Constitutional Law - Statutory Interpretation - Designation of Counsel - Compulsory Appointment in Civil Case

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The United States Supreme Court has held that 28 U.S.C. § 1915(d) does not authorize a federal court to make compulsory assignments of attorneys to represent indigent litigants in a civil case.


In February of 1986, the Iowa State Bar Association and the Legal Services Corporation of Iowa created the Volunteer Lawyers Project (hereinafter VLP), pursuant to the Eighth Circuit Court of Appeal's decision in Nelson v. Redfield Lithograph Printing. Under the system instituted by the District Court for the Southern District of Iowa, the VLP nonalphabetically selected lawyers who had not volunteered for assignment of pro bono state court cases from a roster compiled by the District Court of all attorneys admitted to practice who were in good standing. The District Court's authority to provide for such appointment in proceedings in forma pauperis was conferred by federal statute.

In June of 1987, attorney John H. Mallard was selected by the District Court for the Southern District of Iowa's VLP to represent several indigent inmates in an action against prison officials and administrators under Title 42 of the United States Code, Section 1983.

1. 728 F.2d 1003 (8th Cir. 1984). In Nelson, the Court of Appeals found "it incumbent upon the chief judge of each district to seek the cooperation of the bar associations and 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 . . ." Id. at 1005.

2. 109 S. Ct. 1816 (1989). The VLP provides that lawyers serving under the program may be reimbursed for out-of-pocket expenses and may receive any fee awards provided for by statute; however, there is no assurance of even minimal compensation for acceptance of a VLP assignment. Id at 1817.

3. Id. at 1816. 28 U.S.C. § 1915(d) (1892) provides: "The court may request an attorney to represent any such person [claiming in forma pauperis status] 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.

4. 42 U.S.C. § 1983 (1979). Section 1983 authorizes a United States citizen or person under United States jurisdiction to sue for deprivation of any rights, privileges or immunities secured by the Constitution. The inmates in Mallard's pro bono assignment alleged that prison officials had filed false disciplinary reports against them, physically mistreated them, and subjected them to life-threatening circumstances by exposing them as informants. See
five months earlier, filed a motion to withdraw with the District Court.\(^5\) Mallard stated in his motion to withdraw that upon reviewing the file, he concluded that his lack of experience in depo-
ing and cross-examining witnesses and his unfamiliarity with the legal issues involved in the action rendered him incompetent to lit-
igate the matter and that he would willingly volunteer to serve in an area of the law in which he was proficient.\(^6\)

The VLP opposed the motion, stating that not only was Mallard qualified to serve, but also that it was his ethical duty to serve, and that allowing him to withdraw would be an exception to the assignment rule which would set a "dangerous precedent."\(^7\)

Mallard's motion to withdraw was denied by a Magistrate, whereupon he appealed to the District Court, again asserting his unfamiliarity with Section 1983 actions and further contending that because he was not trained as a litigator, his acceptance of such a case constituted a violation of his ethical obligation to only accept cases he is able to handle competently.\(^8\) He concluded that the district court, in disallowing his withdrawal, would be exceeding its authority under Section 1915(d) of Title 28.\(^9\) In an accompanying affidavit, Mallard also asserted that he did not enjoy the role of litigator, and because of this reluctance, would not be capable of rendering effective assistance.\(^10\) The district court held that Mallard was competent, and upheld the Magistrate's decision, ruling that Section 1915(d) authorizes federal courts to make compulsory assignments of counsel in civil actions.\(^11\)

Mallard then sought a writ of mandamus from the Court of Appeals for the Eighth Circuit which would compel the district court to allow his withdrawal; the appellate court, however, denied his petition without opinion.\(^12\) The United States Supreme Court granted certiorari to decide the question over which the lower courts were in conflict: whether Title 28 of the United States Code,

\(^{10}9\) S. Ct. at 1817.

5. 109 S. Ct. 1817.

6. Id.

7. Id.

8. 109 S. Ct. at 1817. Based on the quality of Mallard's brief in support of his motion to withdraw, however, the District Court pronounced him competent. Id.

9. Id.

10. Id. The United States Supreme Court noted in the majority opinion, however, the existence of periodic seminars held by the VLP, as well as the availability of written materials and consultations with experienced attorneys regarding attorneys assigned to litigate matters with which they lack familiarity were available. Id.

11. Id.

12. 109 S. Ct. at 1817.
Section 1915(d) authorized a federal court to make compulsory assignments of attorneys who were unwilling to represent indigent litigants in civil cases.\textsuperscript{13}

The United States Supreme Court, in a 5-4 decision, answered this question in the negative.\textsuperscript{14} In the majority opinion,\textsuperscript{15} delivered by Justice Brennan, Section 1915(d) was analyzed by interpretation of its operative term, “request.”\textsuperscript{16} The Court opined that because “request” was employed as a verb in Section 1915(d), its colloquial connotation was not synonymous with a “command” or “demand,” as it is when employed as a noun.\textsuperscript{17} The Court concluded that the refusal of a request was generally understood not to carry the consequence of punishment or sanction; therefore, the non-compulsory implication of the word request, as employed in the statute, was evident.\textsuperscript{18}

Comparing Section 1915(d) to Section 1915(c), which was adopted simultaneously, the Court decided that the use of the word “shall” in addressing the duties of court officers and witnesses in Section 1915(c) demonstrated that “Congress knew how to require service when it deemed compulsory service appropriate . . .”;\textsuperscript{19} therefore, merely “requesting” counsel to service evinces an intent that this service should be non-compulsory.\textsuperscript{20}

