the Social Security Act), the right to approve fees for services performed by attorneys before the courts in prosecuting appeals from its decisions. The Department believes, however, that this should be the function of the courts since they are in the better position to determine the quantity, quality, and value of such services. Our reasons for this are likewise explained in *McKittrick*. In referring to section 206(b) of the Social Security Act, the court said:

"The statute imposes no great burden upon the courts. In the ordinary case, no evidentiary hearing is required. The district judge will know what assistance he received from the claimant's attorney. If, with little or no assistance, he is required to read the entire administrative record, discover the issues and do the basic research in his library before he approaches performance of his ultimate decisionmaking role, he will know it. He will know it if, in our adversary system, the lawyers have performed, superbly or adequately, their function of eliminating

irrelevancies, pointing up the issues to be decided and supplying the court with the legislative and judicial materials which he must have at hand when he reaches his ultimate conclusion. He will know, too, the worth of their analyses of the relevant materials, for he will have appraised them in depth in coming to his own decision. If the lawyer's performance has been somewhere in between the excellent and the wholly unacceptable, the judge will know it in all of its gradients. The judge, who has decided a case, need hold no evidentiary hearing to determine the extent and quality of the assistance he received from the lawyers in reaching his conclusion and in preparing an opinion.

* * * * *

* * * There may be extraordinary cases in which the lawyer's claim may depend in part upon factual assertions which are questioned by the Secretary, but in the vast majority of cases, the judge's own observation of the lawyer's performance in the adjudicatory process will be a sufficient basis for his allowance of a reasonable fee. * * *

While the Department, as was stated in testimony before the Subcommittee No. 2 of the House Committee on the Judiciary on August 11, 1966, in relation to S. 1522, 89th Congress, has no basic objection to an attorney obtaining court review of his fee as determined by the Department for services performed before it, the Department believes that H.R. 10216 establishes an unduly complex mechanism by calling for oral testimony, depositions, affidavits, and, in effect, for a trial *de novo* for determining fees to "remedy" a situation that does not truly exist in social security cases, and that attorneys are not disadvantaged by the fee determination policies of the Department. It believes that the fees it allows attorneys demonstrate that they have suffered no such disadvantage. For example, during the calendar year 1965, the Bureau of Hearings and Appeals of the Social Security Administration acted upon 661 petitions from attorneys. The average fee authorized was \$273, the fees ranging from \$50 to \$1,500. The requests were from \$50 to \$4,000. During the calendar year 1966, the Bureau of Hearings and Appeals acted upon 831 petitions from attorneys. The average fee authorized was \$337, the fees ranging from \$30 to \$1,600. The requests were from \$30 to \$3,115.

For the first 5 months of 1967, the Bureau of Hearings and Appeals has acted on 434 fee petitions. The average fee authorized was \$440, the fees ranging from \$50 to \$2,500. The requests were from \$50 to \$5,006. Fees of \$500 or more were approved in 131 cases. Their distribution is set forth in the table that is also attached.

The fees allowed by courts for services attorneys performed before them in cases where they obtained favorable judgments for their clients also are revealing. During the most recent period for which complete figures on court cases are available, November 1965 through May 1967, the average attorney's fee was in excess of \$1,000; the lowest fee was \$275.95, and the highest fee was \$3,940.62.

Accordingly, it is recommended that H.R. 10216 not be enacted in its present form.

We are advised by the Bureau of the Budget that there is no objection to the presentation of this report from the standpoint of the administration's program.

Sincerely,

ALANSON W. WILLCOX,
General Counsel.

FEES OF \$500 AND ABOVE APPROVED JAN. 1 THROUGH MAY 31, 1967

Category	Number	Total amount	Category	Number	Total amount
\$500.....	22	\$11,000	\$1,000.....	10	\$10,000
525.....	2	1,050	1,100.....	4	4,400
550.....	6	3,300	1,200.....	6	7,200
600.....	13	7,800	1,300.....	2	2,600
650.....	7	4,550	1,400.....	2	2,800
700.....	3	2,100	1,500.....	8	12,000
725.....	2	1,450	1,700.....	2	3,400
750.....	15	11,250	1,800.....	1	1,800
775.....	1	775	2,000.....	1	2,000
800.....	6	4,800	2,500.....	3	7,500
850.....	4	3,400			
900.....	7	6,300	Total.....	131	115,275
950.....	4	3,800			

TITLE 20—EMPLOYEES' BENEFITS

CHAPTER III—SOCIAL SECURITY ADMINISTRATION, DEPARTMENT OF HEALTH
EDUCATION, AND WELFARE

[Regs. No. 4]

PART 404—FEDERAL OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE (1950 -----)

Subpart J—Procedures, Payment of Benefits, and Representation of Parties

MISCELLANEOUS AMENDMENTS

On December 3, 1966, notice of proposed rule making regarding amendments to Regulations No. 4, as amended, of the Social Security Administration (20 CFR 404.1 et seq.) relating to representation of parties to actions before the Administration and the setting of fees for services performed was published in the FEDERAL REGISTER (31 F.R. 15198). Interested persons were given 30 days in which to submit data, views, or comments pertaining to the proposed amendments to the regulations.

