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Note

After *Mallard v. United States*: The Federal Courts' Inherent Power to Appoint Representation for Indigent Civil Litigants

I. INTRODUCTION

Historically, the power of American courts to appoint representation for indigent litigants has rested upon either statutory authority¹ or the inherent powers of the judiciary.² Today, both the

1. With respect to statutory authority in the states, see Fisch, *Coercive Appointments of Counsel in Civil Cases In Forma Pauperis: An Easy Case Makes Hard Law*, 50 Mo. L. REV. 527 (1985). Fisch details the development of the modern in forma pauperis statute, developing its origin from 11 Hen. VII, c. 12 (1495), the first known statutory provision for free judicial services for poor persons in civil cases. Fisch, *supra*, at 543-44 & n.79. Fisch then traces the development of the early American state and territorial statutes that codified versions of this in forma pauperis statute, *id.* at 547-51, noting that all but one of these early statutes expressly prohibited attorneys from taking a fee, *id.* at 547. See also *Mallard v. United States* Dist. Court, 490 U.S. 296, 302-03 (1989) (explaining that prior to the twentieth century, many American state statutes specified that courts could assign or appoint counsel). See generally Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735, 756 (1980) (illustrating that, as of 1980, 34 state jurisdictions provided for some court appointment of counsel). Shapiro further provides that 18 states seem to have an "enforceable duty to represent an indigent for little or no compensation when ordered to do so." *Id.*

With respect to federal statutory authority, the first federal in forma pauperis statute, entitled "An act providing when plaintiff may sue as a poor person and when counsel shall be assigned by the court," was passed in 1892 and provided "[t]hat the court may request any attorney of the court to represent such poor person, if it deems the cause worthy of trial." Act of July 20, 1892, ch. 209, 27 Stat. 252 (current version codified at 28 U.S.C. § 1915 (1988)).

2. 21 C.J.S. *Courts* § 14 (1990) (defining "[t]he inherent power of a court [a]s that which is necessary to the orderly and efficient exercise of the court's jurisdiction, for the preservation of its independence and integrity, and for the complete administration of justice") (footnotes omitted); see also *People ex rel. Conn v. Randolph*, 35 Ill. 2d 24, 29, 219 N.E.2d 337, 340 (1966) (Illinois Supreme Court held that when appointed counsel incurred excessive financial burdens in the defense of indigent clients, "the [trial] court's inherent power to appoint counsel also necessarily includes the power to enter an appropriate order ensuring that counsel do not suffer an intolerable sacrifice and burden and that the indigent defendants' right to counsel is protected"); *Knox County Council v. State*, 217 Ind. 493, 512, 29 N.E.2d 405, 413 (1940). The court in *Knox* stated:

The conclusion seems unavoidable that it is the duty of courts to see that criminal cases are tried; that these cases cannot be legally tried unless the defendant, if he is a pauper, is provided with counsel; that attorneys cannot be

federal and state courts' ability to obtain representation for indigents largely has been codified,³ and a statutory right to an appointment of counsel often turns upon whether the nature of the action is criminal,⁴ quasi-criminal,⁵ or civil.⁶

In federal civil actions, appointment of counsel to indigent litigants is governed by section 1915(d) of the Judicial Code, which regulates the assignment of counsel in federal *in forma pauperis*

compelled to serve without compensation; and therefore that, in order to conduct a legal trial, the court must have power to appoint counsel, and order that such counsel be compensated if necessary; and that the right to provide compensation cannot be made to depend upon the will of the Legislature or of the county council.

Id.; see also *Kovarik v. County of Banner*, 192 Neb. 816, 224 N.W.2d 761 (1975) (Nebraska Supreme Court held district court had inherent authority to appoint counsel to represent indigent misdemeanor defendants, and further, that such appointment carried with it an obligation on the part of the county to pay the appointed counsel reasonable fees and expenses).

3. See *Fisch*, *supra* note 1, at 547-55 (tracing the development of state appointment statutes, particularly the populist development of Indiana).

4. It is well recognized that the sixth amendment provides a constitutional right for indigent *criminal* defendants to receive appointed counsel. For the historical evolution of this concept, see *Powell v. Alabama*, 287 U.S. 45 (1932) (requiring appointed counsel in a state capital case, noting that the due process right to hearing logically extends to require the right to an attorney); *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938) (re-emphasizing the sixth amendment importance of assistance of counsel in criminal cases); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (extending *Powell* to require representation by counsel in all felony criminal cases, not just capital prosecutions) (overruling *Betts v. Brady*, 316 U.S. 455 (1942) (appointments in criminal cases requiring only a totality-of-the-circumstances analysis)). In addition, see 18 U.S.C. § 3006A (1988) (codifying the right to appointment of counsel in criminal cases and providing for compensation to those appointed).

5. There is also some provision for mandatory appointments in the area of "quasi-criminal" proceedings—civil actions that potentially affect the personal liberty of a party. "[Q]uasi-criminal" actions are those "technically classified as 'civil,' . . . [but which] are, in reality, hybrid or quasi-criminal in nature. Since they directly involve deprivation of life and liberty, they can be allied with criminal proceedings." Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1322 & n.3 (1966). Examples cited include collateral attack proceedings, juvenile hearings, and commitments to mental institutions. *Id.*; see also Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545, 545 & n.2 (1967) (citing as further examples of quasi-criminal proceedings: habeas corpus, *coram nobis*, probation revocation, and deportation proceedings). Finally, consider *Martin-Trigona v. Lavien*, 737 F.2d 1254, 1260 (2d Cir. 1984) ("[t]he sixth amendment right to counsel of course extends only to criminal and quasi-criminal proceedings").

6. Section 1915(d) of the Judicial Code authorizes assignment of counsel in *in forma pauperis* proceedings. See 28 U.S.C. § 1915(d) (1988); see also *Mallard*, 490 U.S. at 306-07 (listing statutes that authorize appointment of counsel in civil statutory actions, including 25 U.S.C. § 1912(b) (appointment in Indian child custody proceedings), 42 U.S.C. § 1971(f) (assignment for alleged contempt in voting rights cases), 42 U.S.C. § 2000a-3(a) (appointment in civil rights action seeking injunction against discrimination or segregation in places of public accommodation), and 42 U.S.C. § 2000e-5(f)(1) (appointment in Title VII proceedings)).

proceedings.⁷ Section 1915(d) provides that federal courts “may request an attorney” to represent the indigent litigant.⁸

Recently, in *Mallard v. United States District Court*,⁹ the United States Supreme Court held that section 1915(d) does not authorize mandatory appointments of counsel.¹⁰ Instead, the Supreme Court held that federal courts may only request an attorney to serve as counsel for an indigent civil litigant, but cannot compel him to accept such service.¹¹ In so holding, the Court specifically declined to rule on the constitutionality of mandatory appointments¹² or to decide whether such mandatory appointments, while not statutorily authorized by section 1915(d), are nevertheless within the federal courts’ inherent power.¹³

This Note analyzes the implications of the *Mallard* holding for both the judiciary and practicing attorneys. First, consideration is given to the historical background of both judicial and statutory

7. 28 U.S.C. § 1915(d) (1988).

8. See *infra* note 28 for a partial reproduction of the statutory text.

9. 490 U.S. 296 (1989).

10. *Id.* at 310.

11. *Id.* at 305, 310.

12. *Id.* at 306 n.6. For a thorough examination of these constitutional issues, see Shapiro, *supra* note 1, at 762-77, outlining the constitutional challenges to mandatory appointment of representation usually made under the first, fifth, thirteenth, and fourteenth amendments.

The fifth and fourteenth amendment challenges concern appointed counsel receiving inadequate compensation that may constitute a denial of due process, equal protection, or a taking without just compensation. *Id.* at 770-71. The issues raised by these challenges remain unsettled. The argument for the unconstitutionality of mandatory appointments under these amendments asserts that “[a]n obligation to perform certain work, backed by the sanction of contempt, professional discipline, or loss of livelihood, is about as direct an invasion of a person’s control over his labor as can be imagined.” *Id.* at 774 (footnote omitted). Alternatively, the proposition that mandatory appointments without compensation are constitutional is often founded upon “the history and traditions of the bar, which are said to be understood as a condition of the license to practice, and to the monopoly of authorized practice conferred on lawyers in exchange for the duty to serve.” *Id.* at 775-76 (footnote omitted).

The first and thirteenth amendment challenges are not directly related to the issue of compensation for appointed counsel. Assuming that an appointed attorney is not imprisoned for his refusal to serve, the thirteenth amendment challenge of involuntary servitude appears to be the least persuasive of the constitutional challenges. Shapiro agrees with the Second Circuit’s analysis, concluding that “a condition of servitude is within the [thirteenth] amendment’s proscription only when the individual is subjected to physical restraint or threat of legal confinement as an alternative to service.” *Id.* at 770 & n.173 (citing *United States v. Shackney*, 333 F.2d 475, 485-87 (2d Cir. 1964)).

