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# *Mallard v. United States District Court for the Southern District of Iowa: The Supreme Court Ducks Pro Bono Issues*

## I. Introduction

It is well established that indigent criminal defendants facing imprisonment have a right to counsel under the sixth and fourteenth amendments.<sup>1</sup> In civil actions, however, there is no such broad right to counsel.<sup>2</sup> Nevertheless, under 28 U.S.C. § 1915, a civil litigant alleging indigence may apply to the court to have counsel assigned to him.<sup>3</sup> In the absence of a constitutional right to counsel, the court has discretion to deny the indigent's application if it deems the action frivolous or malicious.<sup>4</sup>

A separate issue from the rights of the litigant are the rights and obligations of the court-assigned lawyer, should the applicant's request for counsel be granted.<sup>5</sup> If a lawyer is unwilling to represent the indigent litigant in such an action, the question arises as to whether the court is empowered to require him to do so. A recent Supreme Court decision focused on the right of a lawyer to refuse an assignment made pursuant to the statute.

In *Mallard v. United States District Court for the Southern District of Iowa*,<sup>6</sup> the Court held that under section 1915 a federal court may request, but not require, an attorney to re-

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1. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right of an indigent defendant in a criminal trial to assistance of counsel); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (right of indigent defendant to assistance of counsel in criminal trial if trial may result in a deprivation of his liberty, whether offense is a misdemeanor or felony).

2. A right to counsel based on the due process clause of the fourteenth amendment has been recognized in civil proceedings only when the indigent's "interest in personal freedom" is at stake. *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 25 (1981); see, e.g., *In re Gault*, 387 U.S. 1 (1967) (right to counsel in civil delinquency proceedings as a result of which a juvenile defendant may be confined in a state institution).

3. 28 U.S.C. § 1915(d) (1982).

4. *Id.*

5. The distinction between these two issues, though sometimes unclear, is important; see Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735, 754 (1980).

6. 109 S. Ct. 1814 (1989).

present an indigent litigant in a civil action.<sup>7</sup> Mallard had been assigned to represent several indigent plaintiffs in federal court and requested withdrawal from the assignment. The district court denied his request<sup>8</sup> and the Court of Appeals for the Eighth Circuit denied his petition for a writ of mandamus to compel the district court to allow him to withdraw.<sup>9</sup> In a five to four decision,<sup>10</sup> the Supreme Court reversed the court of appeals, holding that the statute does not authorize coercive appointments of counsel.

As the Court's first treatment of this issue, *Mallard* resolves conflicting readings of the statute among the circuits.<sup>11</sup> The decision, however, rests on narrow grounds of statutory construction. The Court declined to discuss possible constitutional objections to mandatory appointments or the inherent authority of a court to compel a lawyer's services, nor did it adequately consider the ethical or practical problems of coercive appointments that have increasingly concerned individual lawyers, bar associations, and the courts.<sup>12</sup> It is therefore unlikely that this decision will be both the first and the last word from the Court on compelling lawyers to represent indigent civil litigants.

Part II of this Note examines lower court decisions that have given the statute either mandatory or precatory interpretations, as well as brief overviews of the constitutional objections to mandatory appointments, the inherent power of a court to restrict the membership of its bar to those willing to perform public service, and some of the policy considerations regarding pro bono representation. The facts and procedural history of *Mallard* are presented in Part III, along with summaries of the majority and dissenting opinions, while Part IV examines the implications and possible consequences of the Court's deliberate

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7. Although the statute governs both civil and criminal litigants, see 28 U.S.C. § 1915(a), the issue arose in the context of a civil action, and the Court's holding is restricted to coercive appointments in civil cases. *Mallard*, 109 S. Ct. at 1816.

8. Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit app. at 2a-4a, *Mallard v. United States Dist. Court for the S. Dist. of Iowa*, 109 S. Ct. 1814 (1989) (No. 87-1490) [hereinafter Petition for a Writ of Certiorari] (containing district court's unpublished opinion).

9. *Id.* app. at 1a (court of appeals' unpublished denial).

10. See *infra* note 140.

11. See *infra* notes 23-66 and accompanying text.

12. See *infra* notes 149-54 and accompanying text.

avoidance of the questions beyond mere statutory construction. This Note concludes, in Part V, that the Court must consider the issues it avoided in this case in order to provide a full resolution of matters affecting pro bono representation.

## II. Background

### A. *The Statute*

The statute now codified at 28 U.S.C. § 1915 (1982) was enacted in 1892 to govern federal court proceedings *in forma pauperis*.<sup>13</sup> Such proceedings, in both civil and criminal cases,<sup>14</sup> are authorized for a litigant who files an affidavit alleging that he cannot afford costs and is entitled to redress.<sup>15</sup> The court then may direct the transcript or record on appeal to be printed at government expense<sup>16</sup> and officers of the court to serve process.<sup>17</sup> Section 1915(d) provides that "[t]he court may request an attorney to represent any such person unable to employ counsel . . . ."<sup>18</sup>

Legislative history is commonly used in construing a statute,<sup>19</sup> but the legislative history of section 1915(d) is scant. The bill was introduced in the House as one "providing when plaintiff may sue as a poor person, and when counsel shall be assigned by the court."<sup>20</sup> The House Report pointed to Congress' intent to "open the United States courts" to indigent litigants and "to keep pace" with the laws of the "[m]any humane and enlightened States" in which counsel could be ordered to re-

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13. Act of July 20, 1892, ch. 209, §§ 1-5, 27 Stat. 252.

14. Originally, the statute was limited to indigent plaintiffs in civil actions, *id.*, but was extended in 1910 to entitle any indigent "to commence or defend any suit or action, civil or criminal . . ." Act of June 25, 1910, ch. 435, 36 Stat. 866 (1910).

15. 28 U.S.C. § 1915(a) (1982).

16. *Id.* § 1915(b).

17. *Id.* § 1915(c).

18. *Id.* Section 1915(d) provides in full: "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." By far the majority of cases dealing with this section involves determining whether an action is "frivolous."

19. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195 (1983).

20. H.R. 8153, 52d Cong., 1st Sess., 23 CONG. REC. 5199 (1892).

present impoverished litigants.<sup>21</sup> But the brief floor debate focused primarily on an indigent's inability to pay even court costs, revealing nothing about Congress' intent as to whether lawyers could be compelled to serve without pay.<sup>22</sup>

*B. Lower Court Decisions Construing Section 1915(d) as Precatory*

The earliest case to consider whether section 1915(d) authorized mandatory appointment of counsel was *Whelan v. Manhattan Ry. Co.*<sup>23</sup> The Circuit Court for the Southern District of New York noted in its decision that an assigned attorney could apply for a portion of the plaintiff's recovery if the action succeeded, but that he would receive nothing if the action failed.<sup>24</sup> If he was unwilling to proceed on those terms, "the court [would] find some other attorney to prosecute [the] case."<sup>25</sup> Clearly, this statement implies that the lawyer had the option of refusing to accept the assignment.

Courts in the Second Circuit continued to deny that the statute "grant[s] the court the power to compel counsel to accept the appointment. . . . Rather . . . the court, in its discretion, may only request counsel to represent an indigent . . . ." <sup>26</sup> The Second Circuit Court of Appeals has spoken in terms of "appointing" counsel,<sup>27</sup> which might indicate a coercive appointment as opposed to a requested assignment.<sup>28</sup> In light of subsequent comments by the court, however, it is clear that the word "appoint" carried no such implication. Indeed, it recently lamented that a "district court attempted to secure appointed counsel for [the plaintiff] from the Eastern District's *pro bono* panel no fewer than *eight* times . . . and . . . f[ou]nd eight passes

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21. H.R. REP. No. 1079, 52d Cong., 1st Sess., 1-2 (1892).

22. 23 CONG. REC. 5199 (1892):

23. 86 F. 219 (C.C.S.D.N.Y. 1898).

24. *Id.* at 220-21.

25. *Id.* at 221.

26. *Purcell v. Johnston*, 307 F. Supp. 1360 (S.D.N.Y. 1970).

27. *Hodge v. Police Officers*, 802 F.2d 58, 59-62 (2d Cir. 1986).

28. Indeed, the District Court for the Southern District of Iowa, in *Coburn v. Nix*, Civil No. 86-716-B (S.D. Iowa June 16, 1987), cited *Hodge* as authority that the Second Circuit has approved of mandatory appointments under the statute. See *infra* note 135 and accompanying text.

from members of the *pro bono* panel to be particularly disappointing."<sup>29</sup> Eight lawyers would not have been able so easily to decline a mandatory appointment.