After consideration of all such relevant matter as was presented by interested persons, the amendments to the regulations as so proposed are hereby adopted, subject to the following changes:

1. Paragraph (a) of § 404.974 is revised by adding at the end thereof a sentence.

2. Subparagraph (5) of paragraph (b) of § 404.976 is revised.

3. The last sentence of § 404.977a is revised.

Effective date. These amendments to the regulations shall be effective on the date of publication in the FEDERAL REGISTER.

Dated: May 10, 1967.

ROBERT M. BALL,
Commissioner of Social Security.

Approved: May 22, 1967.

WILBUR J. COHEN,
Acting Secretary of Health, Education, and Welfare.

Regulations No. 4, as amended, of the Social Security Administration (20 CFR 404.1 et seq.) are further amended as follows:

1. Section 404.906 is amended by adding after the words "Subpart J," in the introductory paragraph, the phrase "but which may receive administrative review"; and is further amended by adding after paragraph (e) a new paragraph (f).

§ 404.906 Administrative actions which are not initial determinations.

Administrative actions which shall not be considered initial determinations under any provision of the regulations in this Subpart J, but which may receive administrative review, include, but are not limited to, the following:

* * * * *

(f) The authorization approving or regulating the amount of the fee that may be charged or received by a representative for services before the Administration (see § 404.975).

2. Section 404.971 is amended to read:

§ 404.971 Representation of parity—appointment of representative.

A party in an action leading to an initial or reconsidered determination, hearing, or review, as provided in §§ 404.905 to 404.963, inclusive, may appoint as his representative in any such proceeding only an individual who is qualified under § 404.972 to act as a representative. Where the individual appointed by a party to represent him is not an attorney, written notice of the appointment must be given, signed by the party appointing the representative, and accepted by the representative appointed. The notice of appointment shall be filed at an office of the Administration, with a hearing examiner, or with the Appeals Council of the Administration, as the case may be. Where the representative appointed is an attorney, in the absence of information to the contrary, his representation that he has such authority shall be accepted as evidence of the attorney's authority to represent a party.

3. Section 404.972 is amended to read as follows:

§ 404.972 Qualifications of representative.

(a) *Attorney.* Any attorney in good standing who (1) is admitted to practice before a court of a State Territory, District or insular possession or before the Supreme Court of the United States, or an inferior Federal court, (2) has not been disqualified or suspended from acting as a representative in proceedings before the Social Security Administration, and (3) is not, pursuant to any provision of law, otherwise prohibited from acting as a representative, may be appointed as a representative in accordance with § 404.971.

(b) *Person other than attorney.* Any person (other than an attorney described in paragraph (a) of this section) who (1) is of good character, in good repute, and has the necessary qualifications to enable him to render valuable assistance to an individual in connection with his claim (2) has not been disqualified or suspended from acting as a representative in proceedings before the Social Security Administration, and (3) is not, pursuant to any provision of law, otherwise prohibited from acting as a representative, may be appointed as a representative in accordance with § 404.971.

4. Section 404.973 is amended to read as follows:

§ 404.973 Authority of representative.

A representative, appointed and qualified as provided in §§ 404.971 and 404.972, may make or give, on behalf of the party he represents, any request or notice relative to any proceeding before the Social Security Administration under titles II and XVIII of the Act, including reconsideration, hearing and review, except that such representative may not execute an application for benefits, or the establishment of a period of disability, or a lump sum, or for entitlement to hospital insurance benefits or for enrollment for supplementary medical insurance benefits, unless he is a person designated in § 404.603 as authorized to execute an application for benefits, or the establishment of a period of disability, or a lump sum, or for entitlement to hospital insurance benefits, or for enrollment for supplementary medical insurance benefits. A representative shall be entitled to present or elicit evidence and allegations as to fact and law in any proceeding affecting the party he represents and to obtain information with respect to the claim of such party to the same extent as such party. Notice to any party of any administrative action, determination, or decisions or requests to any party for the production of evidence may be sent to the representative of such party, and such notice or request shall have the same force and effect as if it has been sent to the party represented. (For fees to representatives for services performed before the Administration for an individual, see § 404.975.)