Finally, the first amendment challenge has been made without regard to the appointed counsel’s compensation, and rests upon that counsel’s right to freedom of speech and association. *Id.* at 762-67; see also, e.g., Brief for Petitioner, *Mallard v. United States Dist. Court*, 490 U.S. 296 (1989) (No. 87-1490) (LEXIS, Genfed Library, Briefs File).

13. *Mallard*, 490 U.S. at 308 n.8, 310.

authority for attorney appointments. Then, analysis of the *Mallard* opinion will illustrate the Court's current construction of the federal courts' appointment authority. Finally, this Note will examine what inherent powers, if any, the federal courts retain after *Mallard* to compel an attorney to represent an indigent civil litigant.

II. BACKGROUND

A. Inherent Judicial Authority

By virtue of its role as a distinct branch of government, the judiciary possesses certain inherent powers that are not derived from direct constitutional or legislative grants of authority.¹⁴ Typically, the inherent authority of the judiciary consists of those powers "that are reasonably necessary for the administration of justice" within a particular court's jurisdiction.¹⁵ Consequently, courts have invoked their inherent authority to appoint nonjudicial officers¹⁶ such as auditors,¹⁷ technical advisors,¹⁸ and special masters¹⁹ to aid in the administration of justice.

Additionally, inherent judicial authority has been further construed to allow a court to regulate the conduct of its bar.²⁰ Conso-

14. 20 AM. JUR. 2D *Courts* § 79 (1965).

15. *Id.* Further,

[i]t has been said that courts have inherent power to summon witnesses and compel their appearance in court, to administer oaths, . . . to prevent abuse of process, to provide counsel for the indigent, to have errors in the records corrected, to relieve a party in default, to discipline attorneys at law, to take appropriate action in cases of contempt, and to do various other things to maintain order and to function properly as a court.

Id. (footnotes omitted).

16. *Ex parte Peterson*, 253 U.S. 300, 312 (1920) (Brandeis, J.) ("[t]his [inherent] power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause").

17. *Id.* at 314 ("The inherent power of a federal court to invoke such aid is the same whether the court sits in equity or at law. We conclude, therefore, that the order, in so far as it appointed the auditor . . . was within the power of the court.").

18. *Reilly v. United States*, 682 F. Supp. 150, 162 (D.R.I. 1988) (despite the availability of statutory authority, the district court reaffirmed its inherent authority to appoint an economist to assist in the determination of damages for loss of earning capacity of an infant injured at birth by the malpractice of a naval obstetrician).

19. *In re Certain Complaints Under Investigation*, 783 F.2d 1488, 1499 (11th Cir.) (court had inherent authority to appoint a special master to carry out statute authorizing judicial counsel to investigate improper conduct by a federal judge), *cert. denied sub nom. Hastings v. Godbold*, 477 U.S. 904 (1986); *Powell v. Ward*, 487 F. Supp. 917, 935 (S.D.N.Y. 1980) (court upheld appointment of a special master to oversee defendants' compliance with the court's orders), *modified*, 643 F.2d 924 (2d Cir.), *cert. denied*, 454 U.S. 832 (1981).

20. Brief of the Ass'n of the Bar of the City of New York as Amicus Curiae, *Mallard*

nant with this, courts have appointed counsel, both to represent the court in contempt proceedings²¹ and to represent indigent litigants.²²

With respect to court-appointed representation of indigents, the caselaw illustrates that, in practice, inherent authority has been invoked most often (if not always) by courts to appoint counsel in criminal cases.²³ In making these appointments, the courts have utilized several broad justifications, most notably the attorney's duty as an officer of the court²⁴ and the unique nature of the legal

v. United States Dist. Court, 490 U.S. 296 (1989) (No. 87-1490) (LEXIS, Genfed Library, Briefs File) (citing *In re Snyder*, 472 U.S. 634, 643 (1985)); see also *Bleckner v. General Accident Ins. Co.*, 713 F. Supp. 642, 653 & n.4 (S.D.N.Y. 1989) (court ordering counsel to take a *pro bono* representation as punishment for Rule 11 sanctions, citing the majority opinion in *Mallard* as well as Justice Stevens's dissent).

21. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 793 (1987) ("it is long settled that courts possess inherent authority to initiate contempt proceedings for disobedience to their orders, authority which necessarily encompasses the ability to appoint a private attorney to prosecute the contempt").

22. See *Fisch*, *supra* note 1, at 528 ("[t]he claim of judicial power to appoint counsel with or without compensation, and a concomitant duty of the lawyer to accept such appointments, is most often derived from the inherent powers of the judiciary, inferred from the nature of its constitutionally established role as a separate branch of government").

23. See, e.g., *Powell v. Alabama*, 287 U.S. 45, 73 (1932) ("[t]he duty of the trial court to appoint counsel under such circumstances is clear . . . ; and its power to do so, even in the absence of a statute, cannot be questioned"); *State ex rel. Gentry v. Becker*, 351 Mo. 769, 778-79, 174 S.W.2d 181, 184 (1943). The *Becker* court noted:

Another inherent power possessed by the courts is that of providing counsel for the indigent. And when the court assigns or requests counsel to represent an indigent, at least one charged with a crime, it is not only the duty of the attorney to accept the assignment and act but he is also not at liberty to decline the appointment except under certain circumstances.

Id. (citations omitted); see also *United States v. Bowe*, 698 F.2d 560, 566 (2d Cir. 1983) (Criminal Justice Act neither "repeals [n]or displaces a court's 'inherent authority to do those things reasonably necessary for the administration of justice in the exercise of [its] jurisdiction,' including the power to appoint counsel to represent indigents") (citations omitted); *People ex rel. Conn v. Randolph*, 35 Ill. 2d 24, 28, 219 N.E.2d 337, 340 (1966) ("trial court discharged its duty [to appoint counsel to criminal defendants] . . . pursuant to the inherent power of the judiciary to regulate the practice of law and conduct the orderly administration of justice"); *Knox County Council v. State ex rel. McCormick*, 217 Ind. 493, 29 N.E.2d 405 (1940) (court has inherent authority to appoint counsel in criminal case but, to be constitutional, the attorney must be compensated); *Kovarik v. County of Banner*, 192 Neb. 816, —, 224 N.W.2d 761, 763 (1975) (court had inherent authority to appoint counsel for defendant charged with criminal misdemeanor because "when we are concerned with a matter so fundamental as the indigent's right to appointed counsel in criminal matters, no express [statutory] provision granting such authority is required").

24. *Powell*, 287 U.S. at 73 ("[a]ttorneys are officers of the court, and are bound to render service when required by such an appointment"); *Randolph*, 35 Ill. 2d at 28, 219 N.E.2d at 340 ("attorney is an officer of the court and his license to practice carries with it the steadfast obligation to serve the court whenever called upon to do so").

profession.²⁵

B. Statutory Authority

1. Section 1915: The Federal In Forma Pauperis Statute

While several states possessed in forma pauperis statutes by the mid-1800s,²⁶ the first federal statute was not enacted until 1892.²⁷ The current statute, section 1915 of the Judicial Code, establishes procedures for all litigants proceeding in forma pauperis.²⁸ In practice, however, section 1915 is applied only to civil actions, as the right to an appointment of counsel in criminal cases has been separately codified.²⁹

25. See Fisch, *supra* note 1, at 527-28. Although Fisch specifically discusses the Missouri Supreme Court's treatment of this issue in its opinion in *State ex rel. Scott v. Roper*, 688 S.W.2d 757 (Mo. 1985) (en banc), his discussion is relevant to both state and federal court appointments. Fisch suggests that, historically, the inherent power of the courts to compel appointments

has been founded typically on one or more of three arguments: (i) the lawyer is an officer of the court, traditionally subject to judicial regulation and supervision, with an obligation to assist the courts in performing their responsibilities; (ii) the lawyer enjoys the privilege of a monopoly on the practice of law, especially practice before the courts, and therefore cannot complain of having to bear a fair share of the burden of making the courts accessible to all; and (iii) the ethical rules of the self-regulating profession, as embodied in the Canons of Ethics, Code of Professional Responsibility, and Model Rules of Professional Conduct, but also in the concept of a profession, require such uncompensated service.

Fisch, *supra* note 1, at 528 (citations omitted).

26. See Fisch, *supra* note 1, at 547 & nn.100-05 (listing the various state in forma pauperis statutes in effect in the 18th and 19th centuries).