Examining state statutes providing for “assignment” or “appointment” of counsel which were already in effect at the time Section 1915 was adopted,\textsuperscript{21} the Court reasoned that since Congress was aware of the existence of such stringent practices and still chose to employ the word “request,” Congress intended to permit attorneys to decline representation of indigent litigants.\textsuperscript{22}

Vague precedent from the state courts and from English com-

\textsuperscript{13} Id.
\textsuperscript{14} 109 S. Ct. 1816.
\textsuperscript{15} Id. at 1816-1823. Justice Brennan's majority opinion was joined by Rehnquist, C. J., & Justices White, Scalia, and Kennedy. Justice Kennedy also filed a concurring opinion. Justice Steven's dissenting opinion was joined by Justices Marshall, Blackmun and O'Connor. Id. at 1816.
\textsuperscript{17} 109 S. Ct. at 1818.
\textsuperscript{18} Id.
\textsuperscript{19} Id. 28 U.S.C. § 1915(c) provides: “The officers of the court shall issue and serve all process . . . Witnesses shall attend as in other cases . . .” Id. (Emphasis added).
\textsuperscript{20} Id.
\textsuperscript{21} 109 S. Ct. at 1818-19.
\textsuperscript{22} 109 S. Ct. at 1819.
mon law pertaining to the question of whether attorneys could decline representation and not be subject to court sanctioning led the Court to espouse Professor Shapiro's conclusion\(^2^3\) that [t]o justify coerced, uncompensated legal services on the basis of a firm tradition in England and the United States is "to read into that tradition a story that is not there."

A comparison of Section 1915(d) with prior federal statutes authorizing court-ordered representation of indigent litigants\(^2^8\) further supported the Court's conclusion that the subsequent adoption of Section 1915(d) without use of the verb "assign" evinces the deliberate intent of Congress to depart from compulsory assignment when fashioning Section 1915(d).\(^2^6\) Furthermore, the actions of Congress subsequent to the enactment of Section 1915(d) in adopting federal statutes which did employ the word "assign" or "appoint," in addressing the authority of courts to compel representation of the indigent,\(^2^7\) signified that Section 1915(d) was not intended to compel coercive representation, according to the Court.\(^2^8\)

The Court finally addressed the District Court's contention that construing Section 1915(d) as permitting attorneys to decline a court's request for representation in pro bono proceedings would render the section a nullity. The Court reasoned that since statutes often are the mere codification of an existing power, Section 1915(d)'s role was one of formally legitimizing the court's request as appropriate.\(^2^9\)

Regarding the second issue of whether petitioner Mallard had discharged his burden of proving that he was entitled to a writ of mandamus, the Court employed the traditional standard in determining eligibility for this extraordinary remedy.\(^3^0\) The Court first inquired whether the District Court had acted beyond its jurisdic-


\(^{24}\) 109 S. Ct. at 1819, (citing Shapiro, The Enigma of a Lawyer's Duty to Serve, 55 N.Y.U.L. Rev. 735, at 753.) Id.

\(^{25}\) Id. at 1820. The Court uses 18 U.S.C. § 3005 (1948), which provides for "assignment" of counsel for capital defendants in criminal cases, as an illustration of such use of the verb "assign" in authorizing court-ordered appointment of counsel. Id.

\(^{26}\) Id.


\(^{28}\) 109 S. Ct. at 1821.

\(^{29}\) Id.

\(^{30}\) Id. at 1822.
tion. The majority concluded that Mallard was indeed invoking the traditional use of the writ by alleging that the district court did not lawfully exercise its prescribed authority in appointing him, thus constituting a "clear abuse of discretion."\(^3\) The Court's next inquiry was whether petitioner Mallard lacked an adequate alternative remedy.\(^3\) Because Mallard had no other available remedy, the Court concluded that he had met his burden of showing that his right to the writ was indeed "clear and indisputable."\(^3\) Finally, the Court inquired whether any of the principal reasons for reluctance to issue the writ were present.\(^3\) Because the district court Judge was not a party to the action, the undesirable element of making a judge a litigant did not exist in the present action.\(^3\) Furthermore, because petitioner Mallard had not severed any elements of the merits litigation, there was no danger of creating inefficient "piecemeal appellate litigation."\(^3\) Therefore, the Court concluded that Mallard had met his burden of proof regarding his entitlement to the writ of mandamus, and it was error for the Court of Appeals to deny his application.\(^3\)

The Court declined to address respondent's contention that the federal courts possess inherent authority to require attorneys to serve, as neither court below invoked such authority as grounds for their decisions.\(^3\) Thus, it was held that Section 1915(d) did not authorize federal courts to make coercive appointments of counsel in proceedings \textit{in forma pauperis}, and the Court reversed the judg-

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32. \textit{Id.}


34. 109 S. Ct. at 1822. \textit{See Kerr}, 426 U.S. at 402-403; \textit{Allied Chemical Corp.}, 449 U.S. at 35, for further discussion concerning reluctance to condone the use of this extraordinary remedy.

35. \textit{Id.}

36. \textit{See Kerr}, 426 U.S. at 403. Since the Judiciary Act of 1789 Congress has determined that generally, appellate review should be postponed until the trial court has rendered final judgment. "[J]udicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies sought to be furthered by that judgment of Congress." \textit{Id.}

37. 109 S. Ct. at 1822.