5. Section 404.974 is amended to read as follows:

§ 404.974 Proceedings before a State or Federal court.

(a) *Representation of claimant in court proceeding.* Any service rendered by any representative in any proceeding before any State or Federal court shall not be considered services in any proceeding before the Social Security Administration for purposes of §§ 404.973 and 404.975. However, if the representative has also rendered services in connection with the claim in any proceeding before the Administration, as defined in § 404.977a, he must specify what, if any, amount of the fee he desires to charge is for services performed before the Administration, and, if he charges any fee for such services, he must file the petition and furnish all of the information required by § 404.976(a).

(b) *Attorney fee allowed by a Federal court.* In any case where a Federal court in any representative under titles II and XVIII of the Act renders a judgment favorable to a claimant who was represented before the court by an attorney, and the court, pursuant to section 206(b) of the Act, allows to the attorney as part of its judgment a fee not in excess of 25 percent of the total of past-due benefits to which the claimant is entitled by reason of the judgment, the Administration may certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of the past-due benefits payable to the claimant. No other fee may be certified for direct payment to such attorney for such representation.

(c) *Past-due benefits defined.* The term "past-due benefits" as used in paragraph (b) of this section means the total accumulated amount of benefits to which the claimant is entitled by reason of the court's judgment up to the date that judgment directs payment of benefits.

6. Section 404.975 is amended to read as follows :

§ 404.975 Fee for services performed for an individual before the Social Security Administration.

(a) *General.* A fee for services performed for an individual before the Social Security Administration in any proceeding under titles II or XVIII of the Act may be charged and received only as provided in paragraph (b) of this section.

(b) *Charging and receiving fee.* An individual who desires to charge or receive a fee for services rendered for an individual in any proceeding under titles II or XVIII of the Act before the Administration (see § 404.977a), and who is qualified under § 404.972, must file a written petition therefor in accordance with § 404.976(a). The amount of the fee he may charge or receive, if any, shall be determined on the basis of the factors described in § 404.976(b) by an authorized official of the appropriate component of the Administration, where the services were concluded by an initial or reconsidered determination, or by the Bureau of Hearings and Appeals where there is a decision or action by a hearing examiner or the Appeals Council of the Social Security Administration, as the case may be. Every such fee which is charged or received must be approved as provided in this section and no fee shall be charged or received which is in excess of the amount so approved. This rule shall be applicable whether the fee is charged to or received from a party to the proceeding or someone else.

7. Section 404.976 is amended to read as follows :

§ 404.976 Petition for approval of fee.

(a) *Filing of petition.* In accordance with § 404.975, to obtain approval of a fee for services performed before the Social Security Administration in any proceeding under the Act, a representative, upon completion of the proceedings in which he rendered services, must file at an office of the Social Security Administration a written petition which shall contain the following information :

- (1) The dates his services began and ended ;
- (2) An itemization of services rendered by him in a proceeding under the Act, with the amount of time spent in hours, or parts thereof, on each type of service ;
- (3) The amount of the fee he desires to charge for services performed ;
- (4) The amount of fee requested or charged for services rendered in the same matter before any State or Federal court ;
- (5) The amount and itemization of expenses incurred for which reimbursement has been made or is expected ;
- (6) The special qualifications which enabled him to render valuable services to the claimant (this requirement does not apply where the representative is an attorney) ; and
- (7) A statement showing that a copy of the petition was sent to the person represented.

(b) *Factors considered in evaluating a petition for fee.* In evaluating a request for approval of a fee, the purpose of the social security program—to provide a measure of economic security for the beneficiaries thereof—will be considered, together with the following factors :

- (1) The services performed (including type of service) ;
- (2) The complexity of the case ;
- (3) The level of skill and competence required in rendition of the services ;
- (4) The amount of time spent on the case ;
- (5) The results achieved. (While consideration is always to be given to the amount of benefits, if any, which are payable in a case, the amount of fee will not be based on the amount of such benefits alone but on a consideration of all of the factors listed in this section. The benefits payable in a given claim are governed by specific statutory provisions and by the occurrence of termination, deduction, or non-payment events specified in the law, factors which are unrelated to efforts of the representative. In addition, the amount of accrued benefits payable in a given claim is affected by the length of time that has elapsed since the claimant became entitled to benefits) ;
- (6) The level of administrative review to which the claim was carried within the Social Security Administration and the level of such review at which the representative entered the proceedings ; and
- (7) The amount of the fee requested for services rendered, excluding the amount of any expenses incurred, but including any amount previously authorized or requested.

8. Section 404.977 is amended to read as follows:

§ 404.977 Payment of fee.