27. Act of July 20, 1892, ch. 209, § 1, 27 Stat. 252 (statutory language discussed in Fisch, *supra* note 1); see also Reply Brief for Petitioner, *Mallard v. United States Dist. Court*, 490 U.S. 296 (1989) (No. 87-1490) (LEXIS, Genfed Library, Briefs File) (listing the state statutes providing for an assignment or appointment of counsel in effect at the time of the passage of the federal statute).

28. 28 U.S.C. § 1915 (1988). Section 1915, in pertinent part, provides:

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith

. . . .

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious. . . .

Id. § 1915(a), (d).

29. See *supra* note 4 (discussing the right to counsel in criminal cases as codified in 18 U.S.C. § 3006A (1988)).

2. Judicial Interpretation of Section 1915(d)

From its introduction, the full scope of appointment power under section 1915(d), as interpreted by the federal courts, has lacked definition. The early cases were vague as to whether an appointment was mandatory or whether it could in fact be declined by the appointed counsel.³⁰ Moreover, later cases demonstrated the continuing confusion, as district courts failed completely to exercise any section 1915(d) appointment power, on the premise that either they had no authority to do so³¹ or a lack of compensation to the appointed counsel negated the court's ability to appoint or request an attorney to serve.³²

Adding further to the confusion of the scope of appointment power under section 1915(d), distinction was made, beginning in the early twentieth century, between the requirements of appointed

30. See *Whelan v. Manhattan Ry.*, 86 F. 219 (C.C.S.D.N.Y. 1898), cited with approval in *Mallard*, 490 U.S. at 304 n.4 (for the proposition that attorneys are allowed to decline court appointments). Specifically, *Whelan* posited:

[O]nce it is shown to the court that there is a cause of action "worthy of a trial," which plaintiff, a citizen of the United States, cannot prosecute without incurring indebtedness, which such citizen is too poor to pay, then congress provides a way whereby such poor person may have his day in court An attorney is to be provided for him The attorney assigned by the court, in the event of non success, will, of course, receive nothing; in the event of final success, he may apply to the court for an order fixing a fair compensation for the services he may actually render

. . . If the attorney who brought the action is willing to continue the litigation on those terms, he will be assigned to represent plaintiff; if not, the court will find some other attorney to prosecute her case.

Whelan, 86 F. at 220-21. *But cf.* Brief for the Respondent, *Mallard v. United States Dist. Court*, 490 U.S. 296 (1989) (No. 87-1490) (LEXIS, Genfed Library, Briefs File) ("[f]or the first forty years after the enactment of section 1915(d), each decision used the word 'assign' to describe the statute") (citing *United States ex rel. Randolph v. Ross*, 298 F. 64 (6th Cir. 1924); *Phillips v. Louisville & N.R.R.*, 153 F. 795 (C.C.N.D. Ala. 1907), *aff'd*, 164 F. 1022 (5th Cir. 1908); *Brinkley v. Louisville & NRR*, 95 F. 345, 353 (C.C.W.D. Tenn. 1899); *Whelan*, 86 F. at 221; *Boyle v. Great N. Ry.*, 63 F. 539 (C.C.E.D. Wash. 1894)).

31. See, e.g., *United States v. 30.64 Acres of Land*, 795 F.2d 796, 798 (9th Cir. 1986) (district court erred in not considering litigant's request for counsel as it misconceived its authority).

32. See, e.g., *Whisenant v. Yuam*, 739 F.2d 160, 162 (4th Cir. 1984) (district court's denial of request for appointment of counsel erroneously based on the ground that no federal funds were available to pay counsel); *Caruth v. Pinkney*, 683 F.2d 1044, 1049 (7th Cir. 1982) (lack of compensation for appointed counsel is not a consideration in district court's decision to obtain counsel for indigent litigant), *cert. denied*, 459 U.S. 1214 (1983); *McKeever v. Israel*, 689 F.2d 1315, 1319-20 (7th Cir. 1982) (district court erred by failing "entirely to exercise its discretion under section 1915(d) because it did not recognize its authority to appoint counsel . . . ; [t]he unavailability of funds to compensate an appointed attorney seems to have been the major concern of the trial court, but this has no bearing on the power of a court to provide counsel under section 1915(d)").

counsel in criminal and civil cases.³³ The broadened judicial construction of rights protected by the sixth amendment's guarantee, that "[i]n all criminal prosecutions the accused shall . . . have the Assistance of Counsel for his defence,"³⁴ widened the apparent constitutional gap between the rights of criminal and indigent civil litigants.³⁵ The logical extension of this reasoning provided that, for both the court and the appointed attorney, a mandatory appointment in a criminal case was "more justifiable" than in a civil case, given the rights at stake for a criminal defendant.³⁶ The federal courts thus accepted the proposition that there existed a constitutional right to appointed counsel in criminal cases, but that no such right prevailed in civil actions.³⁷

With this in mind, the federal courts considered the reach of section 1915(d) within the context of civil cases. Given the lack of a constitutional requisite, indigent civil litigants were afforded ap-

33. See *supra* note 4.

34. U.S. CONST. amend. VI.

35. *Powell v. Alabama*, 287 U.S. 45, 71-72 (1932). In *Powell*, Justice Sutherland stated:

[I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite to due process of law In a case such as this, whatever may be the rule in other cases, the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel.

Id. (citations omitted).

36. *United States v. 30.64 Acres of Land*, 795 F.2d 796, 801 (9th Cir. 1986) ("The constitutional requirements for civil actions differ significantly from those for criminal actions in which courts may appoint counsel. Federal criminal defendants facing imprisonment are entitled to representation of counsel, and the power of courts to appoint counsel for such defendants is thus necessary to preserve their constitutional rights.") (citations omitted). Compare 18 U.S.C. § 3006A (1988) (court must "appoint" counsel to indigent defendant in criminal case) with 28 U.S.C. § 1915(d) (1988) (court may "request" that counsel represent an indigent party in a civil matter).

37. See, e.g., *Reid v. Charney*, 235 F.2d 47, 47 (6th Cir. 1956). The court in *Reid* stated:

In contrast to a criminal proceeding, in which the court has a duty to "assign" counsel to represent a defendant in accordance with his Constitutional right, the court in a civil case has the statutory power only to "request an attorney to represent" a person unable to employ counsel.

Id. (citations omitted); see also *Caruth v. Pinkney*, 683 F.2d 1044, 1048 (7th Cir. 1982) ("[t]here is little doubt that there is no constitutional right to appointed counsel in a civil case"), *cert. denied*, 459 U.S. 1214 (1983); *Peterson v. Nadler*, 452 F.2d 754, 757 (8th Cir. 1971) ("[i]t is true that there exists no statutory or constitutional right for an indigent to have counsel appointed in a civil case") (emphasis in original); *Ehrlich v. Van Epps*, 428 F.2d 363, 364 (7th Cir. 1970) ("[a]lthough 28 U.S.C. § 1915(d) authorizes the court to request an attorney to represent any person unable to employ counsel, the court is not required to do so in a civil case").

pointed counsel only at the district court's discretion.³⁸ As all section 1915(d) appointments were considered discretionary, the federal courts used a two-prong analysis to determine when an appointment of counsel was proper.

Hence, in the first prong, using what may be termed the "merit prong," the courts considered whether the litigant's case warranted an appointment of counsel. If this merit-prong analysis was met by the litigant demonstrating an actionable claim worthy of an appointment of counsel, the courts then determined under the second prong, the "authority prong," whether the court had authority under section 1915(d) to authorize a compulsory assignment.

Therefore, under their merit-prong analysis, the courts in the Fourth, Fifth, Sixth, and Ninth Circuits examined whether "exceptional circumstances" existed to warrant an appointment of counsel in a civil case.³⁹ While the factors under this exceptional-circumstances analysis varied,⁴⁰ the courts looked primarily to the litigant's likelihood of success on the merits⁴¹ and his ability to articulate his claims *pro se* in light of the complexity of the legal issues involved.⁴²

38. *Martin-Trigona v. Larien*, 737 F.2d 1254, 1260 (2d Cir. 1984) ("In non-criminal cases federal courts have the authority to appoint counsel, but generally they are not required to do so. The determination of whether appointment of counsel is necessary rests with the discretion of the court."); *Moss v. Thomas*, 299 F.2d 729, 730 (6th Cir. 1962) ("while in contrast to a criminal proceeding in which there is a duty upon the Court to assign counsel to represent an indigent defendant, a court in a civil case with respect to the appointment of counsel is endowed with discretion").

39. *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986) (tracing the development of the "exceptional circumstances" analysis); *30.64 Acres*, 795 F.2d at 799; *Whisenant v. Yuam*, 739 F.2d 160, 163 (4th Cir. 1984); *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980); *Cook v. Bounds*, 518 F.2d 779, 780 (4th Cir. 1975); *Willett v. Wells*, 469 F. Supp. 748, 751 (E.D. Tenn. 1977), *aff'd mem.*, 595 F.2d 1227 (6th Cir. 1979).