38. \textit{Id.} at 1823. \textit{See generally} Frazier v. Heebe, 482 U.S. 641, 645 (1987), for the proposition that a federal district court has discretion to adopt local rules that are necessary to carry on its business and that the United States Supreme Court may exercise its inherent supervisory authority to ensure consistency of local rules with "principles of right and justice," (citing In re Ruffalo, 390 U.S. 544, 554 (1968) (White, J., concurring) (citation omitted)).
ment of the Court of Appeals and remanded the case to the lower court.\textsuperscript{39}

Justice Kennedy joined in full the opinion of the Court in a concurring opinion which stated that the majority had only dealt with the interpretation of a statute, not with determining the professional responsibility of a lawyer.\textsuperscript{40} Kennedy concluded that some professional obligations may exceed obligations to the state; accepting a court’s request to represent the indigent was an example of such an obligation.\textsuperscript{41} The majority opinion, he stated, did not suggest otherwise.\textsuperscript{42}

Justice Stevens dissented, emphasizing in his opinion that the paramount issue involved was neither the plain meaning of “request” in Section 1915(d), nor whether an attorney’s reasons for refusing such “requests” were sufficient, nor even whether sanctions may be imposed for such refusals.\textsuperscript{43} The real question involved, the Justice stated, was “whether a lawyer may seek relief by way of mandamus from the court’s request simply because he would rather do something else with his time.”\textsuperscript{44} Both precedent and tradition\textsuperscript{45} were cited to support the premise that a court’s authority to define the terms and conditions upon which an attorney may be admitted to the bar gave it the power to require lawyers to serve.\textsuperscript{47}

Section 1915(d) was interpreted by the dissenters as being adopted for the specific purpose of granting federal courts the

\textsuperscript{39} 109 S. Ct. at 1823.
\textsuperscript{40} Id.\textsuperscript{41} Id. The Justice remarked that an attorney’s duties go beyond what the law demands; it is this characteristic which renders the practice of law a “noble profession.” Id.\textsuperscript{42} Id.\textsuperscript{43} Id.\textsuperscript{44} Id.\textsuperscript{45} Id. at 1824. \textit{See} Frazier v. Heebe, 482 U.S. 641 (1987); United States v. Hvass, 355 U.S. 570 (1958); Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 821 (1987); Sparks v. Parker, 368 So.2d 528, \textit{appeal dismissed}, 444 U.S. 803 (1979); Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 287 (1985); People ex rel. Karlin v. Culkin, 248 N.Y. 465, 470-71, 162 N.E. 487, 489 (1928); Rowe v. Yuba County, 17 Cal. 61, 63 (1860); Powell v. Alabama, 287 U.S. 45, 73 (1932), which address the subject of bar membership as a privilege which carries with it duties and obligations. Id.\textsuperscript{46} Id. \textit{See} E. Brown, \textit{Lawyers and the Promotion of Justice} 253-254 1938; H. Drinker, \textit{Legal Ethics} 62-63 (1963); R. Smith, \textit{Justice and the Poor} 100 (1967), regarding inherent power of the court to assign attorneys and the implied professional duty of the lawyer, as agent of the court, to serve. Id.\textsuperscript{47} Id. \textit{See} United States v. Dillon, 346 F.2d 633, 635 (1965), \textit{cert. denied}, 382 U.S. 976 (1966), \textit{cited in} Hurtado v. United States, 410 U.S. 578, 589 (1973), regarding the duty to serve as a condition to licensing to practice. Id.
same authority of appointment already possessed by the state courts.\textsuperscript{48} Therefore, Section 1915(d) must be construed as requiring counsel to serve as requested, in order to give effect to the legislature's intent.\textsuperscript{49}

The dissent attached no significance to the difference between the plain meaning of "request," as used in Section 1915(d), and "assign" or "appoint," as used in contemporary state statutes.\textsuperscript{50} The title of the statute, originally introduced to the House and Senate as "[a]n Act providing when plaintiff may sue as a poor person and when counsel shall be assigned by the court," evinces legislative intent that the appointment of counsel be compulsory.\textsuperscript{51}

Addressing the issue of petitioner Mallard's entitlement to a writ of mandamus, the dissent stated that petitioner's right to have his motion to withdraw granted by the district court was by no means absolute, because the court's interest in adequate representation of a litigant and in orderly prosecution of a lawsuit outweigh the attorney's interest in terminating a client relationship.\textsuperscript{52} The dissent attached significance to the fact that petitioner had filed his motion to withdraw before he had even entered an appearance, this fact being evidence that he recognized a duty to accept the appointment and therefore felt it appropriate to petition the Magistrate to allow his withdrawal.\textsuperscript{53}

Finally, the dissent examined respondent's contention that a construction of Section 1915(d) as non-compulsory renders the statute a nullity, deciding that "request" indeed meant "respectfully command" in Section 1915(d), and that to construe Congress' intent as otherwise would indeed render the statute meaningless.\textsuperscript{54} No evidence in history, the dissenters concluded, supported the majority's proposition that Section 1915(d) was merely codifying an existing authority of the court in order to legitimize such requests as appropriate.\textsuperscript{55}

Twenty Eight (28) U.S.C. Section 1915 is based on the Act of

\begin{itemize}
\item \textsuperscript{48} Id. at 1825.
\item \textsuperscript{49} Id.
\item \textsuperscript{50} Id.
\item \textsuperscript{51} Id. at 1826. See 23 Cong. Rec. 5199, 6264 (1892).
\item \textsuperscript{52} Id. The dissent cited Ohntrup v. Firearms Center, Inc., 802 F.2d 676 (3rd Cir. 1986) and Mekdeci ex rel. Mekdici v. Merrell National Laboratories, 711 F.2d 1510, 1521-1522 (11th Cir. 1983) as examples of the balancing of the interests of the court and the attorney. Id.
\item \textsuperscript{53} 109 S. Ct. at 1826.
\item \textsuperscript{54} Id.
\item \textsuperscript{55} Id.
\end{itemize}
July 20, 1892, c.209, Sections 1 to 5.\textsuperscript{56} Despite subsequent revisions and amendments,\textsuperscript{57} the word "request" has been retained and appears in the current Section 1915(d), which bears minimal difference from the original wording of the 1892 Act.\textsuperscript{58} Whether such a "request" is compulsory on the part of the attorney assigned is not expressly addressed in this section. The sole reference to compulsory service was made in a short floor debate in the House, yet no conclusive opinion was expressed as dispositive of the issue.\textsuperscript{59}