The next circuit to apply a precatory interpretation of the statute was the Sixth; it explicitly stated that "the court in a civil case has the statutory power only to 'request an attorney to represent' a person unable to employ counsel."<sup>30</sup> Finding lawyers to serve voluntarily, however, was a problem in this circuit as well; in addition to the court of appeals,<sup>31</sup> at least one district court was "aggrieved sorely that a greater number of attorneys seem to feel no individualized responsibility to provide needful litigants necessary legal services . . . ."<sup>32</sup> Similarly, the Tenth Circuit emphasized a decade later that "the court may *request* an attorney to represent" an indigent, even though in the case at bar the defendants were unable "to employ counsel notwithstanding efforts made in eleven different counties in Kansas as well as in other states."<sup>33</sup>

Although the Third Circuit Court of Appeals did not directly construe the statute, it is apparent from dicta in its opinions that it favored a precatory reading. Thus, when a pro se plaintiff requested court-appointed counsel under section 1915(d), the court noted the presence in the state of "a long tradition of *voluntary* service, and . . . three fine law schools engage[d] in extensive public service . . . ."<sup>34</sup> More recently, in a civil rights case, the same court felt it necessary to echo these comments, even though it declined to decide whether appointment was proper in the case at bar.<sup>35</sup>

More explicitly than the Third Circuit, the Fifth Circuit pointed out that a "federal court has discretion to appoint counsel [under section 1915(d)] if doing so would advance the proper administration of justice[.]"<sup>36</sup> but that this appointment was not

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29. *Sellers v. M.C. Floor Crafters*, 842 F.2d 639, 642 n.3 (2d Cir. 1988).

30. *Reid v. Charney*, 235 F.2d 47, 47 (6th Cir. 1956).

31. *Id.*

32. *Bunton v. Englemyre*, 557 F. Supp. 1, 5 (E.D. Tenn. 1981).

33. *Knoll v. Socony Mobil Oil Co.*, 369 F.2d 425, 430 (10th Cir. 1966).

34. *Scott v. Plante*, 532 F.2d 939, 950 (3d Cir. 1976), *cert. granted and vacated*, 458 U.S. 1101 (1982) (emphasis added).

35. *Ray v. Robinson*, 640 F.2d 474, 478-79 (3d Cir. 1981).

36. *Ulmer v. Chancellor*, 691 F.2d 209, 213 (5th Cir. 1982). As in *Hodge*, the District Court for the Southern District of Iowa in *Coburn* cited *Ulmer* as authority for the pro-

to be coercive: "A lawyer should not be conscripted . . . simply because he is a member of the bar . . . ." <sup>37</sup> Although this court, like the Second and Sixth Circuits, noted the practical difficulties of finding lawyers willing to accept such assignments, it nevertheless declined a mandatory reading of the statute. <sup>38</sup>

Finally, the Ninth Circuit Court of Appeals only recently arrived at a precatory interpretation of the statute, <sup>39</sup> although some twenty years earlier at least one district court in the circuit had already noted its inability to compel an attorney to serve. <sup>40</sup> Among the circuits that have dealt with the request-require issue, the Ninth has offered by far the most thorough discussion. The court of appeals observed the conflicting conclusions reached among the circuits, as well as the fact that "[s]ome courts use the term 'appointment' casually . . . without considering the distinction between a request and an appointment." <sup>41</sup> Moreover, the court briefly noted the ethical aspects of pro bono service, <sup>42</sup> the practical problems, <sup>43</sup> and some constitutional objections, <sup>44</sup> thus basing its decision on a consideration, albeit not an extensive one, of many of the relevant factors.

### C. Lower Court Decisions Construing the Statute as Mandatory

The Seventh Circuit has offered conflicting readings of the statute. Initially, the court of appeals unequivocally held, in *Caruth v. Pinkney*, <sup>45</sup> that "a court has the authority only to request an attorney to represent an indigent, not to require him to do so[.]" although it recognized the difficulty district courts faced in securing pro bono counsel. <sup>46</sup> Less than three months af-

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position that the Fifth Circuit approved of mandatory appointments of counsel. See *infra* note 135 and accompanying text.

37. *Ulmer*, 691 F.2d at 213.

38. *Branch v. Cole*, 686 F.2d 264, 266-67 (5th Cir. 1982).

39. *United States v. 30.64 Acres of Land, More or Less, Situated in Klickitat County, Washington*, 795 F.2d 796, 801 (9th Cir. 1986).

40. *Diaz v. Chatterton*, 229 F. Supp. 19, 23 (S.D. Cal. 1964).

41. *United States v. 30.64 Acres*, 795 F.2d at 798-99.

42. *Id.* at 800-01.

43. *Id.* at 803.

44. *Id.* at 801.

45. 683 F.2d 1044 (7th Cir. 1982), *cert. denied*, 459 U.S. 1214 (1983).

46. *Id.* at 1049.

ter *Caruth*, however, in *McKeever v. Israel*,<sup>47</sup> a different panel of judges in the Seventh Circuit pronounced that although "section 1915(d) merely allows a court to 'request' counsel rather than to 'appoint' counsel, . . . the vast weight of authority in this Circuit and elsewhere demonstrates that the power of a court to provide counsel under section 1915(d) is commonly referred to as a power to 'appoint.'" <sup>48</sup> While it may be true that many courts have used the word "appoint" in connection with section 1915(d), this semantic disparity might have reflected only a confusion in terminology, and not necessarily a shift to a mandatory reading of the statute.<sup>49</sup> Nevertheless, still another panel of judges did read the two cases as prescribing opposite interpretations of the statute, though it avoided expressing a preference between them.<sup>50</sup> Finally, in *Conticommodity Services v. Ragan*,<sup>51</sup> the court of appeals, in dicta, discussed *Caruth* and *McKeever*, denying that they were inconsistent: since the latter case "did not involve . . . the question whether a judge can compel an unwilling attorney to represent a civil litigant[,] [i]t is not inconsistent with *Caruth*."<sup>52</sup> Moreover, the court concluded, "*McKeever* [did] not undermine the authority of *Caruth*."<sup>53</sup> Thus, a mandatory interpretation based on *McKeever* seems to have been only a detour.

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47. 689 F.2d 1315 (7th Cir. 1982).

48. *Id.* at 1319 (footnotes omitted). *McKeever* focused primarily on whether the plaintiff in a suit under 42 U.S.C. § 1983 merited court-assigned representation and was decided over a vehement dissent by Judge Posner. Judge Posner's main concern was with the court's endorsement of the widespread practice of providing attorneys for indigent prisoners in "futile litigation" under § 1983; he did not take issue with the court's implication that such attorneys could be forced to provide representation. *Id.* at 1325 (Posner, J., dissenting).

49. See *supra* text accompanying note 41.

50. *Lewis v. Lane*, 816 F.2d 1165, 1168 (7th Cir. 1987).

Cases from this circuit . . . have not interpreted the term "request" consistently. Compare *Caruth v. Pinkney* . . . with *McKeever v. Israel* . . . . We need not choose a definitive definition of "request" in this case because even if consent is required before an appointment is valid under section 1915(d), [the lawyer] validly consented to accept the representation of the plaintiffs in this case.

*Id.*

51. 826 F.2d 601 (7th Cir. 1987).

52. *Id.* at 602.

53. *Id.* Judge Posner wrote the unanimous opinion. It becomes clear from this opinion why, in his dissent in *McKeever*, Judge Posner did not disagree with the court's implication that lawyers were subject to coercive appointments. See *supra* note 48.



Nevertheless, the Fourth Circuit changed its interpretation of section 1915(d) because of its reading of *McKeever*. Initially, the courts in that circuit embraced a precatory reading, either by implication<sup>54</sup> or explicitly.<sup>55</sup> Two years after the Seventh Circuit's decision in *McKeever*, however, the Fourth Circuit maintained that, "[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."<sup>56</sup> This statement led to the later contention that the Fourth Circuit permitted mandatory assignments.<sup>57</sup>

Finally, the Eighth Circuit, where *Mallard* originated, also arrived at a mandatory construction of the statute, although it similarly based its interpretation on tenuous grounds. At least one district court unequivocally attributed to the statute its plain meaning,<sup>58</sup> but the first reading by the Eighth Circuit Court of Appeals was not so explicit. The court of appeals pointed to "the express authority given [a court] in . . . § 1915 to appoint counsel in civil cases."<sup>59</sup> Basing its interpretation of the statute on *Whelan v. Manhattan Ry. Co.*,<sup>60</sup> the court quoted the language in *Whelan* indicating that a lawyer is free to decline an

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54. *Gordon v. Leeke*, 574 F.2d 1147 (4th Cir.), cert. denied, 439 U.S. 970 (1978). The court considered the possibility that "individual counsel [might] be unavailable for [some] reason" and noted the establishment of a clinic sponsored by the South Carolina Law School and programs for inmate legal representation. *Id.* at 1155 and n.5.