40. *See, e.g., Ulmer v. Chancellor*, 691 F.2d 209, 213 (5th Cir. 1982) (listing the *Maclin* factors, *see infra* note 44, as factors to be considered under an exceptional-circumstances analysis).

41. *Childs v. Duckworth*, 705 F.2d 915, 922 (7th Cir. 1983) (inmate properly denied appointed counsel for his section 1983 complaint; "[e]ven though the claim is not frivolous, it does not follow that the indigent litigant has the right to the appointment of counsel if his chances of success are extremely slim"); *Lopez v. Reyes*, 692 F.2d 15, 17 (5th Cir. 1982) (inmate properly denied appointed counsel for his section 1983 complaint as there was "no showing . . . that counsel [was] necessary to present meritorious issues to the Court"); *Willett*, 469 F. Supp. at 751 (prisoner's request for appointment of counsel properly denied when "likelihood of success in his action is highly dubious").

42. *Howland v. Kilquist*, 833 F.2d 639, 646 (7th Cir. 1987) (even though district court abused its discretion by failing to state its reason for denying inmate's motion for appointment of counsel, error was harmless in that the litigant "was familiar with the law, having represented himself on several occasions both in civil matters and in his criminal case; . . . and that he was capable of presenting his own case"); *Wilborn*, 789 F.2d at 1331 (denial of request for counsel upheld as litigant "neither demonstrated a likelihood

The Seventh Circuit's merit-prong analysis, on the other hand, at times employed two separate approaches, one holding that appointment of counsel was discretionary "unless denial would result in fundamental unfairness impinging on due process rights"⁴³ and the other weighing certain factors⁴⁴ to determine whether appointment of counsel was appropriate.⁴⁵

In yet another merit-prong analysis, the Eighth Circuit considered whether the circumstances properly justified an appointment.⁴⁶ Furthermore, other federal appellate courts have used a combination of the foregoing merit tests.⁴⁷ Finally, within all of the above merit-prong analyses, courts have occasionally considered whether the litigant demonstrated to the court her attempts to

of success on the merits nor show[ed] that the complexity of the issues involved was sufficient to require designation of counsel"); *Cook*, 518 F.2d at 780-81 (prisoner properly denied appointed counsel as district court extended the litigant "considerable latitude in questioning witnesses as well as making statements on his own behalf to the court and jury").

In *Wilborn* however, the court noted its consternation with the requirements of the exceptional-circumstances analysis, stating:

[W]e are troubled by what we perceive to be the incoherence of the two-pronged inquiry into exceptional circumstances by which we are bound [W]e question how a court reasonably can expect a strong showing by a [section] 1983 claimant on the first prong when it is manifestly unlikely that a *pro se* petitioner involved in a complex case which he cannot litigate effectively would be *capable* of demonstrating a likelihood of success on the merits. Despite our misgivings, we are bound by the law of this circuit.

Wilborn, 789 F.2d at 1331 n.3 (emphasis in original).

43. *Heidelberg v. Hammer*, 577 F.2d 429, 431 (7th Cir. 1978) (extending this rule as enunciated in *La Clair v. United States*, 374 F.2d 486, 489 (7th Cir. 1967) to section 1983 proceedings).

44. The factors to be considered, while not exhaustive, include: (1) the merits of the indigent litigant's claim; (2) the nature of the factual issues raised in the claim; (3) whether the evidence to be presented to the factfinder consists of conflicting testimony; (4) capability of the indigent litigant to present the case; and (5) the complexity of the legal issues raised by the complaint. *Maclin v. Freake*, 650 F.2d 885, 887-89 (7th Cir. 1981).

45. For cases adopting the *Maclin* factors, see *McKeever v. Israel*, 689 F.2d 1315, 1320-21 (7th Cir. 1982); *Caruth v. Pinkney*, 683 F.2d 1044, 1048 (7th Cir. 1982), *cert. denied*, 459 U.S. 1214 (1983). For cases using both tests, see *Howland*, 833 F.2d at 646; *Childs*, 705 F.2d at 922; *Maclin*, 650 F.2d at 886-89.

46. *See, e.g., Nelson v. Redfield Lithograph Printing*, 728 F.2d 1003, 1005 (8th Cir. 1984) (requiring trial court to consider whether the plaintiff has alleged a valid prima facie claim, "whether the plaintiff has in good faith attempted to retain counsel and has been unsuccessful, . . . and whether the nature of the litigation is such that plaintiff as well as the court will benefit from the assistance of counsel"); *Peterson v. Nadler*, 452 F.2d 754, 757 (8th Cir. 1971) (trial court has authority to make an appointment of counsel "if within the court's discretion the circumstances are such that would properly justify it").

47. *See, e.g., Bemis v. Kelley*, 857 F.2d 14, 15-16 (1st Cir. 1988) (incorporating the exceptional-circumstances test with factors from the Seventh Circuit's *Maclin* test).

procure counsel⁴⁸ and whether appointing counsel would aid the court in its determination of the case.⁴⁹

Once the courts, using their various merit-prong analyses, determined that the civil litigant deserved an appointment of counsel, they then considered, under the authority prong, whether or not section 1915(d) authorized a compulsory assignment of counsel. Early decisions drew no distinction between the courts' ability to "request" or "appoint" attorneys in civil cases.⁵⁰ Instead, these cases emphasized the district court's discretion "to appoint" counsel and did not specify whether such an appointment, if granted, was mandatory or discretionary.⁵¹

Eventually, however, the federal appellate courts articulated varied approaches to the scope of section 1915(d).⁵² Under their au-

48. *Ulmer v. Chancellor*, 691 F.2d 209, 212-13 (5th Cir. 1982) (case remanded for determination by trial court of litigant's own attempts to secure counsel and whether counsel should be appointed).

49. *See, e.g., id.* at 213 ("district court should also consider whether the appointment of counsel would be a service to [the plaintiff] and, perhaps, the court and defendant as well, by sharpening the issues in the case, shaping the examination of witnesses, and thus shortening the trial and assisting in a just determination"); *McKeever*, 689 F.2d at 1321 ("[i]t will aid the court in the resolution of difficult legal issues if argument is presented on both sides by competent counsel"); *see also Heidelberg v. Hammer*, 577 F.2d 429, 431 (7th Cir. 1978). The *Heidelberg* court explained:

We point out . . . that it is extremely helpful to the court to have the plaintiff represented by counsel in a case such as this [a prisoner's section 1983 action]. We ourselves requested counsel to serve on appeal. Although a court is understandably reluctant to impose on an attorney the burden of representing a party in a civil case without a fee, the attorney who accepts such an appointment can perform a valuable service, if only in preventing the waste of valuable judicial time.

Id.

50. *United States v. 30.64 Acres of Land*, 795 F.2d 796, 799 n.3 (9th Cir. 1986) (citing *Lopez v. Reyes*, 692 F.2d 15, 17 (5th Cir. 1982); *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064, 1064-65 (7th Cir. 1981); *Maclin v. Freake*, 650 F.2d 885, 886-89 (7th Cir. 1981); *Cook v. Bounds*, 518 F.2d 779, 780 (4th Cir. 1975); *Bethea v. Crouse*, 417 F.2d 504, 505 (10th Cir. 1969); and *Moss v. Thomas*, 299 F.2d 729, 730 (6th Cir. 1962)).

51. *See, e.g., id.* at 800 (illustrating the use of "to appoint" by courts in two separate contexts: (1) "to appoint" meaning "to [compel] an attorney to represent an indigent client, whether with or without compensation"; and (2) "to appoint" meaning "to designate a *pro bono* volunteer attorney as counsel of record for an indigent client").

52. Nevertheless, even in circuits that have since taken a stance on the scope of section 1915(d), courts continue to use the terms "request" and "appoint" interchangeably. *See, e.g., id.* at 802 & n.10 (noting that it had used request and appoint interchangeably and that other courts had cited these cases for the power of appointment under section 1915(d)); *Caruth v. Pinkney*, 683 F.2d 1044, 1048 (7th Cir. 1982) ("Federal courts . . . are empowered by statute to appoint counsel when circumstances justify it. Section 1915 . . . authorizes a court to request an attorney . . .") (emphasis added). In proffering an explanation for this interchange of "request" and "appoint," the Ninth Circuit stated:

[T]he district court is given considerable discretion in determining whether counsel is necessary, so appellate reversal of trial court denials is . . . rare. As a

thority-prong analysis, the Sixth, Seventh, and Ninth Circuits looked to the statutory language of section 1915(d). These circuits noted that section 1915(d) authorized the courts only to "request" and not "appoint" representation, and thus emphasized the literal distinction between these two terms.⁵³ In addition, these courts stressed the constitutional differences between criminal and civil indigent litigants.⁵⁴ From these findings, the Sixth, Seventh, and Ninth Circuits reasoned that section 1915(d) did not authorize compulsory assignments of counsel.