The Social Security Administration assumes no responsibility for the payment of any fee which a representative has been authorized to charge in accordance with § 404.975, and shall not deduct any such fee from the benefits payable under the Act to any beneficiary except as provided in § 404.974(b). The representative, however shall be sent a copy of the determination made by the Administration.

9. Section 404.977a is amended to read as follows:

§ 404.977a Services rendered for an individual in a proceeding before the Administration under titles II or XVIII of the Act.

Services rendered for an individual in a proceeding before the Administration under titles II or XVIII of the Act consist of services performed for an individual in connection with any claim before the Secretary of Health, Education, and Welfare under titles II or XVIII of the Act, including any services in connection with any asserted right calling for an initial or reconsidered determination by the Administration, and a decision or action by a hearing examiner or by the Appeals Council of the Bureau of Hearings and Appeals of the Administration, whether such determination, decision, or action is rendered before or after remand of a claim by a court. Such services include, but are not limited to, services in connection with an application for benefits or a lump sum; an application for hospital insurance protection or enrollment in the supplementary medical insurance plan; the establishment or continuance of a period of disability; a request for modification of the amount of benefits or lump sum; the reinstatement of benefits; proof of support; a request for the revision of an earnings record; and services in connection with the preparation of proof of earnings.

10. Paragraphs (a), (b), and (c) of § 404.987 are amended to read as follows:

§ 404.987 Rules governing the representation and advising of claimants and parties.

No attorney or other person shall:

(a) With intent to defraud, in any manner willfully and knowingly deceive, mislead, or threaten by word, circular, letter, or advertisement, either oral or written, any claimant or prospective claimant or beneficiary with respect to benefits, including hospital and supplementary medical insurance benefits, lump sums, periods of disability, establishment or maintenance of earnings records, or any other initial or continued right under the Act; or

(b) Knowingly charge or collect, or make any agreement to charge or collect, directly or indirectly, any fee in connection with any claim except under the circumstances prescribed in § 404.975, or knowingly charge, demand, receive, or collect for services rendered before a Federal court in connection with a claim under titles II and XVIII of the Act, any amount in excess of that allowed by the court as described in § 404.974(b); or

(c) Knowingly make or participate in the making or presentation of any false statement, representation, or claim as to the amount of wages or self-employment income earned by, or derived by, or paid to, an individual, or the period of such earnings, or the time of payment, or as to any material fact affecting the right of any person to benefits under titles II and XVIII of the Act, or as to the amount of any benefit or lump sum, or to a period of disability; or

* * * * *

§ 404.979 [Amended]

11. Section 404.979 is amended by changing the reference in the first sentence from "§ 404.977" to "§ 404.975."

§ 404.981 [Amended]

12. Section 404.981 is amended by changing the reference in the sixth sentence from "§ 404.977" to "§ 404.975," and by changing the reference in the seventh sentence from "§§ 404.973-404.977" to "§§ 404.973 to 404.975."

(Secs. 205, 206, 1102, 1872, Social Security Act, 53 Stat. 1368, as amended, 53 Stat. 1372, as amended, 49 Stat. 647, as amended; 79 Stat. 1281; sec. 5, Reorganization Plan No. 1 of 1953, 67 Stat. 18, 631; 42 U.S.C. 405, 406, 1302)

U.S. DEPARTMENT OF LABOR,
Washington, July 20, 1967.

HON. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in further reply to your request for my views on H.R. 10216, a bill to restore to persons having claims against the United States their right to be represented by legal counsel of their own choosing.

The bill seeks to encourage able counsel to participate in administrative proceedings of Federal agencies by liberalizing limitations on attorney's fees in such proceedings. Among other things, the bill would amend the Federal Employees' Compensation Act and the Longshoremen's and Harbor Workers' Compensation Act, which are administered by the Department of Labor.

While I favor the objective of insuring qualified legal counsel for individuals pursuing claims against the Government, I am unable to support H.R. 10216. Among other things, the proposal appears to emphasize the adequacy of attorneys' fees to the possible detriment of other interests of the claimant. For example, in the case of the FECA and the LHWCA, the review procedure relating to an attorney's fee may well delay any final determination of the claimant's net recovery for 6 months or more. Also, provision for the appearance of the local bar association as a party to a proceeding for judicial review of the agency's fee determination may well be unnecessary, as well as inadvisable. The local bar association's interest would seem to be adequately protected by participation in rulemaking to establish a formula for reasonable fees or standard fees rather than in singular adjudications of claims.

In view of these problems, as well as the broad effect of the bill on administrative proceedings, I suggest that the bill be given further study, perhaps with the assistance of the Administrative Conference of the United States.