55. *Waller v. Butkovich*, 584 F. Supp. 909 (M.D.N.C. 1984). "The Court is empowered to appoint counsel only in the sense that it is empowered to direct, or request, counsel to represent indigents without compensation. In a civil case the Court has no power to order fee-paid representation for indigent, unrepresented parties." *Id.* at 947 n.14. See also *Spears v. United States*, 266 F. Supp. 22, 25 (S.D. W. Va. 1967).

56. *Whisenant v. Yuam*, 739 F.2d 160, 163 n.3 (4th Cir. 1984) (citations omitted). The court cited as authority not only *McKeever* but also *Gordon*. The court's reliance on *Gordon* is especially startling. While the court points to the *Gordon* court's statement that "[i]f it is apparent to the district court that a pro se litigant has a colorable claim but lacks the capacity to present it, the district court should appoint counsel to assist him[.]" *Gordon*, 574 F.2d at 1153, it failed to consider language later in the case indicating that such "court-appointed" lawyers were under no obligation to serve. *Whisenant*, 739 F.2d at 163 n.3; see also *supra* note 54.

57. *Mallard v. United States Dist. Court for the S. Dist. of Iowa*, 109 S. Ct. 1814, 1817-18 n.2 (1989).

58. *Rhodes v. Houston*, 258 F. Supp. 546, 579 (D. Neb. 1966), *aff'd*, 418 F.2d 1309 (8th Cir. 1969), cert. denied, 397 U.S. 1049 (1970).

59. *Peterson v. Nadler*, 452 F.2d 754, 757 (8th Cir. 1971) (emphasis added).

60. 86 F. 219 (C.C.S.D.N.Y. 1898). See *supra* text accompanying notes 23-25.

appointment.<sup>61</sup> Furthermore, the court noted the long tradition of pro bono service and expressed "the utmost confidence that lawyers will always be found who will fully cooperate in rendering the indigent equal justice at the bar."<sup>62</sup> Thus, although the court spoke in terms of appointing counsel, suggesting a mandatory reading of the statute, its citation of *Whelan* and its reference to lawyers' cooperation indicate a precatory interpretation. Nevertheless, *Peterson v. Nadler* has been cited as authority supporting mandatory appointments of counsel.<sup>63</sup>

More than a decade later, disapproving the "reluctance by some judges to request lawyers to appear in pro bono litigation[.]"<sup>64</sup> the court of appeals in *Nelson v. Redfield Lithograph Printing* directed the district courts in the Eighth Circuit to furnish a list of attorneys to serve in pro bono cases.<sup>65</sup> Although there was no express indication that the court meant to sanction coercive appointments, subsequently *Nelson* was so read by both the court of appeals and at least one district court.<sup>66</sup> Thus, in the Eighth Circuit, as in the Fourth, the cases cited as authority may have been in fact ambiguous, but they were nevertheless interpreted so as to empower the district courts to compel lawyers to serve in pro bono cases. John Mallard's challenge to this

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61. *Peterson*, 452 F.2d at 757 n.6.

62. *Id.* at 758.

63. *Mallard v. United States Dist. Court for the S. Dist. of Iowa*, 109 S. Ct. 1814, 1817-18 n.2 (1989).

64. *Nelson v. Redfield Lithograph Printing*, 728 F.2d 1003, 1005 (8th Cir. 1984). The very fact that the court spoke in terms of judges *requesting* lawyers to serve indicates that courts in the Eighth Circuit did not feel empowered to mandate appointments pursuant to *Peterson*.

65.

We write here under our general supervisory authority involving the district courts. We think it incumbent upon the chief judge of each district to seek the cooperation of the bar associations and the federal practice committees of the judge's district to obtain a sufficient list of attorneys practicing throughout the district so as to supply the court with competent attorneys who will serve in pro bono situations such as the case presented.

*Id.*

66. See, e.g., *Hahn v. McLey*, 737 F.2d 771, 774 (8th Cir. 1984) (Referring to *Nelson*, the court stated that "when an indigent presents a colorable civil claim to a court, the court . . . should order the appointment of counsel from the bar."); *In re Snyder*, 734 F.2d 334, 341 (8th Cir. 1984), *rev'd on other grounds*, 472 U.S. 634 (1985) (also referring to *Nelson*, the court stated that "careful study . . . should be given to the idea that all active trial lawyers in the federal courts be obligated to provide *pro bono* services . . ."); see also *infra* notes 134-35 and accompanying text.

interpretation of section 1915(d) by a district court in the Eighth Circuit thus enabled the Supreme Court to resolve the ambiguous, inconsistent, or conflicting readings of the statute among the circuits.

#### D. *Constitutional Objections to Mandatory Assignments*<sup>67</sup>

##### 1. *Challenges Based on the Fifth Amendment*

The earliest constitutional objection to mandatory pro bono assignments to be raised in the federal courts was based on the fifth amendment prohibition against the taking of private property without just compensation.<sup>68</sup> The leading case came out of the Ninth Circuit, where the court of appeals reversed a district court which found that requiring a lawyer to represent an indigent was a taking of his property for public use.<sup>69</sup> The court of appeals agreed with the government's contention that

representation 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

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67. This Note presents cases challenging mandatory representation in federal courts only. For comprehensive discussions including constitutional objections raised in state courts, see Rosenfeld, *Mandatory Pro Bono: Historical and Constitutional Perspectives*, 2 CARDOZO L. REV. 255, 287-96 (1981); Shapiro, *supra* note 5, at 762-77; Note, *Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance*, 81 COLUM. L. REV. 366, 377-90 (1981) [hereinafter *Court Appointment*]; Note, *Forcing Attorneys to Represent Indigent Civil Litigants: The Problems and Some Proposals*, 18 J.L. REFORM 767, 781-87 (1985) [hereinafter *Forcing Attorneys*].

In addition to challenges to mandatory appointments in federal courts based on the fifth and thirteenth amendments, very limited use has been made of the first amendment in objecting to mandatory appointments of counsel; however, no case has been found discussing this point. Mallard argued a first amendment right "to be free in his choices and expressions of speech[.]" contending that mandatory representation would force him to speak "against his will (in light of his belief that he [was] not competent to undertake the representation) and . . . in a manner that is contrary to his good conscience (in light of his dislike for confrontational and accusatory speech)." Brief for the Petitioner at 39-40, *Mallard v. United States Dist. Court for the S. Dist. of Iowa*, 109 S. Ct. 1814 (1989) (No. 87-1490) [hereinafter *Brief for the Petitioner*]. For a qualified approval of coercive appointments in the face of a first amendment challenge, see Shapiro, *supra* note 5, at 763-67.

68. U.S. CONST. amend. V provides, in pertinent part, "nor shall private property be taken for public use, without just compensation."

69. *United States v. Dillon*, 346 F.2d 633, 634 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966). As a collateral attack on a criminal sentence under 28 U.S.C. § 2255, *coram nobis*, the proceeding was a civil one.

justly be deemed to be aware of the traditions of the profession . . . Thus, the lawyer has consented to . . . this obligation and when he is called upon to fulfill it, he cannot contend that it is a "taking of his services."<sup>70</sup>

Since the court found that there was no taking, it did not reach the question of whether a lawyer's services constituted "property" within the meaning of the fifth amendment.<sup>71</sup> The Ninth Circuit's holding was the basis for similar results in the Fifth<sup>72</sup> and Eighth Circuits.<sup>73</sup> All three circuits have determined that any further action to provide compensation for court-appointed attorneys "is a matter for legislative and not judicial treatment."<sup>74</sup>

While the Court of Appeals for the District of Columbia held that there was no per se taking of property for public use when attorneys were ordered to serve pro bono, it allowed for the possibility that "an unreasonable amount of required uncompensated service might so qualify."<sup>75</sup> The court stated that whether "the appointment system [is] sufficiently burdensome

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70. *Dillon*, 346 F.2d at 635. *Dillon* was cited with approval by the Supreme Court for the proposition that "the Fifth Amendment does not require that the Government pay for the performance of a public duty it is already owed." *Hurtado v. United States*, 410 U.S. 578, 588-89 (1973).

71. *Dillon*, 346 F.2d at 636.