In contrast, the Fourth and Eighth Circuits argued that section 1915(d) did authorize compulsory appointments.⁵⁵ In so holding, these circuits emphasized that the proper administration of justice required such mandatory appointments.⁵⁶ Further, the Eighth Circuit stressed the attorney's professional duty to provide public service, noting that attorneys would accept mandatory appointments

result, courts at both levels often have little incentive to choose their language carefully in ruling on section 1915(d) motions; it little matters to a litigant who is denied counsel whether the court declines to "appoint" an attorney or merely declines to "request" an attorney to serve.

30.64 *Acres*, 795 F.2d at 800.

53. 30.64 *Acres*, 795 F.2d at 801 ("In our view, 28 U.S.C. § 1915(d) does not authorize appointment of counsel to involuntary service. Several factors lead us to this conclusion. Most persuasively, the plain language of the statute states that a court may 'request' counsel for indigents.") (citation omitted); *Caruth*, 683 F.2d at 1049 ("a court has the authority only to *request* an attorney to represent an indigent, not to require him to do so") (emphasis in original); *Reid v. Charney*, 235 F.2d 47, 47 (6th Cir. 1956) ("the court in a civil case has the statutory power only to 'request an attorney to represent' a person unable to employ counsel") (citation omitted).

54. See *supra* notes 37-38.

55. See, e.g., *Whisenant v. Yuam*, 739 F.2d 160, 163 (4th Cir. 1984) ("[a]lthough [plaintiff] makes no claim that he has a constitutional right to the appointment of counsel for civil litigation, the district court was authorized by 28 U.S.C. § 1915(d) to appoint counsel"); *id.* n.3 ("[a]lthough the statute says that a court may 'request' an attorney to represent an indigent defendant, the cases construe the statute as authorizing a court to 'appoint' counsel"); see also *Peterson v. Nadler*, 452 F.2d 754 (8th Cir. 1971) ("express authority [is] given . . . in 28 U.S.C. § 1915 to appoint counsel in civil cases . . . federal courts do possess the statutory power to make this appointment").

56. See *Whisenant*, 739 F.2d at 163-64 (district court's denial of inmate's request for counsel on his section 1983 claim denied inmate a fundamentally fair trial); *Shields v. Jackson*, 570 F.2d 284, 286 (8th Cir. 1978) (holding that an appointment of counsel was appropriate and would advance the proper administration of justice as inmate alleged an actionable claim against the arresting police officer for taking inmate's property). In a 1971 case, the Eighth Circuit observed:

Plaintiff [a federal prisoner] is admittedly an indigent. For obvious reasons he alone cannot investigate the case or hope to obtain evidence to prove his allegations. The court will be aided by appearance of counsel at all proceedings. These circumstances fully justify the appointment of counsel to represent plaintiff and a failure to do so would amount to an abuse of discretion.

Peterson, 452 F.2d at 758.

to fulfill their professional obligations.⁵⁷

III. THE MALLARD DECISION

Due to the conflicting interpretations given section 1915(d) by the circuit courts, the United States Supreme Court granted certiorari in *Mallard v. United States*⁵⁸ to decide the scope of the federal courts' appointment powers under section 1915(d).

A. The Facts of the Case

In January 1987, John E. Mallard was admitted to practice law before the District Court for the Southern District of Iowa.⁵⁹ Six months later, the Volunteer Lawyers Project (VLP)⁶⁰ asked Mallard to represent two inmates and one former inmate in their section 1983⁶¹ claim against several prison guards and the prison administration.⁶² After reviewing his potential clients' case file, Mallard filed a motion to withdraw, claiming that he was unquali-

57. *Nelson v. Redfield Lithograph Printing*, 728 F.2d 1003, 1005 (8th Cir. 1984) (disapproving of judges' reluctance to request lawyers to appear in *pro bono* litigation and restating the *Peterson* court's confidence that attorneys will serve when assigned to do so). The *Peterson* court observed:

Lawyers have long served in state and federal practice as appointed counsel for indigents in both criminal and civil cases. The vast majority of the bar have viewed such appointments to be integrally within their professional duty to provide public service. Only rarely are lawyers asked to serve in civil matters. We have the utmost confidence that lawyers will always be found who will fully cooperate in rendering the indigent equal justice at the bar.

Peterson, 452 F.2d at 758.

58. 488 U.S. 815 (1988).

59. *Mallard v. United States Dist. Court*, 490 U.S. 296, 299 (1989). Despite the inference that Mallard was a mere babe in the legal woods, Mallard graduated from law school in 1980, practiced for several years in California, and then served as in-house counsel to an Iowa corporation. Affidavit of John E. Mallard at 1, *Traman v. Parkin*, No. 87-317-B (S.D. Iowa June 25, 1987) (LEXIS, Genfed Library, Briefs File).

60. *Mallard*, 490 U.S. at 299. The Volunteer Lawyers Project (VLP), a joint venture of the Legal Services Corporation of Iowa and the Iowa Bar Association, participates in supplying attorneys to represent indigents. After the Eighth Circuit required a program to provide representation in *pro bono* situations, the Southern District of Iowa instituted a program in conjunction with VLP to provide attorneys to represent clients in *pro bono* cases, including in forma pauperis actions, under section 1915. *Id.* at 298 (citing *Nelson*, 728 F.2d at 1005).

Under this program, a qualifying attorney (one admitted to practice in federal court) would only be eligible to be appointed every third year, consideration would be given to geographical convenience, support services would be available concerning the substantive and procedural law at issue, and the attorney could apply to the court for reimbursement of out-of-pocket costs. Brief for the Respondent app. I, *Mallard v. United States Dist. Court*, 490 U.S. 296 (1989) (No. 87-1490) (LEXIS, Genfed Library, Briefs File).

61. 42 U.S.C. § 1983 (1982).

62. *Mallard*, 490 U.S. at 299.

fied to handle the case.⁶³ Mallard supported his withdrawal motion by citing his lack of litigation experience in general and with section 1983 claims in particular.⁶⁴ The VLP contested Mallard's withdrawal, arguing that Mallard was competent to take the case.⁶⁵ After the magistrate denied Mallard's motion to withdraw, Mallard sought relief from the district court.⁶⁶

B. *The Lower Courts' Decisions*

The district court upheld the magistrate's decision declining to allow Mallard to withdraw.⁶⁷ In so holding, the judge rejected Mallard's contention that he was insufficiently familiar with litigation to take the case, noting that Mallard's brief on his own behalf evidenced his ability to represent the section 1983 plaintiffs.⁶⁸ The court further held that section 1915(d) empowers federal courts to make compulsory appointments in civil cases. The district court concluded, therefore, that Mallard had to serve as appointed counsel.⁶⁹

63. Specifically, Mallard sought

dismissal of his appointment on the grounds (a) that he was not competent to represent the inmates based on his general lack of experience in litigation and (b) that 28 U.S.C. § 1915(d) does not empower the District Court to require an unwilling attorney to represent a person making a request for counsel thereunder.

Statement of the Case, Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, *Mallard v. United States Dist. Court*, 488 U.S. 815 (1988) (No. 87-1490) (LEXIS, Genfed Library, Briefs File).

64. Mallard's motion to withdraw stated:

I have no experience in litigation in cases such as the subject case which involves multiple plaintiffs and defendants and requires substantial depositions and an ability to prepare, examine, and cross examine numerous parties and witnesses at trial. . . .

. . . I am willing to volunteer my legal services for other volunteer lawyers projects with the legal services program, in lieu of participating in the federal pro bono referral program for which I am not qualified. Motion to Withdraw, *Traman v. Parkin*, No. 87-317-B (S.D. Iowa June 25, 1987), as found in On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit app., *Mallard v. United States Dist. Court*, 490 U.S. 296 (1989) (No. 87-1490) (LEXIS, Genfed library, Briefs file).

65. *Mallard*, 490 U.S. at 299.

66. *Id.*

67. *Id.* at 300.

68. *Id.*; see also Ruling on Motion, *Traman v. Parkin*, No. 87-317-B (S.D. Iowa June 25, 1987) as found in Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, *Mallard v. United States Dist. Court*, 488 U.S. 815 (1988) (No. 87-1490) (LEXIS, Genfed Library, Briefs File) ("Mallard can hardly claim incompetence when he has filed an eighteen page brief in support of this motion that demonstrates thorough research, careful reasoning, and effective writing.").

69. *Mallard*, 490 U.S. at 300.