The Bureau of the Budget advises that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely,

W. WILLARD WIRTZ,
Secretary of Labor.

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES,
Washington, D.C., July 11, 1967.

HON. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Further reference is made to your request of June 1, 1967, for the views of the Foreign Claims Settlement Commission on the bill, H.R. 10216, 90th Congress, entitled, "A bill to restore to persons having claims against the United States their right to be represented by legal counsel of their own choosing."

The purpose of the bill is not entirely clear in light of its title. In this connection, the bill's title would appear to imply that persons having claims against the United States are restricted by the Federal agencies concerned with respect to the choice of legal counsel. The committee is advised that it has never been the policy of the Commission to interfere in attorney-client relationships in matters before the Commission. Moreover, the Commission's regulations relating to appearance and practice of individuals provide that an individual may appear in his own behalf or be represented by an attorney at law admitted to practice in any State or territory of the United States, or the District of Columbia. No formal application is required to practice before the Commission.

The Commission exercises no control in choosing or recommending attorneys for individuals who have claims before it.

On the other hand, the statutes which are administered by the Commission, prescribe certain maximum fee limitations regarding the prosecution of claims before it by attorneys. However, the Commission has no statutory authority to enforce such limitations. In case violations are reported involving fees exceeding the statutory limitations, the matter is referred, generally, to the appropriate U.S. District Attorney's office.

The bill, H.R. 10216, would affect the present procedure by (1) defining the terms "attorney," "fee," and services performed in connection with claims

considered by an agency; (2) the prescribing of rule by the affected agencies for the determination of a reasonable amount for fees; (3) establishing a rule for "standard fees"; (4) establishing a rule for reporting attorneys' fees; (5) penalty for false or misleading information; (6) requires a determination of fees by the agency where fees are in excess of "standard" fees or "reasonable" fees; (7) procedures for final agency determinations; (8) procedures for serving notice of final determination; and (9) method of serving notice of final determination.

The bill, H.R. 10216, also confers jurisdiction on the U.S. district court of any civil action brought in connection with such fees. Provision is also made that in case the court does not sustain the agency's determination, the court is required to enter an order fixing a reasonable amount for the fee in question applying the same rules of law as are applicable to the agency.

H.R. 10216 further provides for an amendment to section 4(f) of the International Claims Settlement Act of 1949 (22 U.S.C. 1623(f)), which is designed to eliminate the present limitation on attorney's fees of 10 percent and the authority of the Commission to set the amount of the fee within the 10-percent limitation. The Secretary of the Treasury is required also to make deductions of such fees from the amounts of awards for payment directly to the attorney. Upon the enactment of H.R. 10216, the procedures as established under new subchapter IV, chapter 5 of title 5 of the United States Code would be applicable to fees of attorneys representing claimants under title I of the International Claims Settlement Act of 1949, as amended.

It is noted that the term "fee" as defined under H.R. 10216 includes any amount of compensation which is charged or requested to be paid, regardless of whether payment is actually made. The statutes administered by the Commission make no reference to any attorney fee arrangement in those cases which have been denied compensation.

A proposal has been made under H.R. 9063, 90th Congress, to change the existing attorney fee arrangement under title I of the International Claims Settlement Act of 1949, as amended, to conform with a more simplified procedure contained under titles III and IV of the act which were, of course, enacted at a later date.

The latter two titles provide simply that such fees shall not exceed 10 percent of any payment made on an award by the Commission, and leave the settlement thereof to attorney and client.

It is to be noted that section 8 of H.R. 10216 refers only to section 4(f) of the International Claims Settlement Act of 1949, which is applicable to claims within the scope of title I of the act. It would appear that the claims under the Yugoslav Claims Agreement of November 5, 1964, would be the only claims program affected by the enactment of H.R. 10216.

The Foreign Claims Settlement Commission has experienced many variants of limitations on attorneys' fees in the several statutes which it has administered or is presently administering. Thus, titles I and II of the War Claims Act of 1948 (50 U.S.C. App. 2001 et seq.), impose a 10-percent limitation or such lesser per centum as may be fixed by the Commission with respect to any class of claims.

As noted above, under title I of the International Claims Settlement Act of 1949 (22 U.S.C. 1601 et seq.), in addition to a 10-percent maximum limitation, the Commission was authorized to determine and apportion fees upon the request of attorneys or claimants. It was further provided that the amount of the fee could be deducted from the award and paid directly to the attorney by the Secretary of the Treasury.

Again, title III of the International Claims Settlement Act of 1949, placed a 10-percent limitation but provides further that upon a showing of just cause the Commission was authorized to allow fees in excess of 10 percent. Moreover, the act specifically placed such authority within the discretion of the Commission, denying court review.