72. *Dolan v. United States*, 351 F.2d 671, 672 (5th Cir. 1965). The court affirmed a district court's dismissal of a lawyer's claim for compensation for representing an indigent criminal defendant before the enactment of 18 U.S.C. § 3006A, providing government funds for such representation. The majority of the court's short opinion was simply an extensive quotation from *Dillon*. *Id.*

73. *Tyler v. Lark*, 472 F.2d 1077, 1079 (8th Cir.), *cert. denied sub nom. Beilenson v. Treasurer of the United States*, 414 U.S. 864 (1973). This court also relied on *Dillon* and moreover found "no justification for distinguishing representation in criminal matters from representation in civil matters in regard to the question of nonstatutory just compensation rights." *Id.* at 1079 n.4; *see also Williamson v. Vardeman*, 674 F.2d 1211, 1214-15 (8th Cir. 1982) (listing the various state courts that have rejected a fifth amendment challenge).

74. *Dillon*, 346 F.2d at 636. *Accord Tyler*, 472 F.2d at 1079 n.4; *Wright v. Louisiana*, 362 F.2d 95, 95 (5th Cir. 1966).

75. *Family Div. Trial Lawyers v. Moultrie*, 725 F.2d 695, 705 (D.C. Cir. 1984) (reversing district court's dismissal of a constitutional challenge to the procedure established by the D.C. Superior Court for appointing pro bono counsel to indigent parents in child neglect proceedings). The court noted that "several state courts have recognized that at some point the burden on particular attorneys could become so excessive that it might rise to the level of a 'taking' of property." *Id.* at 705-06 (citing decisions in Illinois, Oklahoma, West Virginia, and New York).

to prevent [attorneys] from engaging in a remunerative practice" and thus constitutes a taking is a matter for factual determination at the district court level.<sup>76</sup> Thus, although several commentators have concluded that arguments against requiring compensation must fail under the fifth amendment,<sup>77</sup> no court has yet agreed without qualification.<sup>78</sup>

Less common is a fifth amendment claim of violation of due process and equal protection.<sup>79</sup> The contention here is that a particular scheme may create inequities in its selection process, treating some lawyers differently from others similarly situated.<sup>80</sup> Here, the inquiry revolves around a deferential rationality test: If those affected are not members of a suspect class and if no fundamental right is being restricted, the classification must be reasonable and the procedure must be rationally related to a legitimate governmental end.<sup>81</sup>

In the only federal court case to entertain a serious consideration of this claim, the court found that the right to earn a living as a lawyer was not a fundamental one and remanded the case for a determination of whether the particular system constituted a rational means to further the legitimate governmental interest in guaranteeing adequate representation to a certain class of indigents.<sup>82</sup> Thus, although an equal protection attack

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76. *Id.* at 707. The court remanded the case for further factual development and gave the district court guidelines to use in deciding whether the particular program rose to a constitutionally objectionable level. *Id.* at 710. No further action has been reported.

77. See Shapiro, *supra* note 5, at 774; *Forcing Attorneys*, *supra* note 67, at 784. But see *Court Appointment*, *supra* note 67, at 388-90.

78. Compared with the uncertain result of a challenge to a requirement that attorneys serve without compensation, a constitutional objection to compelling lawyers to pay court expenses when serving pro bono is unproblematic. See *Williamson v. Vardeman*, 674 F.2d 1211, 1215-16 (8th Cir. 1982), where such a challenge was unhesitatingly sustained.

79. U.S. CONST. amend. V provides, in pertinent part, "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." The due process clause of the fifth amendment has been held to admit equal protection claims as well. See *Davis v. Passman*, 442 U.S. 228, 234 (1979); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

80. See Shapiro, *supra* note 5, at 770-71; see also Brief for the Petitioner, *supra* note 67, at 45-52.

81. *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). Since the mid-1930s, a fair degree of deference has been accorded to legislative and regulatory determinations. See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-91 (1955).

82. *Family Div. Trial Lawyers v. Moultrie*, 725 F.2d 695, 709-10 (D.C. Cir. 1984).

would fail if all lawyers were required to serve pro bono under substantially equivalent requirements,<sup>83</sup> such a challenge could be viable under a particular local plan.

## 2. Challenges Based on the Thirteenth Amendment

Thirteenth amendment<sup>84</sup> challenges to mandatory pro bono service initially made slight advances in federal courts but have ultimately proven no more successful than those based on the fifth amendment. In an early case, a district court in California held that section 1915(d) did not empower it to "coerce an attorney to represent anyone," since to do so would force lawyers into involuntary servitude.<sup>85</sup> In a later challenge to compulsory service a district court in Alabama found that the provision for mandatory service of appointed counsel under Title VII of the 1964 Civil Rights Act violated the thirteenth amendment, and suggested voluntary representation under section 1915(d) as "an alternative method of giving legal representation to indigent claimants . . . ."<sup>86</sup> The Fifth Circuit Court of Appeals, however, vacated the district court's judgment, finding that none of the parties had standing to raise the thirteenth amendment objection.<sup>87</sup> Subsequent thirteenth amendment attacks on mandatory

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83. Rosenfeld, *supra* note 67, at 294-96; *Forcing Attorneys*, *supra* note 67, at 780-81.

84. U.S. CONST. amend. XIII provides, in pertinent part, "Neither slavery nor involuntary servitude . . . shall exist within the United States . . . ."

85. *United States v. Leser*, 233 F. Supp. 535, 537-38 (S.D. Cal.), *remanded by* 335 F.2d 832 (9th Cir. 1964), *cert. denied*, 379 U.S. 983 (1965). The court stated rather vividly that

it has no more power to compel a member of the [b]ar . . . to do the tremendous amount of work and put in the tremendous amount of time it would require to conscientiously examine the files and records in this case, and represent the defendants on appeal, and thus compel involuntary servitude by a lawyer to convicted criminals, than I have to make an order compelling these defendants, had they not been convicted, to pick cotton for a private individual.

*Id.* at 538.

86. *In re Nine Applications for Appointment of Counsel in Title VII Proceedings*, 475 F. Supp. 87, 90-91 (N.D. Ala. S.D. 1979), *vacated sub nom.* *White v. United States Pipe & Foundry Co. (In re Five Applications for Appointment of Counsel [in] Title VII Proceedings)*, 646 F.2d 203 (5th Cir. Unit B 1981). The provision for appointment of counsel in the Civil Rights Act of 1964 is found in 42 U.S.C. § 2000e-5(f)(1).

87. *White v. United States Pipe & Foundry Co. (In re Five Applications for Appointment of Counsel [in] Title VII Proceedings)*, 646 F.2d 203, 204 (5th Cir. Unit B 1981). The court also found that the lower court could have avoided the constitutional

pro bono assignments have also been dismissed for lack of standing.<sup>88</sup> In only two recent cases have courts reached the merits of the challenge, and in neither one were the claimants successful.<sup>89</sup> Thus, there seems to be no viability to the involuntary servitude objection to coercive appointments, although a thirteenth amendment challenge to sanctions imposed on an attorney for failure to serve might be sustained.<sup>90</sup>

### E. *Inherent Power of the Courts*

District courts have "broad discretion . . . in promulgating their own rules."<sup>91</sup> As long as a lower court does not act inconsistently with Acts of Congress or rules prescribed by the Supreme Court, it may "prescribe rules for the conduct of [its] business,"<sup>92</sup> which may include regulating the membership of its bar.<sup>93</sup> Consequently, the argument has been made that a district court has "the inherent authority to appoint [counsel] if it believe[s] the assignment of counsel . . . necessary to effectuate the fair administration of justice" by restricting the membership of its bar to those willing to accept such pro bono appointments.<sup>94</sup>

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question and still have reached the merits of the case. *Id.*

88. See, e.g., *Brooks v. Central Bank of Birmingham*, 717 F.2d 1340, 1342 (11th Cir. 1983); *Luna v. International Ass'n of Machinists and Aerospace Workers*, 614 F.2d 529, 531 (5th Cir. 1980) (both in the context of Title VII appointments).

89. *Family Div. Trial Lawyers v. Moultrie*, 725 F.2d at 695, 705 (D.C. Cir. 1984) ("Inability to avoid continued service is the essential ingredient of involuntary servitude." Here it was possible for lawyers to continue in practice while avoiding eligibility for court appointment.); *Williamson v. Vardeman*, 674 F.2d 1211, 1214 (8th Cir. 1982) ("The thirteenth amendment has never been applied to forbid compulsion of traditional modes of public service even when only a limited segment of the population is so compelled.").

90. See *Shapiro*, *supra* note 5, at 767-70.

91. *Frazier v. Heebe*, 482 U.S. 641, 652 (1987) (Rehnquist, C.J., dissenting).