Thus, in November 1987, on appeal to the Eighth Circuit Court of Appeals, Mallard requested a writ of mandamus "to compel the district court to allow his withdrawal" from the case.⁷⁰ Mallard's writ of mandamus was denied without opinion by the Eighth Circuit.⁷¹ Mallard then petitioned the United States Supreme Court for a writ of certiorari, and the Supreme Court granted Mallard's petition.⁷²

C. *The Opinion of the Court*

The United States Supreme Court reversed the decision of the Eighth Circuit. The Court held that section 1915(d) does not authorize the federal courts to make coercive appointments of counsel; rather, it allows the courts only to request an attorney to serve as counsel for an indigent civil litigant.⁷³ Writing for the majority,⁷⁴ Justice Brennan focused his analysis on the statutory language of section 1915(d).⁷⁵ In pertinent part, the statute provides that "the court may request an attorney to represent any such person unable to employ counsel."⁷⁶ Justice Brennan emphasized that interpretation of the word "request" in section 1915(d) was dispositive of the issue.⁷⁷

To determine the proper interpretation of the term "request," the majority considered the congressional intent in enacting section 1915(d).⁷⁸ The Court looked to the congressional floor debates concerning the passage of the original statute in 1892⁷⁹ and con-

70. *Id.*

71. *Mallard v. United States Dist. Court*, No. 87-2583 (8th Cir. Dec. 7, 1987), *rev'd*, 490 U.S. 296 (1989).

72. 488 U.S. 815 (1988).

73. *Mallard*, 490 U.S. at 310.

74. *Id.* at 298. Justice Brennan delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices White, Scalia, and Kennedy joined. Justice Kennedy filed a concurring opinion. *See id.* at 310-11.

75. *Id.* at 300 ("[i]nterpretation of a statute must begin with the statute's language").

76. 28 U.S.C. § 1915(d) (1982); *see supra* note 28 for the text of section 1915(d).

77. *Mallard*, 490 U.S. at 301.

78. The predecessor of section 1915(d) originally was passed in 1892. Act of July 20, 1892, ch. 209, § 1, 27 Stat. 252, *cited in Mallard*, 490 U.S. at 306 n.5.

79. A brief filed by Mallard quoted the following exchange:

Mr. WILLIAM A. STONE. In a case where the plaintiff is wholly unable to pay the costs where there is a judgment against him for the costs, how do the officers get their pay?

Mr. CULBERSON. They do not get any in that event.

Mr. WILLIAM A. STONE. Then you are simply compelling the officers to do that work for nothing.

Mr. CULBERSON. We are simply in these cases of charity and humanity compelling these officers, all of whom make good salaries, to do this work for

cluded that compelled service without compensation was not intended by Congress.⁸⁰

Further, the Court examined section 1915(d) in the context of the other provisions of section 1915, noting that Congress had mandated certain services by witnesses in in forma pauperis proceedings.⁸¹ From this, the Court reasoned that the use of the term "request" in section 1915(d) was intentional and that if Congress had wanted to "require" representation, it would have done so.⁸²

Next, the Court considered various state statutes authorizing the appointment of counsel that were in effect at the time the original section 1915(d) was enacted.⁸³ Comparing these state statutes with the federal legislation, the majority again suggested that Congress understood the import of the linguistic distinction between "request" and "assign," and thus concluded that Congress did not intend to compel mandatory representation.⁸⁴ In addition, the Court reviewed the English common law roots of appointed counsel, observing that the "long-standing duty" of attorneys to provide indigent representation is not as firmly planted in English tradition as has been assumed.⁸⁵

In its final comparison, the Court examined section 1915(d) in light of other federal statutes authorizing appointments of counsel.⁸⁶ The Court concluded that the use of "assign" in the only

nothing. That is all the bill does. There may be one such case upon a docket of five hundred; and they are not required to do much ex-officio service.

Reply Brief for the Petitioner app., *Mallard v. United States Dist. Court*, 490 U.S. 296 (1989) (LEXIS, Genfed Library, Briefs File) (citing 23 CONG. REC. 5199 (1892)).

80. *Mallard*, 490 U.S. at 302 & n.3. *But see supra* note 79. Read in context, the use of "compel" by Mr. Culberson suggests that mandatory service in these "rare" cases was indeed intended. Moreover, characterizing attorneys as officers of the court potentially implies a duty to assist the court in every way.

81. The Court stated:

Whereas § 1915(d) merely empowers a court to *request* an attorney to represent a litigant proceeding in forma pauperis, § 1915(c)—adopted at the very same time as § 1915(d)—treats court officers and witnesses differently: "The officers of the court *shall* issue and serve all process, and perform all duties in such cases. Witnesses *shall* attend as in other cases"

Mallard, 490 U.S. at 301-02 (emphasis in original) (quoting 28 U.S.C. § 1915(c) (1982)).

82. *Id.* at 302.

83. *Id.* at 302-03. Justice Brennan noted that at the time of the 1892 act, 12 states had statutes authorizing courts to "assign" or "appoint" attorneys to serve without compensation, and not merely "requesting" them to do so.

84. *Id.* at 303-04 ("[i]t is nevertheless significant that no reported decision exists in the above States prior to 1892 holding that a lawyer could not decline representation without compensation, [suggesting] that Congress did not intend to replicate a system of coercive appointments when it enacted § 1915(d)") (citation omitted).

85. *Id.* at 304 n.4 (citing Shapiro, *supra* note 1, at 749-62).

86. *Id.* at 305.

federal appointment statute contemporaneous with the original section 1915(d),⁸⁷ as well as the use of “assign” and “appoint” in later statutes,⁸⁸ evidenced the intent of Congress not to authorize mandatory appointments of counsel.⁸⁹

From the above considerations, the Court concluded that section 1915(d) authorizes federal courts only to request attorneys to serve and does not compel them to do so.⁹⁰ However, the Court then stated that its interpretation “did not render section 1915(d) a nullity.”⁹¹ The Court opined that in practice, section 1915(d) legitimizes a court’s request for an attorney to serve, in that the attorney should understand that the request is appropriate and thus should not be ignored or disregarded.⁹² In essence, the Court suggested that attorneys have a duty, as part of their ethical obligation to the profession, to obey section 1915(d) court appointment requests.⁹³

In conclusion, the majority stressed that its holding was limited to statutory interpretation of section 1915(d), suggesting that the independent, individual duty of attorneys to represent indigent litigants remains unscathed.⁹⁴ The Court reiterated that a section 1915(d) request should neither be taken lightly nor refused for anything less than an ethical violation, such as a conflict of interest.⁹⁵

Although the Court resolved the scope of the federal courts’ statutory appointment power under section 1915(d), the majority nevertheless declined to address two crucial related issues. Specifically, the majority declined to decide the constitutionality of

87. The Court noted:

The sole federal statute antedating § 1915(d) that provided for court-ordered representation allowed a capital defendant “to make his full defence by counsel learned in the law” and stated that “the court before whom such person shall be tried, or some judge thereof, shall . . . immediately, upon his request . . . assign to such person such counsel, not exceeding two, as such person shall desire. . . .”

Id. at 305-06 (emphasis in original) (quoting Act of April 30, 1790, ch. 9, § 29, 1 Stat. 118 (current version codified at 18 U.S.C. § 3005 (1988))).

88. *Id.* at 306 (“[e]very federal statute still in force that was passed after 1892 and that authorizes courts to provide counsel states that courts may ‘assign’ or ‘appoint’ attorneys, just as did the 1790 capital representation statute”).

89. *Id.* at 306-07.

90. *Id.* at 307.

91. *Id.* The Court rejected the contention that without a coercive reading, section 1915(d) was superfluous, noting that “[s]tatutory provisions may simply codify existing rights or powers.”

92. *Id.* at 308.

93. *Id.* at 310.

94. *Id.*

95. *Id.*

mandatory appointments⁹⁶ and whether the federal courts have the inherent authority, regardless of section 1915(d), to compel attorneys to serve.⁹⁷

D. *The Concurrence*

In his brief concurrence, Justice Kennedy re-emphasized the *Mallard* opinion's function as one of statutory interpretation and *not* one of defining the professional responsibilities of attorneys.⁹⁸ Kennedy stressed that it is attorneys' "special status as officers of the court" and their "traditional obligations" that require acceptance of court appointments, rather than the statutory language of section 1915(d).⁹⁹

E. *The Dissent*

In dissent, Justice Stevens¹⁰⁰ first argued that the relationship between a court and the members of its bar is not merely statutory.¹⁰¹ Consequently, in the dissent's view, this particular case concerned more than the interpretation of section 1915(d).¹⁰² Specifically, the dissent argued that as a professional, an attorney's duties exceed those provided by statute.¹⁰³ In particular, Justice Stevens stressed that traditionally, representation of indigents has been required as a condition to bar membership and is firmly

96. The Court stated:

We do not decide today, whether, or under what conditions, 18 U.S.C. § 3005 or any other federal statute providing for the "assignment" or "appointment" of counsel authorizes federal courts to compel an unwilling attorney to render service. Nor do we offer an opinion on the constitutionality of compulsory assignments.