It appears that Section 1915(d), although now applicable to civil and criminal proceedings, was originally drafted as applying only to suits commenced by the indigent (i.e., proceedings initiated by a civil plaintiff, since a private individual may not commence a criminal prosecution).\textsuperscript{60}

Tradition in the English Courts and the history of colonial America do not supply evidence of the existence of any requirement of compulsory representation of indigent plaintiffs in a civil action prior to the enactment of the 1892 Act which is presently Section 1915(d).\textsuperscript{61} English history reveals the existence of a statute, entitled "an Act to admit such persons as are poor to sue in forma pauperis," enacted in 1495 and replaced by court rules in 1883,\textsuperscript{62} but its provisions were inapplicable to a civil defendant, and a civil plaintiff had to establish the fact of his indigence and submit a certificate of counsel showing good cause for his suit.\textsuperscript{63}

\textsuperscript{56} 27 Stat. 252. The 1892 Act was entitled "An Act providing when plaintiff may sue as a poor person and when counsel shall be assigned by the court." Section 4 is the corresponding portion pertaining to the appointment of counsel, provided for currently in 28 U.S.C. § 1915(d) (1982).


\textsuperscript{58} Compare Act July 20, 1892 c.209, § 4 with 28 U.S.C. § 1915(d). The original Act provides "[t]hat the court may request any attorney of the court to represent such poor person, if it deems the cause worthy of a trial, and may dismiss any such cause so brought under this act if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious." The current § 1915(d) reads: "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."

\textsuperscript{59} 23 CONG. REc. 5199 (1892).

\textsuperscript{60} 109 S. Ct. at 1820, n.5. The House Report refers solely to property disputes and the floor debate in the House mentions only indigent civil plaintiffs. See H.R. Rep. at No. 1079, 52nd Cong. 1st Sess., 1 (1892), and 23 CONG. REc. 5199 (1892).

\textsuperscript{61} Shapiro, The Enigma of the Lawyer's Duty to Serve, 55 N.Y.U.L. Rev. 735, 739-753 (1980).

\textsuperscript{62} Id. at 741, (citing 11 Hen. 7, c.12 (1495)).

\textsuperscript{63} Id. at 745-46. It is difficult to determine the frequency with which the English courts actually exercised this statutory power of appointment. Serjeants-at-law, however,
Assignment in criminal cases was made only in cases of treason after 1688, and finally in respect of felonies generally in 1836.64 Finally, in 1695, an attorney’s obligation to serve upon court assignment was given limited statutory recognition by virtue of a statute which required the courts to appoint counsel upon the request of criminal defendants charged with treason.65 By the nineteenth century, however, the procedure of appointive counsel had reached the point of “being worth ‘little or nothing’” in the English system, which again underwent reform in the twentieth century to establish an entirely voluntary appointive system.66

American history is replete with both statutory and case law pertaining to the appointment of counsel in a criminal proceeding.67 However, record of the extent to which such appointments were deemed compulsory was incomplete and record of the frequency

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65. U.S. v. Dillon, 346 F.2d 633 at 636-37 (9th Cir. 1965), (citing 7 and 8 W.3, C.3, S.1 (1695)).
67. See Shapiro, The Enigma of a Lawyer’s Duty to Serve, 55 N.Y.U.L. Rev. 735, 750-756 (1980). Prior and subsequent to the American Revolution, the Colonies exhibited variation in their treatment of the right to counsel in criminal cases. Shapiro acknowledges three basic approaches: adhering closely to English practice recognizing a broader right to counsel than observed in England, and providing for assignment of counsel in cases of serious or capital crimes. Among those states who rejected the English rule in force until 1836 (i.e., in felonies the court itself was counsel for the prisoner) and granted a constitutional right to counsel in all criminal proceedings were: Maryland, Massachusetts, N. Hampshire, N. York, Pennsylvania, Delaware, N. Jersey, Connecticut and Georgia. While the constitutions of North Carolina, South Carolina, Virginia and Rhode Island did not originally recognize a right to counsel in criminal proceedings, provision was made for such representation by statute. See Powell, 287 U.S. 45, 61-65 (1932).

In addition, Pennsylvania and Delaware and New Jersey recognized the obligation of counsel to represent indigents upon court order by statutes enacted in 1718, 1709, and 1731, respectively. See United States v. Dillon, 346 F.2d 633, 637 (9th Cir. 1965), and Sparks v. Parker, 368 So.2d 528, 532 (1979). Following the American Revolution, New Jersey again gave statutory recognition of the right to counsel in all cases of indictment (1795); federal statutory recognition of the obligation of counsel to serve in cases of treason and other capital crimes occurred in 1790. 1 Stat. 118 (1790). See U.S. v. Dillon, 346 F.2d 633, 637 (9th Cir. 1965), and Sparks v. Parker, 368 So.2d 528, 532 (1979).