92. *Id.* 28 U.S.C. § 2071 (1982) provides: "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

93. 28 U.S.C. § 1654 (1982) provides: "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

94. Brief of the Association of the Bar of the City of New York as Amicus Curiae at 3, *Mallard v. United States Dist. Court for the S. Dist. of Iowa*, 109 S. Ct. 1814 (1989) (No. 87-1490). For a brief survey of the state courts that have held it within their inherent power to compel pro bono representation, see Note, *Courts—No Inherent Power to Compel Uncompensated Representation in Civil Cases—State ex rel Scott v. Roper*, 37

If this inherent power is to be found valid, such a rule must withstand a four-part test: "whether the rule conflicts with an Act of Congress; whether the rule conflicts with the rules of procedure promulgated by [the Supreme] Court; whether the rule is constitutionally infirm; and whether the subject matter governed by the rule is not within the power of a lower federal court to regulate."<sup>95</sup> In addition, it must be neither unnecessary nor irrational.<sup>96</sup> Arguably, a local rule restricting federal court practice to attorneys willing to serve pro bono does not conflict with 28 U.S.C. § 1915(d), which permits a court to request such representation.<sup>97</sup> Such a rule would not conflict with the rules of procedure promulgated by the Supreme Court; rather, it is entirely consistent with them if adequate notice and public debate precede the rule's adoption.<sup>98</sup> Certainly, admission to a court's bar is within the court's power to regulate;<sup>99</sup> but a court rule requiring pro bono service, however necessary it may be, may not withstand constitutional scrutiny.<sup>100</sup>

A court repeatedly frustrated in its attempts to secure representation for indigents may contemplate the possibility of restricting its practice to lawyers willing to undertake pro bono appointments.<sup>101</sup> Indeed, "[t]he ingenuity of federal judges . . . is limitless[.]" and promulgating such a local rule is one of the "many avenues for a district judge to explore when attempting to locate counsel . . . ."<sup>102</sup>

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MERCER L. REV. 873, 875-78 (1986).

95. *Frazier*, 482 U.S. at 654 (Rehnquist, C.J., dissenting).

96. *Id.* at 655.

97. The Supreme Court has not resolved this question, thus leaving open the possibility that a district court remains free to mandate such a requirement under its own authority. See *infra* text accompanying note 153.

98. See FED. R. CIV. P. 83, which provides in part: "Each district court . . . may . . . after giving appropriate public notice and an opportunity to comment, make . . . rules governing its practice . . . ."

99. *Frazier*, 482 U.S. at 645.

100. See *supra* notes 75-83 and accompanying text.

101. "If the court continues to have difficulty in obtaining the voluntary service of counsel . . . it may wish to limit the compensated practice by members of its bar to those willing to accept their share of indigent cases." *Branch v. Cole*, 686 F.2d 264, 267 (5th Cir. 1982).

102. *Bradshaw v. United States Dist. Court for the S. Dist. of Cal.*, 742 F.2d 515, 519 (9th Cir. 1984) (Reinhardt, J., concurring).



## F. *Ethical and Policy Considerations Regarding Pro Bono Service*

Recognition of a lawyer's obligation to provide pro bono service has been codified by the American Bar Association in both the Model Code of Professional Responsibility<sup>103</sup> and the Model Rules of Professional Conduct.<sup>104</sup> Notwithstanding these ethical concerns, however, the financial burden placed on pro bono lawyers is well recognized and has been cited as a substantial argument against mandatory public service by court,<sup>105</sup> counsel,<sup>106</sup> and commentator<sup>107</sup> alike. Beyond the obvious economic effect to lawyers in terms of lost income, a further concern is the liability of lawyers in state malpractice actions for services provided

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103. Excerpts from several Ethical Considerations in the MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981) highlight this obligation. EC 2-16: "[P]ersons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective"; EC 2-25: "The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer . . ."; EC 2-29: "When a lawyer is appointed by a court . . . to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, he should not seek to be excused from undertaking the representation except for compelling reasons"; EC 8-3: "Those persons unable to pay for legal services should be provided needed services."

104. Relevant excerpts from the MODEL RULES OF PROFESSIONAL CONDUCT (1983) include Rule 6.1: "A lawyer should render public interest legal service . . ." and Rule 6.2: "A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause . . ."

105. For a particularly colorful assertion, see *Yarbrough v. Superior Court of Napa County*, 39 Cal.3d 197, 208, 702 P.2d 583, 590, 216 Cal. Rptr. 425, 432 (1985) (Bird, C.J., dissenting).

[L]awyers should not be forced to represent anyone without adequate compensation . . . . As with any other working person, lawyers should be properly compensated for their time and effort . . . . No one would dare suggest courts have the authority to order a doctor, dentist or any other professional to provide free services . . . . No crystal ball is necessary to foresee the public outrage which would erupt if we ordered grocery store owners to give indigents two months of free groceries or automobile dealers to give them two months of free cars. Lawyers in our society are entitled to no greater privileges than the butcher, the baker and the candlestick maker; but they are entitled to no less.

*Id.* (quoting Court of Appeals opinion, 197 Cal. Rptr. 737, 744-45 (King, J., concurring)).

106. See Brief for State Bar of California as Amicus Curiae at 6-10, *Mallard v. United States Dist. Court for the S. Dist. of Iowa*, 109 S. Ct. 1814 (1989) (No. 87-1490).

107. See Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1079-80 (1976); Shapiro, *supra* note 5, at 781-84; *Forcing Attorneys*, *supra* note 67, at 771.

pursuant to court appointment.<sup>108</sup>

The financial imposition on the legal profession and the paucity of available legal assistance for those who cannot afford it<sup>109</sup> are not the only economic factors to be considered; there is also an enormous waste of judicial resources involved in a voluntary system. Many pro bono cases suffer delays in proceedings when appointed counsel are reluctant to serve or when the courts must make repeated attempts to secure representation for indigents.<sup>110</sup> Thus, the contention is not entirely well-founded that a volunteer system is more efficient because "the private bar plays an essential role in filtering out meritless cases . . ."<sup>111</sup> Indeed, the reporters would be devoid of cases in which plaintiffs could not secure representation if failure to do so truly indicated that "their claims most likely border on the frivolous."<sup>112</sup> Whatever may be the policies favoring or opposing mandatory public service, however, the fact remains that no mandatory pro bono system is currently in effect in the federal courts.

### III. *Mallard v. United States District Court for the Southern District of Iowa*

#### A. *The Facts*

*Mallard v. United States District Court for the Southern District of Iowa*<sup>113</sup> arose as a challenge to the Eighth Circuit Court of Appeals' previous holding that 28 U.S.C. § 1915(d) em-

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108. *Ferri v. Ackerman*, 444 U.S. 193, 205 (1979) (court-appointed attorney not absolutely immune as a matter of federal law in state malpractice suit).

109. Although the number of lawyers increased in a ten-year span from one private practitioner per 850 people in 1970 to one per 612 in 1980, only 1.5% of all lawyers in 1980 were employed in legal aid and public defender programs. CURRAN, *THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980S* 13, 21 (1985). Since 1980, moreover, government policy has been "to shift the responsibility for indigents' legal representation from salaried poverty law specialists to local private attorneys." KESSLER, *LEGAL SERVICES FOR THE POOR: A COMPARATIVE AND CONTEMPORARY ANALYSIS OF INTERORGANIZATIONAL POLITICS* 9 (1987).

110. For extreme cases, see *Sellers v. M.C. Floor Crafters*, 842 F.2d 639, 642 n.3 (2d Cir. 1988) (court made eight attempts to secure pro bono counsel); *Bradshaw v. United States Dist. Court for the S. Dist. of Cal.*, 742 F.2d 515, 516 (9th Cir. 1984) (court tried for over thirteen months to secure representation and met with twenty refusals by private attorneys and seven from legal organizations, clinics, or governmental agencies).

111. *Poindexter v. FBI*, 737 F.2d 1173, 1181 (D.C. Cir. 1984).