Id. at 306 n.6.

97. *Id.* at 308 n.8, 310. Justice Brennan sidestepped the inherent-authority issue by providing that the district court below had not invoked its inherent authority, nor had the Eighth Circuit offered this as a ground for denying *Mallard's* writ of mandamus. *Id.* Justice Brennan observed, however, that the argument that the majority's reading of section 1915(d) was superfluous would undermine the assertion that the courts already have inherent power to compel unwilling attorneys to serve.

98. *Id.* at 310 (Kennedy, J., concurring).

99. *Id.* at 310-11 (Kennedy, J., concurring).

100. *Id.* at 311 (Stevens, J., dissenting). Justices Marshall, Blackmun, and O'Connor joined in the dissent.

101. *Id.* (Stevens, J., dissenting).

102. *Id.* (Stevens, J., dissenting). Concurrently, Justice Stevens noted that this case did "not concern the sufficiency of the lawyer's reasons for declining an appointment or the sanctions that may be imposed on an attorney who refuses to serve without compensation." *Id.* (Stevens, J., dissenting) (footnote omitted).

103. *Id.* (Stevens, J., dissenting) ("[t]he duties of the practitioner are an amalgam of tradition, respect for the profession, the inherent power of the judiciary, and the commands that are set forth in canons of ethics, rules of court, and legislative enactments").

rooted, at least in the United States, as a duty of the legal community.¹⁰⁴

Further, the dissent contested the majority's reading of the congressional intent behind section 1915(d).¹⁰⁵ Rather than intending a distinction between the federal and state courts' appointment authority, the dissent argued that Congress meant to provide the same appointment powers to the federal courts.¹⁰⁶ Noting that in the original enactment of section 1915(d) Congress had used the words "assign" and "request" interchangeably,¹⁰⁷ Justice Stevens concluded that the use of the term "request" had no particular significance.¹⁰⁸ Moreover, the dissent observed that the term "assign" was used by the courts in their initial interpretations of the section 1915(d) appointment power.¹⁰⁹

Accordingly, the dissent rejected the majority's literal distinction between the federal section 1915(d) use of "request" and the states' use of "appoint" or "assign."¹¹⁰ Instead, Justice Stevens maintained that Congress clearly intended that section 1915(d) authorize mandatory appointments.¹¹¹

Thus, the dissent concluded, based on the traditional duties of attorneys and the congressional intent behind section 1915(d), the proper construction of section 1915(d) would permit federal courts to make mandatory appointments of counsel.¹¹² In the dissent's

104. *Id.* at 311-12 & nn.2-4 (Stevens, J., dissenting) (citing *Supreme Court v. Piper*, 470 U.S. 274, 287 (1985) ("a nonresident bar member, like the resident member, could be required to represent indigents and perhaps to participate in formal legal-aid work"); *Barnard v. Thorstenn*, 489 U.S. 546 (1989) (noting that representation of indigent criminal defendants is a condition of Virgin Island bar membership); and *People ex rel. Karlin v. Culkin*, 248 N.Y. 465, 470-71, 162 N.E. 487, 489 (1928) (Justice Cardozo recognizing that "[m]embership in the bar is a privilege burdened with conditions" including that of representing indigents without compensation)).

105. *Id.* at 314-15 & n.6 (Stevens, J., dissenting).

106. The dissent stated:

Congress intended to "open the United States courts" to impoverished litigants and "to keep pace" with the laws of these "[m]any humane and enlightened States." Congress also intended to insure that the rights of litigants suing diverse parties in the most liberal of these States would not be defeated by the defendant's removal of the suit to federal court.

Id. at 314-15 (Stevens, J., dissenting) (quoting H.R. REP. NO. 1079, 52d Cong., 1st Sess. 1-2 (1892)).

107. *Id.* at 315-16 (Stevens, J., dissenting) ("federal statute was introduced in the House and the Senate as an Act empowering courts to 'assign' counsel for poor persons") (quoting 23 CONG. REC. 5199, 6264 (1892)).

108. *Id.* at 315-16 (Stevens, J., dissenting).

109. *Id.* at 316 (Stevens, J., dissenting); *see also supra* note 30.

110. *Mallard*, 490 U.S. at 315 (Stevens, J., dissenting).

111. *Id.* (Stevens, J., dissenting).

112. *Id.* at 316-18 (Stevens, J., dissenting).

view, this interpretation of section 1915(d) appointments would "require counsel to serve, absent good reason,"¹¹³ when asked to do so by the court.¹¹⁴

Moreover, the dissent contended that in this particular case, Mallard's admission to the bar was premised on his acceptance of an obligation to participate in the court's representation for indigents program.¹¹⁵ Accordingly, the dissent construed the court's formal request to Mallard as "tantamount to a command."¹¹⁶ In conclusion, Justice Stevens surmised that the power of the federal courts to appoint counsel had a firm tradition and should not be disrupted by so literal a reading of the word "request."¹¹⁷

IV. ANALYSIS

While *Mallard* defined the scope of statutory appointment power under section 1915(d), the opinion quite significantly did not decide what power the federal courts retain, outside of section 1915(d), to compel mandatory representation for indigent civil litigants. Specifically, the *Mallard* opinion leaves open two questions: (1) the constitutionality of mandatory appointments¹¹⁸ and (2) the federal courts' inherent power to compel representation.¹¹⁹

A. *The Constitutionality of Mandatory Appointments*

If *Mallard* had held compulsory assignments unconstitutional, that decision would have determined the scope of section 1915(d) and concluded any further inquiry into the appointment powers of the federal courts. However, by declining to address the constitutionality of mandatory appointments,¹²⁰ *Mallard* left undisturbed prior Court decisions that approved the constitutionality of such

113. The dissent explained:

There are, of course, many situations in which a lawyer may properly decline such representation. He or she may have a conflict of interest, may be engaged in another trial, may already have accepted more than a fair share of the uncompensated burdens that fall upon the profession, or may not have the qualifications for a particular assignment.

Id. at 311 & n.1 (Stevens, J., dissenting). Justice Stevens noted that this last reason was given by Mallard to support his motion to withdraw and was rejected by the district court.

114. *Id.* at 315 (Stevens, J., dissenting).

115. *Id.* at 317 (Stevens, J., dissenting).

116. *Id.* (Stevens, J., dissenting).

117. *Id.* (Stevens, J., dissenting).

118. *Id.* at 306 n.6; *see also supra* note 96.

119. *Mallard*, 490 U.S. at 308 n.8, 310; *see also supra* note 97.

120. *See supra* note 12 for an overview of the arguments concerning the constitutionality of mandatory appointments, with or without compensation. While there are several

appointments. For example, in *Hurtado v. United States*,¹²¹ the Court endorsed the notion that mandatory appointments do not constitute a taking without just compensation violative of the fifth amendment.¹²²

Although valid arguments exist on both sides of the takings issue, those arguments that contend that mandatory representation is constitutional are often grounded upon the notion that attorneys, as officers of the court, are professionally obligated to provide indigent representation.¹²³ In these terms, an attorney is provided a right to practice law only to the extent licensed by the bar; if practicing law is conditioned upon representing indigents, there has been no taking from an individual attorney, as an unconditional right to practice was never granted initially. Hence, the attorney's property right in practicing law is merely definitional; if the courts and the bar put conditions on that right to practice, then there has been no taking when an attorney is appointed to represent an indigent.

Therefore, assuming that mandatory appointments are constitutional, the issue becomes whether the federal courts retain power, in light of *Mallard* and its construction of section 1915(d), to compel an unwilling attorney to represent indigent civil litigants.

B. The Significance of Inherent Authority

By addressing only the statutory appointment power under sec-

constitutional challenges, the most contested one concerns whether mandatory representation violates the fifth amendment's guarantee of no taking without just compensation.

121. 410 U.S. 578 (1973).

122. *Id.* at 588-89 ("the Fifth Amendment does not require that the Government pay for the performance of a public duty it is already owed . . . [for example] representation of indigents by court-appointed attorney") (citing *United States v. Dillon*, 346 F.2d 633, 635 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966)).

123. *United States v. Dillon*, 346 F.2d 633, 635 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966). While *Dillon* specifically concerned representation for a criminal defendant, the court in that case broadly stated:

[T]he obligation of the legal profession to serve indigents on court order is an ancient and established tradition, and . . . appointed counsel have generally been compensated, if at all, only by statutory fees which would be inadequate under just compensation principles, and which are usually payable only in limited types of cases [R]epresentation of indigents under court order, without a fee, is a condition under which lawyers are licensed to practice as officers of the court An applicant for admission to practice law may justly be deemed to be aware of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order.