The 1790 federal statute is presently codified at 18 U.S.C. § 3005 (1976), which the Mallard Court declined to address regarding “whether, or under what conditions, (such a federal statute) providing for the ‘assignment’ or ‘appointment’ of counsel authorizes federal courts to compel an unwilling attorney to render service.” See Malard 109 S. Ct. 1820.
with which attorneys' refusals to accept appointment met with disciplinary action was nonexistent.\(^6\) The United States Supreme Court has never specifically addressed the issue of whether compelled service in a civil \textit{pro bono} case is constitutional,\(^6\) but had intimated in several opinions that an attorney may, by virtue of his profession, possess a unique duty to serve in such situations.\(^7\)

More recently, the related issue of whether a United States district court has the power to appoint counsel to file a civil suit for a plaintiff arose in \textit{Brooks v. Central Bank of Birmingham,}\(^7\) enabling the United States District Court for the Northern District of Alabama to discuss the constitutionality of compelling an attorney to represent a civil litigant.\(^7\) The \textit{Brooks} court, relying on \textit{In the Matter of Nine Applications for Appointments of Counsel in Title VII Proceedings,}\(^7\) held that the relevant statute providing for such appointment was unconstitutional and that therefore the district court lacked the power to appoint counsel to file a civil suit for a plaintiff. The court referred to its prior determination\(^4\) that such appointment was compulsory under the statute because of both the clarity of legislative history and the use of the word "appoint" rather than "request,"\(^7\) and then addressed the application

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68. Shapiro, \textit{The Enigma of a Lawyer's Duty to Serve}, 55 N.Y.U.L. Rev. at 751, 755-56. There are numerous cases, however, regarding a lawyer's claim to compensation beyond the statutorily authorized amount after completion of a \textit{pro bono} assignment. \textit{Id.}

69. \textit{Id} at 757.


\textit{Powell} acknowledged the power of the trial court, even absent a statute, to appoint an attorney for the accused in a capital case and viewed the attorney as an officer of the court who was bound to serve when the appointment required such service.

\textit{Hurtado} involved the validity of a federal law which provided that material witnesses who were unable to give bail may be incarcerated and paid a dollar a day, before trial. The Court there also discussed the obligation of the attorney, as court officer, to serve without compensation.

\textit{Sparks} involved the constitutionality of a Seventh Judicial Circuit order which established an indigent defense system providing for appointment in criminal cases, and reiterated the notion of the attorney's unique duty, as officer of the court, to render service without compensation.


72. \textit{Id.} The statute involved in \textit{Brooks} was 42 U.S.C. § 2000e-5(f)(1), which provides for the appointment of counsel for a Title VII Complainant. Counsel in \textit{Brooks} sought re-determination of an order denying his motion to withdraw as appointed counsel for the plaintiff in a Title VII action. \textit{Id.}


74. \textit{Id.}

of the Thirteenth Amendment’s provision prohibiting involuntary servitude to the appointment in question. The court reasoned that if the meaning of involuntary servitude were limited to a narrow interpretation including only chattel slavery, then the Amendment’s exclusion of situations such as the forced labor of a convicted criminal would be superfluous. The court deduced three propositions from previous United States Supreme Court decisions, and concluded that continuance of service under a contract of personal service, when compelled under statute, amounts to involuntary servitude. The argument that the lawyer’s duty to represent a Title VII complainant was analogous to other limited public service obligations was rejected by the court, which distinguished between the obligation to represent a criminal defendant and the representation of a private plaintiff in a civil case. Conceding that such an obligation to represent an indigent client existed in a criminal proceeding but not in proceedings initiated by a private plaintiff, the court granted counsel’s motion to withdraw.

Nelson v. Redfield Lithograph Printing involved the issue of whether failure to appoint counsel for a civil plaintiff was abuse of discretion on the part of the trial court and addressed the standard regarding the showing which must be made in order for counsel to be appointed under Section 1915(d). The court held that there

making the distinction between a compulsory appointment and a request to serve.

76. Id.
77. Id. "Ex hypothesi, such forced labor would not be involuntary servitude anyway, so why make it an exception?" The court cited a famous law review article regarding involuntary servitude and the reasons generally employed in denying specific performance of personal service contracts. See Stevens, Involuntary Servitude by Injunction, 6 CORNELL L.Q. 235, 244-45, 247-50, 255 (1921). Id.
78. Id. The propositions are that a contract of service from which the law permits no release except by performance amounts to involuntary servitude; when continuance of such service is compelled by and punishable under statute, such service is involuntary servitude; such continued service is no less involuntary servitude merely because the contract was entered into voluntarily. Id.
79. Id.
80. Id. The court noted that compulsory appointment of counsel for indigent criminal defendants has been sustained as an exception to the Thirteenth Amendment, but that "for the legislature to compel an attorney to work by passing a statute requiring the judge to order it" would be to take the attorney’s property without just compensation. Id.
81. Id.
82. 728 F.2d 1003 (8th Cir. 1984). It was in response to this decision that the VLP, through which Mallard’s name was selected for appointment, was established. Nelson involved a case treated as a Title VII action wherein the plaintiff requested that counsel be appointed for him. Following this demonstration that he was unable to retain private counsel, he was refused counsel by the court.
83. Id.
was no abuse of discretion by the trial court, but that the standard requiring a showing of "compelling and meritorious" need for counsel was too high and therefore a standard requiring only a showing of a *prima facie* claim upon which relief could be granted was appropriate. The court acknowledged no constitutional or statutory right to appointment of counsel in a civil case, but conceded to the express authority of the district court to appoint counsel in such proceedings. Refusal of the trial court to appoint counsel was found not to be an abuse of discretion because of the crucial fact that after exploring the facts, the trial court found that had counsel been employed, the conclusion reached at trial would not have been altered. The court's rejection of the standard of showing of need employed by the trial court was based on the rationale that while appointment of counsel should be given serious consideration by the trial court, a showing of "compelling and meritorious" need was too extreme and that establishing a valid *prima facie* claim was more in accord with the purpose of Section 1915(d) in dismissing frivolous or malicious claims. Commenting on the reluctance of judges to request pro bono representation, the court, citing *Peterson v. Nadler*, expressed confidence that attorneys would view such appointments as being "integrally within their professional duty to provide public service." Thus, representation was held not to be compulsory in *Nelson*, wherein the appearance of counsel would have made no difference in the outcome of the proceedings at trial.