112. *Id.*

113. 109 S. Ct. 1814 (1989).

powers a federal district court to require attorneys to serve in pro bono cases.<sup>114</sup> Pursuant to that holding, the chief judges of the district courts were ordered "to seek the cooperation of the bar associations and the federal practice committees . . . to obtain a sufficient list of attorneys practicing . . . so as to supply the court with competent attorneys who will serve in pro bono situations . . . ." <sup>115</sup>

To comply with the court of appeals' directive, the District Court for the Southern District of Iowa prepared a list of all attorneys in good standing who were admitted to practice before its bench and who had appeared as counsel of record in non-bankruptcy federal cases within the previous five years.<sup>116</sup> The list was forwarded to the Volunteer Lawyers Project, "a joint venture of the Legal Services Corporation of Iowa and the Iowa State Bar Association."<sup>117</sup> After eliminating the names of attorneys who had volunteered to serve pro bono in state court, the Volunteer Lawyers Project chose a lawyer to receive the assignment whenever the district court determined that an appointment was proper under section 1915(d).<sup>118</sup> The project undertook to assist any lawyer unfamiliar with the designated area of law by providing various support services, including "written materials dealing with the substantive and procedural law at issue, periodic seminars . . . and consultation with experienced lawyers."<sup>119</sup>

It was through this process that John Mallard was selected to represent three indigent plaintiffs in a civil rights suit under 42 U.S.C. § 1983.<sup>120</sup> Mallard, who practiced business law in Fairfield, Iowa,<sup>121</sup> had been admitted to federal practice in January

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114. See *supra* notes 58-66 and accompanying text. For a discussion of 28 U.S.C. § 1915 (d), see *supra* notes 13-22 and accompanying text.

115. *Nelson v. Redfield Lithograph Printing*, 728 F.2d 1003, 1005 (8th Cir. 1984).

116. Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit app. at 2-3, *Mallard v. United States Dist. Court for the S. Dist. of Iowa* (No. 87-1490) [hereinafter *Opposition Brief*].

117. *Mallard*, 109 S. Ct. at 1816.

118. *Id.* at 1816-17.

119. Brief for the Respondent app. at 4-5, *Mallard v. United States Dist. Court for the S. Dist. of Iowa* (No. 87-1490) [hereinafter *Brief for the Respondent*].

120. *Mallard*, 109 S. Ct. at 1817.

121. Brief for the Petitioner, *supra* note 67, at 6.

1987.<sup>122</sup> In June 1987, the Volunteer Lawyers Project advised him that he had been selected to represent the plaintiffs in *Traman v. Parkin*<sup>123</sup> and sent him the case file.<sup>124</sup> Upon reviewing the file, Mallard determined that, with three plaintiffs and eight defendants, the case would involve extensive pretrial depositions in addition to substantial witness examination and cross-examination at trial.<sup>125</sup> Since he had no litigation experience involving multiple parties and witnesses, Mallard called the Volunteer Lawyers Project to request that it recommend him instead for some other case involving his areas of expertise, such as bankruptcy or securities law.<sup>126</sup> He was told that, since his name had already been submitted to the court, he would need to make a motion to withdraw.<sup>127</sup> Mallard filed the motion on June 26, 1987, alleging that he lacked the litigation experience necessary for the case.<sup>128</sup>

#### B. Lower Court Decisions

A magistrate denied Mallard's motion.<sup>129</sup> On July 29, 1987, Mallard appealed the magistrate's decision to the district court and petitioned the court to remove him as counsel, reasserting his insufficient experience as a litigator.<sup>130</sup> He further asserted that the court had no authority to appoint him to serve in a case so beyond his abilities as a litigator as to result in his violating his ethical obligation to provide competent representation.<sup>131</sup>

On October 27, 1987, the district court affirmed the magistrate's decision and denied Mallard's motion to dismiss appoint-

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122. *Mallard*, 109 S. Ct. at 1817. Since Peter Jenkins, who had become "of counsel" to Mallard's firm, was not eligible for admission to federal practice because he was not yet a member of the Iowa bar, Mallard sought admission to federal court practice so that his firm could appear as counsel of record in civil cases Jenkins was to handle. Brief for the Petitioner, *supra* note 67, at 6-7.

123. Civil No. 87-317-B, S.D. Iowa.

124. Joint Appendix at 4-5, *Mallard v. United States Dist. Court for the S. Dist. of Iowa*, 109 S. Ct. 1814 (1989) (No. 87-1490) [hereinafter Joint Appendix].

125. *Id.* at 6.

126. *Id.* at 6-7.

127. *Id.* at 7.

128. *Id.* at 4, 6-8.

129. *Mallard*, 109 S. Ct. at 1817.

130. Joint Appendix, *supra* note 124, at 19, 23.

131. *Id.* at 19-24.

ment of counsel.<sup>132</sup> The court rejected Mallard's contention that he was an incompetent litigator by pointing to his "eighteen page brief in support of this motion that demonstrates thorough research, careful reasoning, and effective writing."<sup>133</sup> Regarding its authority to make a coercive appointment, the court pointed to its decision in *Coburn v. Nix*,<sup>134</sup> in which it had rejected a similar challenge.<sup>135</sup> Following an unsuccessful attempt to bring an interlocutory appeal and enforce a stay,<sup>136</sup> Mallard filed a petition on November 27, 1987, for a writ of mandamus from the Eighth Circuit Court of Appeals to compel the district court to allow him to withdraw.<sup>137</sup> On December 7, 1987, the court of appeals issued a bare denial of Mallard's petition without an opinion.<sup>138</sup>

### C. *The Supreme Court Decision*

Certiorari was granted on October 3, 1988.<sup>139</sup> On May 1, 1989, in a five to four decision, the Court held that a federal court may request, but not require, an attorney's services under section 1915(d).<sup>140</sup>

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132. Petition for a Writ of Certiorari, *supra* note 8, app. at 2a-4a (containing the district court's unpublished decision).

133. *Id.* app. at 3a. The court, further disregarding Mallard's hesitation about his effectiveness as a litigator, added that "[e]ven without litigation experience, Mallard would not necessarily be incompetent. Therefore, Mallard is not incompetent." *Id.*

134. Civil No. 86-716-B (S.D. Iowa, June 16, 1987). See Opposition Brief, *supra* note 116, app. at 1a-7a.

135. Petition for a Writ of Certiorari, *supra* note 8, app. at 3a. In ruling on a motion to dismiss appointment of counsel in *Coburn v. Nix*, Chief Judge Harold Vietor — the same judge who denied Mallard's motion—had based his decision on the Eighth Circuit Court of Appeals' interpretation of § 1915(d) in *Peterson v. Nadler*, 452 F.2d 754 (8th Cir. 1971) and *Nelson v. Redfield Lithograph Printing*, 728 F.2d 1003 (8th Cir. 1984) (see *supra* 59-65 and accompanying text), as well as questionable readings of cases in the Second and Fifth Circuits (see *supra* notes 28, 36, and accompanying text).

136. Opposition Brief, *supra* note 116, app. at 8a-9a. Judge Vietor did "not believe that an immediate appeal from [his] ruling would materially advance the ultimate termination of this litigation, which is Mr. Traman's litigation against the defendants." *Id.*

137. Joint Appendix, *supra* note 124, at 2.

138. Petition for a Writ of Certiorari, *supra* note 8, app. at 1a (containing unpublished denial of the court of appeals).

139. 109 S. Ct. 51 (1988).

140. *Mallard*, 109 S. Ct. at 1814. The decision reflects an unexpected alignment of justices: Justice Brennan, writing for the majority, was joined by Chief Justice Rehnquist and Justices White, Scalia, and Kennedy; Justices Marshall, Blackmun, and O'Connor joined in Justice Stevens' dissent. Justice Kennedy also wrote a brief concurrence. See

### 1. *The Majority Opinion*

Justice Brennan, writing for the majority, began by examining the language of section 1915(d). Noting that the statute's "operative term is 'request,'" he found that the ordinary meaning of the verb, both today and when Congress enacted the statute in 1892, is precatory.<sup>141</sup> Looking beyond the language of the statute to infer Congress' probable intent, the Court first contrasted the wording with that of section 1915(c) as evidence that Congress used mandatory language "when it deemed compulsory service appropriate."<sup>142</sup> The Court next focused on the twelve state statutes governing proceedings *in forma pauperis* that were in effect in 1892, all of which empowered a court to assign or appoint counsel.<sup>143</sup> Because "[t]he Congress that adopted 1915(d) was undoubtedly aware of those statutes," the Court reasoned, Congress' use of the word *request* was a deliberate avoidance "of more stringent state practices . . . ."<sup>144</sup>

To further reinforce its conclusion that Congress did not intend to authorize coercive appointments under the statute, the Court compared section 1915(d) with other federal statutes providing for court-appointed representation.<sup>145</sup> In the only such statute passed before 1892,<sup>146</sup> as well as those subsequently enacted,<sup>147</sup> the language used unequivocally authorizes a court to assign or appoint attorneys. To Justice Brennan, this language supports the implication that "§ 1915(d)'s use of 'request' instead of 'assign' or 'appoint' was understood [by Congress] to signify that § 1915(d) did not authorize compulsory

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*infra* note 155.