Id.

tion 1915(d),¹²⁴ the Court in *Mallard* increased the potential significance of the inherent powers of the federal courts to appoint mandatory representation in civil cases. While Justice Brennan limited the federal courts' appointment power under section 1915(d) to an ability to "request" attorney services, he nevertheless stressed the ethical duty of individual lawyers to step up and take these requested assignments.¹²⁵ By urging attorneys not to take court-requested appointments lightly,¹²⁶ Justice Brennan tacitly embraced Justice Stevens's assertion that there exists more than a statutory relationship between attorneys and the judiciary.¹²⁷ This view was emphasized further by Justice Kennedy, who in his concurrence stressed that attorneys have duties that emanate from their unique status as officers of the court.¹²⁸ Thus, to argue inconsistently that the courts have merely statutory power to request, but that an attorney's obligation to accept is greater, implies the existence of an inherent power on the part of the courts to compel representation.

Moreover, the majority's enumeration of valid factors that allow attorneys to decline appointments¹²⁹ further evidences that the courts' power in this regard is more than statutory. Justice Brennan suggested that, originally, Congress intentionally used the term "request" to allow attorneys to decline representation for ethical reasons.¹³⁰ Yet, under *Mallard*, if a court's request is just that, a request, and hence optional, why stress the significance of an attorney's reason for refusal? Therefore, despite *Mallard*'s holding that section 1915(d) does not allow mandatory appointment of counsel, the implications within the *Mallard* opinion, as well as the majority's reliance on the unique status of attorneys, suggest that the federal courts retain inherent authority to appoint counsel for indigent civil litigants.

As noted previously, prior caselaw suggests that courts have in-

124. See *supra* notes 96-97.

125. *Mallard v. United States Dist. Court*, 490 U.S. 296, 310 ("[w]e do not mean to question, let alone denigrate, lawyers' ethical obligation to assist those who are too poor to afford counsel, or to suggest that requests made pursuant to § 1915(d) may be lightly declined because they give rise to no ethical claim").

126. *Id.*

127. *Id.* at 311 (Stevens, J., dissenting). In particular, Justice Stevens noted the traditions behind the relationship between the bench and bar, giving force to the argument that courts retain their inherent authority to appoint representation after *Mallard*.

128. *Id.* at 310-11 (Kennedy, J., concurring).

129. *Id.* at 303, 310.

130. *Id.* at 303 (attorneys should decline a request "if in their view their personal, professional, or ethical concerns bid them do so") (emphasis added).

voked their inherent authority to appoint counsel only in criminal cases.¹³¹ This same inherent authority, however, should be equally invocable in civil cases, as the basis for inherent authority is not constitutional or statutory, but rather is grounded in the administration of the judiciary.¹³² To say that a court can appoint representation for a criminal defendant due to his constitutional right misstates the argument. A court's inherent authority to administer justice should always be available, regardless of the "type" of case before it. Such rigid adherence to this perceived constitutional distinction between criminal and civil indigent litigants results in the civil litigant being denied justice.

In practice, the federal courts' use of this inherent power would be employed on the same discretionary basis as their power invocable under section 1915(d). Thus, the indigent civil litigant would first have to demonstrate a colorable claim. *Only* if this threshold were met would the court *then* consider using its inherent authority to appoint an attorney to represent the indigent civil litigant.¹³³

Accordingly, *Mallard* illustrates the anomaly inherent in allowing a skilled attorney to decline a court appointment for representation of an indigent civil litigant. That John Mallard was competent enough to argue his case before the United States Supreme Court certainly suggests his competence to represent prison inmates in their section 1983 claims. As a practical matter, courts recognize that certain factors, such as financial burden or excessive case load, will excuse an attorney from accepting an appointment. However, absent such a legitimate excuse, federal courts do retain the inherent authority to require an attorney to accept indigent civil appointments.

131. See *supra* note 23 and accompanying text.

132. 20 AM. JUR. 2D *Courts* § 79 (1965); see also *supra* note 25.

133. In *McKeever v. Israel*, 689 F.2d 1315, 1325 (7th Cir. 1982) (Posner, J., dissenting), Judge Posner suggests that there "should be a presumption against appointing counsel in a prisoner's civil rights suit." Instead, Judge Posner argues, the burden placed on the legal profession, judges, and prison administrators by prisoners' civil rights cases, and prisoner requests for appointed counsel, require that the marketplace be the true testing ground for whether a prisoner has a meritorious claim. *Id.* (Posner, J., dissenting)

Fisch challenges this argument as extended to the denial of appointed representation for all indigent civil litigants, not just prisoners. Specifically, Fisch argues:

It is one thing to insist that a plaintiff undergo such a market test—assuming that it is a market to which the plaintiff has been given fair and full access—prior to invoking the court's discretion so as to avoid forcing a lawyer to take a case someone else would be willing to take voluntarily. It is quite another to deny the court any power to override the results of the [marketplace] test.

Fisch, *supra* note 1, at 541.

V. IMPACT

The Court's *Mallard* opinion has done little to clarify the appointment powers of the federal courts. Precisely because the Court did not reach the inherent authority issue, the full scope of the federal courts' appointment power remains undefined. Thus, the practical effect of the *Mallard* holding remains unclear. Federal courts may continue to make mandatory appointments, relying on their inherent authority rather than section 1915(d), or they may actually lessen their number of section 1915(d) requests, depending on the availability of volunteer legal counsel.

In either event, it is apparent that the potential for the federal courts to utilize their inherent authority remains. In a recent case decided by the United States Supreme Court, attorneys in the District of Columbia who served as court-appointed counsel for indigent defendants in criminal cases boycotted the Superior Court of the District of Columbia to force an increase in their compensation.¹³⁴ While the main issue concerned antitrust considerations, Justice Blackmun intimated that the attorneys could be compelled to serve, regardless of an increase in compensation.¹³⁵ In so doing, Justice Blackmun returned to the attorneys' duty to serve either as a condition of practicing law in the District of Columbia or through contempt proceedings.¹³⁶ Justice Blackmun also stated that such a view was not inconsistent with *Mallard*, specifically noting that *Mallard* had not addressed the power of the federal courts' inherent authority to compel attorneys to serve.¹³⁷

VI. CONCLUSION

For the majority of licensed attorneys, the issue of mandatory appointment is seemingly irrelevant. Indeed, for most practitioners, the question of the courts' power to compel an attorney to represent an indigent litigant may appear to be a purely academic exercise. However, the relevance of this issue may soon be brought to bear as more states consider the imposition of mandatory *pro bono publico* work¹³⁸ and as local rules require this duty of repre-

134. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990).

135. *Id.* at 453 (Blackmun, J., concurring in part and dissenting in part).

136. *Id.* (Blackmun, J., concurring in part and dissenting in part).

137. *Id.* at 454 footnote following n.9 (Blackmun, J., concurring in part and dissenting in part).

138. Chambers, *Lawyers Find Loopholes in Pro Bono*, NAT'L L.J., Oct. 1, 1990, at 13, col. 3 (discussing New York's consideration of a mandatory *pro bono* program evidencing a re-emphasis upon this issue); see also Taylor, *Texans Make Pro Bono Pitch*, NAT'L L.J.,

sentation as an obligation for admission to that particular bar.¹³⁹ Thus, the parameters of when a court can compel an appointment and when an attorney is required to serve become important.

While explicitly interpreting section 1915(d), *Mallard* does little to define the courts' inherent powers in this area. By emphasizing the traditional duties of attorneys, the Court suggests that the judiciary retains its inherent power to compel appointments. As a practical matter, the analyses previously employed by the circuits will change little. A district court will analyze the case and determine, in its discretion, whether the indigent civil litigant is entitled to appointment of representation. If the litigant is entitled to an appointment, the court will then attempt to secure such counsel. The difficulty lies in the cases in which no volunteer counsel can be obtained to take the case. In this situation, the court must exercise the inherent power it hopefully has, or leave justice unadministered.

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Apr. 1, 1991, at 3, col. 1 (discussing a class action suit brought by Texas attorneys to force the State Bar of Texas to institute a mandatory *pro bono* program).

139. For example, the application for admission to the trial bar for the United States District Court for the Northern District of Illinois provides the following:

Note: Trial Bar membership carries with it an obligation for *pro bono* service. Pursuant to General Rule 3.31 of the United States District Court for the Northern District of Illinois, "Every member of the Trial Bar is to be available for appointment by the court to represent or assist in the representation of those who cannot afford to hire a member of the trial bar."

Instructions for Completing Trial Bar Petition, United States District Court for the Northern District of Illinois (available from United States District Court, Attorney Admissions Coordinator).