*United States v. 30.64 Acres of Land* involved the issue of whether the public duty of attorneys to serve without compensation constituted a taking of property without due process of law under the Fifth Amendment or involuntary servitude under the Thirteenth Amendment, and significantly, whether Section 1915(d)

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84. *Id.* at 1004. Only after such *prima facie* claim is established can further inquiry as to plaintiff's need for counsel be made. *Id.*
85. *Id.* at 1004. *See also* *White v. Walsh*, 649 F.2d 560 (8th Cir. 1981); *Peterson v. Nadler*, 452 F.2d 754 (8th Cir. 1971). The court in *Mallard* expressly declined to address the issue of whether federal statutes providing for "assignment" or "appointment" of counsel authorize federal courts to compel an unwilling attorney to serve. *See supra* note 66 and accompanying text.
86. 728 F.2d at 1006.
87. *Id.* at 1005.
88. 452 F.2d 754, 758 (8th Cir. 1971).
89. *Id.* The court also commented on the rarity at that time of lawyers being asked to serve in civil matters. *Id.*
90. 728 F.2d at 1005-06.
91. 795 F.2d 796 (1986).
Recent Decisions

authorized appointment of counsel to involuntary service in the form of mandatory assignment. The court conceded that the statute did give courts the authority and discretion to appoint counsel for indigent civil litigants, and discussed the varied interpretations of the nature of this power of appointment by different jurisdictions. The factors enumerated by the court as being responsible for such varied interpretation were: federal courts’ habitual use of language of mandatory appointment of counsel without consideration of the appropriateness of such language, the rarity of successful Section 1915(d) motions; the rarity of reversal of trial court denials of counsel because of the broad discretion afforded the trial court, and the dual employment of the word “appoint” by courts. The court held that the public duty of an attorney to serve without compensation when called on constitutes neither a taking under the Fifth Amendment nor involuntary servitude under the Thirteenth Amendment, and is a condition of practicing law.

The court held that Section 1915(d) did not authorize appointment of counsel to involuntary service, based upon the plain lan-

92. Id.

93. Id. at 798-800. Among those courts adapting the literal approach, treating §1915(d) as authorizing only a request by the district court, is the Seventh Circuit. See, e.g. Heidelberg v. Hammer, 577 F.2d 429, 431 (7th Cir. 1978). The Eighth Circuit has interpreted § 1915(d) more broadly, as requiring counsel to serve without compensation. See, e.g., Peterson v. Nadler, 452 F.2d 754,757 (8th Cir. 1971); see also Tyler v. Lark 472 F.2d 1077, 1078-80, cert. denied, 414 U.S. 864 (1973). The Fourth, Fifth, Sixth and Tenth Circuits use “appointment casually and do not consider the distinction between a request and an appointment, an approach also adopted by the Seventh Circuit. See, e.g., Cook v. Bounds, 518 F.2d 779, 780 (4th Cir. 1975); Lopez v. Reyes, 692 F.2d 15,17 (5th Cir. 1982); Moss v. Thomas, 299 F.2d 729, 730 (6th Cir. 1962); Bethea v. Crouse, 417 F.2d 504, 505 (10th Cir. 1969). Among courts which adopt the approach that “request” and “appointment” are, in fact, interchangeable are the Sixth, Seventh and Tenth Circuits. See, e.g., Willett v. Wells, 469 F. Supp. 748, 751, aff’d 585 F.2d 1227 (1979) (mem.); McKeever v. Israel, 689 F.2d 1315, 1319 and n.9 (7th Cir. 1982); Knoll v. Socony Mobile Oil Co., 369 F.2d 425, 430 (10th Cir. 1966), cert. denied, 386 U.S. 977 (1967).

94. 795 F.2d at 799. This rarity results from the fact that counsel for an indigent civil litigant will only be secured by a district court under “exceptional circumstances.” See Aldabe v. Aldabe, 616 F.2d 1089, 1093 (9th Cir. 1980).

95. 795 F.2d 796, 800. Because of the rarity of reversal, neither the trial nor appellate courts have much incentive to choose their language carefully: in ruling on § 1915(d) motions. In such cases, denial of counsel does not turn on construction of the statute. Id.

96. Id. “Appoint” may seem to mean either “to order” an attorney to represent an indigent client, or “to designate” a pro bono volunteer attorney as counsel of record for such a client. Id.

97. 795 F.2d at 801. The court noted, however, such appointments may constitute a grave imposition on the attorney called to serve, and consequently, such appointments are not compelled lightly by Congress nor by the courts. Id.
guage of the statute, the lack of provision for payment within the statute, and the difference in constitutional requirements for appointment of counsel in civil and criminal actions. Reasoning that statutes which authorize appointment of counsel generally utilize the word "assign" or "appoint," that statutes usually provide for payment of counsel if appointment is intended, and that there is normally no constitutional right to counsel in a civil case, the court concluded that Section 1915(d) did not authorize federal district courts to make mandatory assignments of counsel in civil proceedings.