Title IV of the act returned to the straight 10-percent limitation with no discretion or authority in the Commission for setting either lesser or greater fees.

Title V of the act undertakes a further modification in that it limits attorneys' fees to 10 percent on the first \$20,000 of an award and to 5 percent on any amount in excess of \$20,000.

Under Public Law 87-616, the Philippines Claims program, attorneys' fees were limited to 5 percent.

Finally, under Public Law 87-587, the Lake Ontario program, no reference at all was made to attorney's fees.

Claims before the Commission are matters of grace involving losses sustained in foreign areas as the result of expropriation of properties or losses caused by the military operations of war. Losses arising in these circumstances can seldom be substantiated by primary evidence which has either been destroyed or is unattainable since it lies behind the Iron Curtain. Obviously then, the need for competent counsel becomes apparent.

Furthermore, in the Commission's experience it has become clear that stringent fee limitations have resulted in circumstances wherein more than 50 percent of the claimants are not represented by counsel, and many others wherein attorneys are reluctant to devote the time and effort required. The lifting of the limitations, the Commission feels, would encourage practice before it by more able, competent and industrious lawyers who would be willing to perform the necessary research, investigation and make presentations warranting favorable action by the Commission on claims before it. Indeed, it is felt that this latter type of representation would greatly facilitate the adjudicatory process of the Commission. By fully assuming his duties and responsibilities in the representation of claims before the Commission counsel is indirectly assisting in the formulation of the legal decisions of the Commission.

Although the primary objective of counsel's effort is favorable action in any specific claim, it goes without saying that the contribution of the lawyer extends to the overall quasi-judicial function of the Commission.

It should also be noted that the funds from which awards, as well as the administrative expenses of the Commission, are paid are derived either through en bloc settlements with the foreign government involved or from the liquidated proceeds of their assets in this country. Seldom have these sums been sufficient to pay our awards in full. In fact, payments have ranged from 1.5 cents on the dollar as in the case of Hungary, to 100 cents on the dollar in the Italian program. For this reason, hard and fast statutory fee limitations can become unjust and inequitable.

Undoubtedly, some means of policing the size and proportion of attorneys' fees is necessary in order to protect the unwary from the unscrupulous. Although this Commission in the past has not encouraged exercise of its fee-setting discretion when authorized, it has exercised the authority where justice required it.

It has been the experience of the Commission that fee limitations seriously impinge upon the welfare of claimants before it as well as upon attorneys. For instance, the Commission constantly hears complaints from claimants that they are unable to obtain adequate representation because of the fee limits. On the other hand, the Commission is aware that in many instances claims are denied as a result of the lack of competent counsel. This becomes apparent in our appellate procedure where counsel for the first time enters an appearance after the initial denial of a claim.

It is also noteworthy that no limitation is placed upon the fees attorneys may charge if they are unsuccessful before the Commission. Thus, the lawyer who fails adequately to prosecute a claim and loses is in a better position than one who obtains a small award for his client. Accordingly, it appears that an agreement in advance as to fees which could be policed by the respective agency would afford the claimant the best protection.

Finally, the Commission believes that H.R. 10216 provides for proper and adequate policing authority in the Commission over attorney fee agreements and arrangements and contains authority for complaints by awardees who feel any fee demand to be excessive.

The Commission favors the enactment of legislation of the type proposed by H.R. 10216 and did recommend that favorable action be taken with respect to similar legislation in the 89th Congress, S. 1522.

The Commission appreciates the fact that there may be other agencies covered under the bill which may encounter special problems in carrying out its provisions. Accordingly, the Commission cannot comment regarding the effect of the bill with respect to its administration by other agencies. However, as between the two bills, it is the Commission's opinion that from its own viewpoints, the proposals under S. 1522 presented a more simplified procedure than that proposed by H.R. 10216. Consequently, it follows that such proposal would cost less and require less time to administer.

Advice has been received from the Bureau of the Budget that there would be no objection to the presentation of this report to your Committee.

Sincerely yours,

EDWARD D. RE, *Chairman.*

RAILROAD RETIREMENT BOARD,
Chicago, Ill., July 7, 1967.

HON. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your letter of June 1, 1967, requesting the views of the Railroad Retirement Board on the bill H.R. 10216, which was introduced on May 23, 1967, by Mr. Ashmore.

The bill would amend chapter 5 of title 5 of the United States Code by adding at the end a new subchapter IV. That subchapter would provide, in effect, procedures for determining reasonable attorneys' fees for services in connection with any claim before certain governmental agencies, including the Railroad Retirement Board under the Railroad Unemployment Insurance Act. Penalties would be provided for violation by attorneys of the prescribed requirements.