141. 109 S. Ct. at 1818.

142. *Id.* 28 U.S.C. § 1915(c) (1982) was passed at the same time as § 1915(d). *Id.*

143. *Id.* at 1818-19.

144. *Id.* at 1819.

145. *Id.* at 1820-21.

146. 18 U.S.C. § 3005 (1988) (effective April 30, 1790). *See Mallard*, 109 S. Ct. at 1820.

147. 18 U.S.C. §§ 3006A, 3503(c), 4109 (1988); 25 U.S.C. § 1912(b) (1989); 42 U.S.C. §§ 1971(f), 2000a-3(a), 2000e-5(f)(1), 3413(1) (1982). *See Mallard*, 109 S. Ct. at 1821. The dissent objected to the majority's reliance on these statutes enacted in subsequent sessions. At least in the case of the Criminal Justice Act, 18 U.S.C. § 3006A, the mandatory language was used specifically to remedy the problems encountered when an attorney was not subject to mandatory appointment. *Mallard*, 109 S. Ct. at 1826-27 n.8 (Stevens, J., dissenting).

appointments.”<sup>148</sup>

As to the constitutional objections raised by *Mallard*<sup>149</sup> and discussed in the respondent’s brief<sup>150</sup> and two amicus briefs<sup>151</sup> the Court offered no opinion.<sup>152</sup> The Court also left undecided “the question whether the federal courts possess inherent authority to require lawyers to serve.”<sup>153</sup> Finally, the Court offered little guidance on ethical and practical issues involved in pro bono representation.<sup>154</sup> Rather, the Court emphasized that its decision is limited to statutory interpretation only.<sup>155</sup>

## 2. *The Dissent*

Justice Stevens, objecting to the narrow focus adopted by the majority, began his dissent by observing that lawyers’ obliga-

148. *Mallard*, 109 S. Ct. at 1821. Before closing, the Court also considered the court of appeals’ denial of *Mallard*’s application for a writ of mandamus; the Court found that *Mallard* had made the requisite showing and was thus entitled to issuance of the writ. *Id.* at 1822.

149. *Mallard* claimed that coercive pro bono appointments would violate an attorney’s freedom of speech, deny him due process and equal protection, and constitute a taking of property without just compensation. Brief for the Petitioner, *supra* note 67, at 33-63.

150. Brief for the Respondent, *supra* note 119, at 31-41.

151. Brief for State Bar of California as *Amicus Curiae* at 21-27, *Mallard* (No. 87-1490) (objecting that a reading of the statute as authorizing a coercive appointment would violate the fifth amendment by constituting a taking of property without compensation); Brief of the Association of the Bar of the City of New York as *Amicus Curiae* at 14-19, *Mallard* (No. 87-1490) (arguing that under the plan adopted by the district court there was no taking for fifth amendment purposes). The other two amicus briefs, filed by the Legal Services Corporation of Iowa (in support of respondent) and the California Attorneys for Criminal Justice and the National Association of Criminal Defense Lawyers (in support of petitioner) dealt mainly with ethical, financial, and other policy considerations.

152. *Mallard*, 109 S. Ct. at 1821 n.6.

153. *Id.* at 1823.

154. The court did state that

We do not mean to . . . suggest that requests made pursuant to § 1915(d) may be lightly declined because they give rise to no ethical claim. On the contrary, in a time when the need for legal services among the poor is growing and public funding for such services has not kept pace, lawyers’ ethical obligation to volunteer their time and skills *pro bono publico* is manifest.

*Id.* at 1822-23.

155. *Id.* at 1822. In a brief concurrence, Justice Kennedy repeated the caveat that the Court’s decision “speaks to the interpretation of a statute, to the requirements of the law, and not to the professional responsibility of the lawyer.” *Id.* at 1823 (Kennedy, J., concurring). Nevertheless, he reminded lawyers of their obligation, as officers of the court, to undertake representation of indigent litigants. *Id.*

tions 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."<sup>156</sup> He further differed from the majority in his overall characterization of the case, framing the issue as Mallard's "seek[ing] relief . . . from the court's request simply because he would rather do something else with his time."<sup>157</sup> Notwithstanding a lawyer's personal interest, however, Justice Stevens concluded that lawyers have a duty to represent the indigent and a court has the power to make such service one of the "conditions upon which members are admitted to the bar."<sup>158</sup>

Justice Stevens offered his own reading of the relevant legislative history, pointing to the interchangeability of the words *assign* and *request* in contemporary decisions and by Congress itself.<sup>159</sup> He took note of a House report that demonstrated Congress' intent to follow the lead of those states that by 1892 had empowered a court to order counsel to represent indigent litigants; this report also expressed the Congressional intent "to insure that the rights of litigants suing diverse parties in . . . these States would not be defeated by the defendant's removal of the suit to federal court."<sup>160</sup>

The dissent further observed that, since Mallard had notice of the district court's pro bono scheme when he was admitted to federal practice, he implicitly accepted an obligation to participate in that program when he became a member of that court's bar.<sup>161</sup> Justice Stevens therefore "construe[d] the word 'request' in § 1915(d) as meaning 'respectfully command[.]'" that is, making "a formal request . . . tantamount to a command."<sup>162</sup> To

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156. *Id.* at 1823 (Stevens, J., dissenting).

157. *Id.*

158. *Id.* at 1824.

159. *Id.* at 1825-26. "Significantly, [§ 1915(d) was] entitled 'An Act providing when plaintiff may sue as a poor person and when counsel shall be assigned by the court.'" *Id.* at 1826. The majority, however, considered it more telling that "the word 'assign' does not appear in the statute itself or the relevant section of the United States Code . . . ." *Id.* at 1820 n.4.

160. *Id.* at 1825 (Stevens, J., dissenting).

161. *Id.* at 1826. The majority objected to such bootstrapping, however. The Court pointed out that the district court's authority for establishing this program stemmed from § 1915(d) itself; if, as the Court found, the statute fails to grant the district court that authority, Mallard had no such obligation to begin with. *Id.* at 1820 n.4.

162. *Id.* at 1826.



hold otherwise, Justice Stevens concluded, would mean that Congress has merely endorsed a court's ability to request and would thus render the statute "virtually meaningless."<sup>163</sup>

#### IV. Analysis

The Supreme Court's holding that 28 U.S.C. § 1915(d) does not authorize coercive appointments of counsel was not unreasonable. The Court followed accepted methods of statutory interpretation<sup>164</sup> in ascribing to the words of the statute their ordinary meaning in light of the legislative history. Moreover, by comparing both contemporary and subsequently enacted statutes, the Court reinforced its conclusion that the word *request* assumes its normal meaning in section 1915(d).<sup>165</sup>

As is obvious from Justice Stevens' dissent, however, the legislative history can be used to argue for the opposite result.<sup>166</sup> Thus, Justice Stevens' objection to the narrow focus adopted by the majority opinion<sup>167</sup> is well taken. Accordingly, the Court should have lent further weight to its conclusion by discussing any of the three following factors which were submitted in briefs for its consideration.

First, constitutional challenges to mandatory appointments were deemed important by both of the parties and two amici.<sup>168</sup> Moreover, these questions have been raised in lower federal courts with varying degrees of success.<sup>169</sup> Although thirteenth amendment objections seem by now to be devoid of any viability<sup>170</sup> and first amendment challenges have not formed the basis for lower court decisions,<sup>171</sup> the validity of claims that coercive appointments violate the fifth amendment takings clause or that they deny due process and equal protection has not been re-

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163. *Id.* The majority, however, had no problem with reading this statute as one that "codif[ies] existing rights or powers." *Id.* at 1821.

164. "[T]he 'plain meaning' rule . . . has effectively been laid to rest. No occasion for statutory construction now exists when the Court will not look at the legislative history." Wald, *supra* note 19, at 195.