The court in *United States v. 30.64 Acres of Land* espoused the Sixth Circuits' position in *Reid v. Charney*, regarding appointment of counsel, and expressly rejected the Eighth Circuit's approach in *Peterson v. Nadler*, observing that the lack of court authority to make mandatory assignments of counsel would be compensated by attorneys' recognition of their ethical obligation to undertake such assistance upon request. The 30.64 court concluded that although no mandatory representation was authorized by Section 1915(d), the motion for counsel in the case before it had not adequately been considered by the district court, therefore requiring reversal of the denial of counsel and remanding to the district court for redetermination.

Unlike the courts in *Brooks* and *30.64 Acres*, the United States Supreme Court shied away from addressing the coercive appointment of counsel issue in a Constitutional context. The *Mallard* Court, in the majority opinion, viewed the issue as one disposed of through the employment of general principles of statutory interpretation, and did not find it necessary at the time of its deci-

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98. *Id.*
99. *Id.*
100. 235 F.2d 47 (6th Cir. 1956). *Reid* held that in a civil case, the court has statutory power only to request, not assign, representation of the indigent. *Id.*
101. 452 F.2d 754, 757 (8th Cir. 1971). *Peterson* interpreted § 1915(d) as conferring the express authority of appointment of counsel in civil cases upon the district court. *Id.*
102. 795 F.2d at 803.
103. *Id.* at 804.
104. *Brooks* structured its analysis of compulsory appointment around the implications of the Thirteenth Amendment's prohibition against involuntary servitude; *U.S. v. 30.64 Acres* incorporated Fifth Amendment and Thirteenth Amendment analyses into its interpretation of § 1915(d). *Cf. Brooks*, Civil Action No. 81-G-1303-S (N.D. Alabama S.D. June 14, 1982) (WL Allfeds library, Dist file); *U.S. v. 30.64 Acres*, 795 F.2d 796, 801 (9th Cir. 1986).
sion to reach the related issues of the constitutionality of compulsory appointment, the inherent authority of a federal court to compel such appointment, the ethical duty accompanying an attorney's admission to the bar, and lack of competence on the part of the attorney as a sufficient basis for withdrawal.

The broad issue of the inherent authority of a federal court to compel representation of an indigent civil plaintiff was left undecided as the Court dealt with the more specific issue of whether Section 1915(d) itself gave a federal court such coercive authority. Since its analysis was thus transformed into construing a statute, the Court justifiably employed principles such as plain meaning and legislative intent in arriving at its conclusion that the operative term "request" did not confer the authority of coercive appointment upon the federal courts.

The Ninth Circuit, in United States v. 30.64 Acres, however, when faced with a similar opportunity to interpret Section 1915(d), found it appropriate to include a brief acknowledgement of the Fifth and Thirteenth Amendment issues involved before arriving at a construction of Section 1915(d) identical to that reached in Mallard. Because there was no constitutional challenge raised below, and because the district court did not invoke its inherent power in arriving at its decision, the sole issue in Mallard, i.e., the meaning of "request" in Section 1915(d), was resolved through statutory interpretation.

106. The Thirteenth Amendment constitutional issue was addressed in Brooks, U.S. v. 30.64 Acres, and Sparks; the Fifth Amendment challenge was brought in U.S. v. Dillon, 346 F.2d 633, cert. denied 382 U.S. 978 (1965), and Hurtado v. U.S., 410 U.S. 578 (1973), as well as U.S. v. 30.64 Acres.

107. 109 S. Ct. at 1823. "... [n]or do we express an opinion on the question whether the federal courts possess inherent authority to require lawyers to serve." The Court left this question unaddressed, as inherent authority was not invoked by the District Court's opinion below. Id.

108. Nelson, 728 F.2d 1003, 1005 (8th Cir. 1984), expressed confidence that attorneys would cooperate in shouldering the burden of pro bono appointments, in mere recognition of their responsibility as professionals. But see U.S. v. Dillon, 346 F.2d 633, 635 (9th Cir. 1965) for the proposition that pro bono representation of indigents under court order is a condition under which lawyers are licensed to practice as officers of the court.

109. 57 U.S.L.W. 3611. The question of incompetence as a sufficient basis for withdrawal was briefly addressed by Chief Justice Rehnquist during oral argument of the case, however.

110. 109 S. Ct. at 1821, note 8. The issue of inherent authority of coercive appointment was briefly addressed by the Court in a footnote. Id.

111. 109 S. Ct. at 1823.

112. 795 F.2d at 801.

113. Mallard, 109 S. Ct. at 1823.

114. Id. at 1818.
The court's reliance on the plain meaning of "request" when employed as a verb, coupled with its analysis of prior and subsequent federal statutes, justified its conclusion that Section 1915(d) merely legitimized a federal court's request for an attorney to provide legal assistance, but in no way authorized the imposition of sanctions for an attorney's failure to comply.\textsuperscript{116}

In \textit{Brooks}, the district court found it unnecessary to engage in such grammatical complexities, as it employed Section 1915(d) as an example of a non-compulsory appointment statute.\textsuperscript{116} The court utilized "appoint" and "request" as the distinction between a statute which authorized coercive appointment and one which did not.\textsuperscript{117}

Because of the dearth of the case history regarding coercive civil appointments of counsel, the Supreme Court apparently chose to rely instead on statutory comparisons and to isolate the issue within this context. Justice Stevens' dissent, however, asserts that the real issue involved was broader than a mere problem of statutory interpretation; nor was it a matter of deciding which reasons for declining an appointment would be accepted as sufficient.\textsuperscript{118} The real issue, according to the dissent, was one of duty, and if this proposition was correct, then the majority's limitation of the issue to being one of statutory interpretation was neither a complete nor effective resolution.\textsuperscript{119}