The bill would also amend chapter 7 of title 5 of the United States Code by adding a new subchapter thereto. This subchapter would provide for the review and enforcement in the U.S. district courts of the limitations on attorneys' fees under the provisions of the new subchapter IV of chapter 5 of title 5 of the United States Code.

The bill would also amend the various acts administered by the agencies involved with respect to provisions therein for determinations of attorneys' fees to accord with the other provisions of the bill. In this connection, the bill would amend section 5(i) of the Railroad Unemployment Insurance Act.

There have been very few occasions over the years when there has been any objection by an attorney as to the determinations by the Board under section 5(i) of the Railroad Unemployment Insurance Act in setting reasonable attorneys' fees. Actually, the Board has applied, in an informal manner, the same criteria which the bill would establish. Most claims for unemployment insurance benefits under the act involve relatively small amounts, however, and only in an extremely small number of cases are attorneys involved. In the light of these circumstances, and the fact that the procedures the bill would establish are rather complex, and could involve extended proceedings, it is the strong view of the Board that section 2 of the bill should be amended to eliminate paragraph 6 of the proposed section 581 of subchapter IV of chapter 5 of title 5 of the United States Code to exclude the Railroad Retirement Board from the operation of the provisions of the subchapter. In order to accomplish fully this purpose, it would be necessary also to change the bill by eliminating section 11 thereof. The Board expresses no view with respect to the bill as it would have effect with respect to the other agencies of the Government which are involved.

Bureau of the Budget has advised that there is no objection to the presentation of this report from the standpoint of the administration's program.

Sincerely yours,

HOWARD W. HABERMEYER,
Chairman.

ADMINISTRATIVE OFFICE OF THE U.S. COURTS,
Washington, D.C., March 4, 1968.

HON. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR CONGRESSMAN CELLER: This refers further to your letter of August 2, 1967 concerning H.R. 10216, a bill "to restore to persons having claims against the United States their right to be represented by legal counsel of their own choosing."

At its meeting on February 27-28, 1968, the Judicial Conference of the United States considered the provisions of H.R. 10216 and concluded that this legislation in its present form would impose an undue burden on the judiciary and, accordingly, voted its disapproval of the bill as it relates to judicial review of attorneys' fees set by administrative agencies.

Sincerely,

WILLIAM E. FOLEY,
Deputy Director.

SECURITIES AND EXCHANGE COMMISSION,
Washington, D.C., January 24, 1968.

HON. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Although the bill has not been submitted to us for comment, it has been brought to the attention of the Commission that S. 1073 was passed by the Senate during the first session of the 90th Congress and is now under consideration in the House of Representatives.

In accordance with discussions by Mr. North of our staff with members of the staff of your committee, the Commission is submitting three copies of the attached memorandum of comments setting forth its opposition to enactment of S. 1073 in its present form and the reasons therefor.

We have been advised that the Bureau of the Budget has no objection to our comments from the standpoint of the program of the administration.

Sincerely,

MANUEL F. COHEN,
Chairman.

MEMORANDUM OF THE SECURITIES AND EXCHANGE COMMISSION

Analysis of the bill

S. 1073 is essentially a bill which would remove all presently existing statutory limitations on attorney's fees for services rendered in any administrative proceedings and would terminate the present authority of administrative agencies to "determine" or "approve" any such fees. In lieu of present limitations and agency authority to control fees, the bill would permit an administrative agency to adopt a rule under which "an attorney shall, at the conclusion of such proceedings, file with the agency the amount of fee charged in connection with his services rendered in such proceedings." Under further published rules or regulations the agency could then determine "that such fee charged is excessive." Following this, if "the agency and the attorney fail to agree upon a fee," the agency could, within 90 days after the fee information was originally filed with it, petition a district court in the district in which the attorney maintains his office and "the court shall determine a reasonable fee for the services rendered by the attorney."

Background information

By way of background, the Senate Committee on the Judiciary reported this bill to the floor of the Senate on November 20, 1967, through Report No. 795, which recommended approval of the bill. On November 22, 1967, the Senate passed the bill and transmitted it to the House of Representatives where it was referred to its Committee on the Judiciary before which it is now pending. The Senate Committee on the Judiciary did not request the Commission's comments on the bill, presumably because the Commission had informed that same committee in the 89th Congress that it did not care to comment on the original version of S. 1522, the forerunner of the present bill, because it did not appear to have any effect on the Commission. However, the 89th Congress later amended S. 1522 in material ways which, had it become law, would have affected and impaired the work of the Commission in substantial respects. S. 1073, as now pending in the 90th Congress, is identical with the final version of the former S. 1522 and, accordingly, would have the same adverse effects on important functions of the Commission. It is for this reason that the Commission desires to submit this comment.