165. See *supra* notes 145-48 and accompanying text.

166. See *supra* notes 147, 159-60 and accompanying text.

167. See *supra* text accompanying note 156.

168. See *supra* notes 149-51 and accompanying text.

169. See *supra* notes 67-90 and accompanying text.

170. See *supra* notes 84-90 and accompanying text.

171. See *supra* note 67.

solved.<sup>172</sup> It is not evident that the Court was following its practice of avoiding a construction "that could in turn call upon the Court to resolve difficult and sensitive questions arising out of [constitutional] guarantees . . . ."<sup>173</sup> Rather, constitutional considerations simply played no role at all in this decision,<sup>174</sup> although Justice Stevens might have had the fifth amendment question in mind when formulating his dissent.<sup>175</sup>

Constitutional problems will, however, come to the fore if a state requirement for mandatory pro bono service, either legislatively or judicially arrived at, is subject to constitutional attack. Indeed, such challenges have been entertained in several states, although none has yet reached Supreme Court review.<sup>176</sup> Given the increasing public debate over pro bono services, it is not unlikely that constitutional challenges to coercive state provisions will be pursued and will ultimately require Supreme Court resolution. More significantly, the constitutionality of mandatory appointments will be crucial to a federal court's ability to invoke its inherent authority to require pro bono service.<sup>177</sup>

The second factor that the Court should have considered is the inherent power of a district court to make compulsory assignments.<sup>178</sup> Should any district court decide that it has the inherent authority to restrict membership of its bar to lawyers

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172. See *supra* notes 68-78, 82-83 and accompanying text.

173. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979).

174. See *supra* text accompanying notes 149-52.

175. The dissent's contention that Mallard implicitly accepted the district court's mandatory pro bono requirement because he had notice of it when he was admitted to the federal bar (see *supra* note 161 and accompanying text) is strikingly similar to the leading court of appeals case that rejected a fifth amendment claim. See *supra* text accompanying notes 69-70.

176. *Shapiro*, *supra* note 5, at 756-62.

177. See *supra* text accompanying note 95.

178. The Court declined to decide this issue because "the District Court did not invoke its inherent power in its opinion below, and the Court of Appeals did not offer this ground for denying Mallard's application for a writ of mandamus." *Mallard v. United States Dist. Court for the S. Dist. of Iowa*, 109 S. Ct. 1814, 1823 (1989). The Court was free to consider the issue nevertheless. Although the question was not presented in the petition for certiorari, the issue was raised for the Court's consideration. See *supra* note 94 and accompanying text. Even if it were not, however, Supreme Court Rule 21.1(a), providing that "[o]nly the questions set forth in the petition [for certiorari] or fairly comprised therein will be considered by the Court[,] . . . does not limit [the Court's] power to decide important questions not raised by the parties." *Blonder-Tongue Laboratories v. University of Illinois Found.*, 402 U.S. 313, 320 n.6 (1971).

performing public service before it,<sup>179</sup> such a local rule would undoubtedly be challenged. It can hardly be expected that several such challenges would yield uniform results among the district courts; thus, guidance by the *Mallard* Court on this question as well would have been desirable to foreclose any further contention involving a court's inherent authority to invoke such a rule.

Finally, in light of the ambiguity of Congress' intent as evidenced by the legislative history,<sup>180</sup> it would have been reasonable for the Court to have considered ethics or policy arguments in reaching its holding.<sup>181</sup> Ranging from the aspirational pronouncements of the American Bar Association<sup>182</sup> to the practical realities of economics<sup>183</sup> and sufficient availability of volunteers,<sup>184</sup> these widely debated factors should have found some place, however subsidiary, in support of the Court's consideration of the issue of coercive appointments.<sup>185</sup>

Even if the Court was unmoved by the need of the profession for some guidance on these matters, it should not have overlooked the impact of its decision on the judicial systems,

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179. See *supra* notes 91-102 and accompanying text.

180. See *supra* notes 19-22 and accompanying text. For a discussion of the opposite conclusions reached by the majority and dissent on Congress' intent, see *supra* notes 141-44, 159-60, and accompanying text.

181. It has been proposed that

the "best" interpretation of a statute is typically the one that is most consonant with our current "web of beliefs" and policies surrounding the statute. That is, statutory interpretation involves the present-day interpreter's understanding and reconciliation of three different perspectives, no one of which will always control. These three perspectives relate to (1) the statutory text . . . ; (2) the original legislative expectations surrounding the statute's creation . . . ; and (3) the subsequent evolution of the statute and its present context, especially the ways in which the societal and legal environment of the statute has materially changed over time

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Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1483 (1987) (footnote omitted).

182. See *supra* notes 103-04.

183. See *supra* notes 105-08 and accompanying text.

184. See *supra* note 109.

185. Although these policy arguments constituted a substantial section in each of the parties' briefs (see Brief for the Petitioner, *supra* note 69, at 24-33; Brief for the Respondent, *supra* note 119, at 2026) and constituted the major thrust of two of the amicus briefs (see Brief for State Bar of California as *Amicus Curiae*, *Mallard* (No. 87-1490); Brief of California Attorneys for Criminal Justice and The National Association of Criminal Defense Lawyers, *Amici Curiae*, in Support of the Petitioner, *Mallard* (No. 87-1490)), the Court gave no more than a perfunctory mention of these matters. See *supra* note 154.

both federal and state. The effect of voluntary public service on the resources of the federal courts has been noted by the circuit courts of appeals.<sup>186</sup> The possible impact of *Mallard* on state court systems, however, was only hinted at in the dissent.<sup>187</sup> States that have established their authority, either statutorily or judicially,<sup>188</sup> to compel pro bono service may under certain circumstances have that authority undermined as a result of this decision. For example, if such a state court appointment is made in a case involving a substantial federal question, or to a nonresident defendant in a diversity case, the defendant's court-appointed lawyer may remove the case to federal court,<sup>189</sup> where he will no longer be compelled to serve under section 1915(d). Whether a federal court would be free to honor the state's rule on mandatory appointments or would have to follow the Supreme Court's construction of section 1915(d) is a matter left completely open by this decision.<sup>190</sup>

Thus, by declining to consider any one of these three issues, the Court missed an opportunity to resolve matters of increasing concern to the entire legal profession. More important, however, the Court decided *Mallard* on such narrow grounds that it will be possible for federal courts to achieve coercive appointments notwithstanding the Supreme Court's holding that section 1915(d) does not authorize such appointments. A district court need only promulgate a rule restricting its practice to lawyers willing to accept mandatory pro bono appointments, by invoking its inherent authority to regulate the membership of its bar. Furthermore, for cases originating in state court in which an attorney's services have been properly mandated by the state and

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186. See *supra* note 110 and accompanying text.

187. See *supra* text accompanying note 160.

188. "Such a professional obligation of each lawyer to accept appointment without compensation is widely recognized [by courts] in almost every state, and has been codified by statute in more than half the states . . . ." Rosenfeld, *supra* note 67, at 276 (footnotes omitted); see also *Courts—No Inherent Power to Compel Uncompensated Representation in Civil Cases*, *supra* note 94, at 875-78.

189. In cases for which there is concurrent state and federal jurisdiction, removal is proper in a federal question case without regard to state citizenship and in diversity cases by nonresident defendants only. 28 U.S.C. § 1441(b) (1982).

190. Two conflicting policies support these opposite results: The concerns of comity and federalism favor deference to a state's policy of coercive appointments, but the preference for uniformity within the federal system argues for the precatory result.

which have been removed to federal court, the district court may defer to the state provision for coercive appointments rather than allow lawyers to withdraw. In either case, the Court's intention to relieve lawyers of compulsory service can easily be thwarted, and the fundamental questions of the constitutionality of mandatory appointments, a court's inherent authority to compel representation, and the underlying policy considerations will undoubtedly continue to occupy the attention of the lower courts. It is to be hoped that the Supreme Court will not avoid offering its guidance on these issues if presented with an opportunity to do so in some future case.

### V. Conclusion

The Supreme Court's first examination of the right of an attorney to refuse a court-ordered appointment to represent an indigent civil litigant, *Mallard v. United States District Court for the Southern District of Iowa*,<sup>191</sup> focuses on an area of great concern to the legal profession. By deciding *Mallard* narrowly, however, the Court effectively ensured that further litigation touching on pro bono appointments will emerge in both federal and state courts, at some point necessitating the Court's resolution. While mere statutory interpretation was certainly sufficient to resolve the immediate matter in question, a twofold benefit would have ensued had the Court expanded its focus. First, the meager legislative history, given opposite interpretations by the majority and the dissent, would not have been relied upon as the sole basis for the Court's decision. Rather, the decision would have acquired added weight had it been buttressed by a consideration of the factors that the Court chose to ignore: the constitutional validity of mandatory pro bono appointments, the inherent power of a court to make such appointments, and the policy issues relevant to pro bono representation.

More important, however, such a decision would have offered the Court's guidance on matters beyond the narrow grounds considered. Important issues bearing on pro bono representation would have been clarified, to the benefit of courts and counsel alike. As the matter stands now, federal courts may still

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191. 109 S. Ct. 1814 (1989).

be able to mandate assignments, since the much debated and litigated questions involving pro bono representation have found no resolution beyond the statutory construction enunciated in this case.

*Hinda Keller Farber*