The majority in its conclusion did assert, in dicta, that it in no way intended that its decision be a denigration of the lawyer's ethical obligation to assist the indigent.\textsuperscript{120} Justice Kennedy, in his concurring opinion, likewise gave deference to the concept of lawyers' obligations to their calling.\textsuperscript{121}

\textsuperscript{115} Id. at 1818-1821. When "request" is given its plain meaning as a verb, in which case it is not interchangeable with "require" or "demand," it becomes apparent that Congress, although aware of other statutes employing such mandatory language, desired not to make § 1915(d) an authorization for mandatory service. \textit{Id.}

\textsuperscript{116} \textit{Brooks}, Civil Action No. 81-G-1303-S (N.D. Alabama S.D. June 14, 1982) (WL Allfeds library, Dist file). The court was comparing § 1915(d) to 42 U.S.C. § 2000e-5(f)(1), which employs the term "appoint."

\textsuperscript{117} \textit{Id.}

\textsuperscript{118} 109 S. Ct. at 1823. Petitioner Mallard's assertion that he lacked competency to effectively litigate the matter was not addressed by the majority. However, see \textit{Sparks} at 530-531, involving the assertion by indigent defendants that assigned, underpaid attorneys would not render effective assistance. The court there addressed the competency issue with the remark that flexibility among fields of law is the essence of the practice of law, stating that few cases turn completely upon the skill of the advocate.

\textsuperscript{119} \textit{Id.} at 1825.

\textsuperscript{120} \textit{Id.} at 1822-23.

\textsuperscript{121} \textit{Id.} at 1823. Such obligations, the Justice stated, exceed obligations to the State.
The dissent, however, apparently saw such dicta as insufficient in addressing what it viewed as the true issue. The dissent's basis for rejecting the majority's analysis of Section 1915(d) turns on its refusal to distinguish between "request" and "appoint." This was the approach adopted by the Sixth, Seventh and Tenth Circuits, as discussed in United States v. 30.64 Acres, which categorized the various Circuits' stances regarding this distinction.

The dissent's inclusion of the surrounding circumstances in its interpretation of Section 1915(d) suggests that the issue of the inherent authority of a federal court to make such appointments has a direct bearing on the duty of an attorney to serve. As the dissent reasoned, when a court has established a fair procedure for assignment of counsel, as the District Court for the Southern District of Iowa had, a formal request made by the court pursuant to that procedure is "tantamount to a command." Because the majority limited its holding to deciding only that no such coercive authority existed under Section 1915(d), the broad issues of duty and inherent authority remain left "for another day" by the Court.

The Mallard Court's specific ruling on Section 1915(d), while not deciding the general issue of inherent authority of a federal court to make coercive appointment of counsel, nevertheless expands the significance of the distinction between statutes which employ "request" and those which utilize "appoint." The Court's interpretation of such distinction may lend clarity to courts confronted with the confusion of the varied approaches to interpretation identified in United States v. 30.64 Acres.

In resolving the secondary issue of Mallard's entitlement to the remedy of a writ of mandamus, the Court employed no novel analysis nor did it pronounce any elevated standard. It relied on the traditional use of the writ, which was to "confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."

122. 109 S. Ct. at 1823. The dissent relied on the Court's recent decision in Barnard v. Thorstenn, 489 U.S. ___ (1989) which addressed the issue of duty and discussed a court's inherent power of appointment as being justified by its authority to define the terms and conditions of admittance to the bar. Id.
123. Id. at 1825.
124. See supra, note 92 and accompanying text.
125. 109 S. Ct. at 1826.
126. Id. at 1823.
127. See note 92, supra, and accompanying text.
128. 109 S. Ct. at 1822, (citing Roche v. Evaporated Milk Association, 319 U.S. 21, 26
The dissent incorporated several considerations in its discussion of the attorney's ethical duty, not without merit. In granting a motion to withdraw in a case such as Mallard, a balancing of interests should be employed before the motion is granted. These interests are that of the court in assuring adequate representation of a litigant, orderly prosecution of a lawsuit, and those personal interests of the attorney in terminating the client relationship. Also to be considered, Justice Stevens noted, were the circumstances surrounding the court's "request." If a "fair and detailed" procedure of appointment has been established by the court, the "request" is to receive the elevated status of a command.

While the majority’s interpretation of Section 1915(d) satisfied the dispute concerning the meaning of "request" in that statute in particular, the dissent’s incorporation of the broad issue of an attorney’s ethical duty raises questions which must be addressed on a subsequent occasion, according to the majority. Assuming an attorney is under such a duty to provide pro bono representation of an indigent civil plaintiff, how is the duty to be enforced? The majority in Mallard acknowledged the existence of an ethical duty, but made no remarks regarding enforcement, presumably because of their conclusion that such "requests" do not compel an attorney to mandatory representation. The dissent, after examining the circumstances surrounding a court's "request," would find the court authorized to enforce such a "request" if that court had previously established a system of appointment.

Thus, the majority’s narrow resolution of a single issue involving the construction of a statute clarifies the previous lack of conformity concerning the interpretation of "request" in appointment stat-
utes. The dissent's dictum regarding the collateral issue of inherent court power lays the groundwork for further discussion of the question of an attorney's duty, which will surely confront the Court again at "another day," as Justice Brennan concluded.136

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136. 109 S. Ct. at 1823.