The original version of S. 1522 in the 89th Congress was prompted by a desire to eliminate certain arbitrary statutory limitations on attorney fees permitted to be charged in presenting monetary claims against the Government for such items as veterans and social security benefits and claims on behalf of Indians, which limitations are unrealistic on the basis of today's economy. The Commission has no quarrel with this objective—indeed, no direct concern with it—since the statutes which the Commission administers are not of a type which involve passing upon monetary claims against the Government. The Commission is, however, concerned with the impact which S. 1073, as now worded, would have upon its administration of the Public Utility Holding Company Act of 1935 (Holding Company Act).

A plausible argument can be made that the definition of the term "administrative proceeding" which is contained in the bill is confined to proceedings of a type which involve claims against the Government. Holding Company Act proceedings in which the Commission passes upon fees are not of that character. On the other hand, the appendix attached to the Senate committee's report on the bill includes the Holding Company Act in a list of Federal laws which presumably would be affected by the bill.

Effect of bill on Holding Company Act

A primary part of the congressional pattern established by the Holding Company Act consists of the authority granted to the Commission to determine whether reorganization plans are fair and equitable and also the reasonableness of fees charged in connection with other transactions involving public utility holding companies and subsidiaries in their systems with a view to eliminating numerous evils which existed in that industry prior to 1935 and which were detrimental to both public investors in securities in the utility industry and to the consumers of electricity and gas. This function is performed by the Commission in large part through administrative proceedings and findings and rulings made by it under various sections of the Holding Company Act including sections 7, 10, 11, and 12. Under each of these sections, an integral part of the Commission's responsibility in passing upon the reasonableness of a plan or transaction consists of determining or approving fees claimed in connection with it. As the Supreme Court said in *S.E.C. v. Drexel & Co.* (348 U.S. 341 (1955)), "The amount of fees to be paid by Electric plainly would be relevant to the question whether the plan was fair and equitable." Moreover, the fees upon which the Commission passes are not limited to attorneys' fees. Depending upon the nature of the particular transaction or plan and the types of persons employed in formulating it, the Commission may have occasion to fix or approve fees for accountants, financial analysts, underwriters, bank custodians, indenture trustees, expert witnesses, solicitors of proxies, and persons serving on committees representing various interests involved in a particular plan as well as fees of attorneys. Indeed, under section 11(f), for example, the Commission may require that "any or all fees, expenses, and remuneration, to whomsoever paid," in connection with certain types of proceedings involving registered holding companies or their subsidiaries, shall be subject to its approval. The Commission's action in fixing or approving fees is, of course, subject to review in the appropriate Federal court.

From the foregoing, it is quite apparent that S. 1073, if enacted would seriously impair major aspects of the statutory pattern of the Holding Company Act and would create an anomalous situation as between legal fees and other types of fees on which the Commission passes in administering that act. Thus:

1. The bill would wipe out the Commission's authority to determine and approve attorney fees even though the amounts of such fees are generally significant factors in deciding whether plans of reorganization or other transactions by registered holding companies or their subsidiaries are reasonable, decisions which the Holding Company Act requires the Commission to make.

2. Since, as just noted the reasonableness of attorney fees charged in connection with plans and transactions subject to the Holding Company Act has a substantial impact on "fair and equitable" determinations and since such determinations must be made *during the course of administrative proceedings*, S. 1073 would make it impossible for the Commission to perform this function in the manner contemplated by the Holding Company Act because the amount of the attorney fees could not be challenged *until after the administrative proceedings had been concluded*. Indeed, under S. 1073, attorneys involved in proceedings under the Holding Company Act would apparently not have to disclose the amount of fees they charged except "at the conclusion of such proceedings."

3. Some of the more complicated plans submitted to the Commission for a determination of their reasonableness involves legal services performed by numerous law firms representing diverse and conflicting interests. The offices of such law firms might well be scattered across the Nation. It would be highly impractical to require the Commission to petition each of a number of Federal district courts where each law firm maintained its office for a determination of the reasonableness of the fees charged by each such firm.

4. The bill would create the anomalous situation of depriving the Commission of authority to determine the reasonableness of fees for legal services rendered in connection with reorganization plans and other transactions which are subject to the provisions of the Holding Company Act while that act continued to require the Commission to pass upon the reasonableness of all manner of other fees which were incurred incident to such plans and transactions.

Conclusions

On the basis of the foregoing, the Commission would oppose enactment of the bill in its present form. If it were amended so that it would not affect the Commission's present administration of the Holding Company Act, there would be no reason to oppose it, as the bill would then have no material effect on any aspect of the functions performed by the Commission.

