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NOTES

The Constitutionality of Compulsory Attorney Service: The Void Left by Mallard

Many attorneys recognize and accept the duty to perform pro bono work as an ethical responsibility of membership in the legal profession. Whether this duty may take the form of a mandatory requirement, however, is another question. In Mallard v. United States District Court for the Southern District of Iowa\(^1\) the United States Supreme Court held that the federal in forma pauperis statute\(^2\) does not authorize a federal court to require an unwilling attorney to represent an indigent in a civil action.\(^3\)

This Note examines the Mallard decision in light of the history of indigent representation and the development of an individual’s right to counsel. The Note concludes that the Mallard Court’s interpretation of section 1915(d)—the in forma pauperis statute—comports with the legislative history and language of the statute. The Court’s narrow decision, however, ignores important constitutional considerations underlying the issue of compelling attorney service in civil actions. As a result, state statutes that might have been affected by a constitutional holding remain unaffected. This Note contends that uncompensated compulsory civil appointments are unconstitutional. Consequently, legislative action is needed to establish a constitutional system for such appointments.

In 1987 the Volunteer Lawyers Project (VLP) selected\(^4\) John Mallard to represent two indigent inmates and one indigent former inmate in their suit against prison officials under 42 U.S.C. \(\S\) 1983.\(^5\) After reviewing the case file, Mallard filed a motion to withdraw from representation, contending that he lacked the requisite skill and experience to represent the inmates.\(^6\) He added

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2. 28 U.S.C. \(\S\) 1915(d) (1982). The statute provides: “[t]he 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. “In forma pauperis” may be defined as “in the character of a pauper.” BLACK’S LAW DICTIONARY 701 (5th ed. 1979).
4. The VLP compiles a list of all attorneys admitted to practice before the District Court of the Southern District of Iowa who are in good standing and who have litigated non-bankruptcy claims in the past five years. Brief for Petitioner at 4-5, Mallard (No. 87-1490). Attorneys who have volunteered for VLP referrals of pro bono state cases are deleted from the list. Id. The VLP then selects attorneys from the list for \(\S\) 1915(d) assignments. Mallard, 109 S.Ct. at 1816-17. Attorneys who are chosen are reimbursed for out-of-pocket costs and they may keep any fee awards provided by statute. The attorneys, however, are not guaranteed any compensation for their own services. Id.
5. Mallard, 109 S. Ct. at 1817. The indigents alleged that prison guards had filed false disciplinary reports against them, physically abused them, and endangered their lives by exposing them as informants. Id.; see 42 U.S.C. \(\S\) 1983 (1982) (civil action for deprivation of rights by any person acting under color of law of any state).
that he would willingly volunteer his services in an area in which he had more expertise, such as bankruptcy and securities law. After a magistrate denied his motion, Mallard appealed to the federal district court, reasserting his former arguments. He further claimed that because he was not a litigator by training or temperament, compelling him to take the case would force him to violate his ethical obligation to handle only matters for which he was competent. The district court upheld the magistrate's decision. The court cited Mallard's brief as evidence that he was a qualified attorney and stated that under section 1915(d), it had the power to make compulsory appointments in civil cases. The United States Court of Appeals for the Eighth Circuit, without opinion, denied Mallard's petition for a writ of mandamus to compel the district court to allow his withdrawal.

In 1988 the United States Supreme Court granted certiorari to resolve the conflict among the courts of appeals over whether section 1915(d) authorizes compulsory assignments of attorneys in civil cases. The issue was one of first impression for the Court. In a five-to-four decision, the Supreme Court reversed the court of appeals and held that section 1915(d) does not authorize courts to force unwilling attorneys to represent indigents in civil cases. Justice Brennan, writing for the majority, viewed the issue in Mallard primarily as one of statutory interpretation rather than one of federal courts' inherent authority. Section 1915(d) provides that "the court may request an attorney to represent any such person [claiming in forma pauperis status] unable to employ counsel." The Court emphasized that the section's operative term, "request," has a plain meaning that courts should respect. Justice Brennan stated that "[t]o request that somebody do something is to express a desire that he do it, even though he may not generally be disciplined or sanctioned if he declines."

8. Id.
9. Id.; see supra note 6.
10. Mallard, 109 S. Ct. at 1817 (the district court opinion is reprinted in Petitioner's Brief in Support of Petition for Writ of Certiorari at 2a, Mallard (No. 87-1490)).
11. Id.
12. Id. (a copy of the order is attached to Petitioner's Brief in Support of Petition for Writ of Certiorari at 1a, Mallard (No. 87-1490)).
14. See infra notes 51-75 and accompanying text for discussion of the conflict among the circuits.
15. Chief Justice Rehnquist and Justices White, Scalia, and Kennedy joined Justice Brennan in the majority opinion. Mallard, 109 S. Ct. at 1816. Justice Kennedy filed a concurring opinion emphasizing that the majority decision in no way meant to discourage the traditional obligation of attorneys to represent indigents. Id. at 1823 (Kennedy, J., concurring).
16. Id.
17. The court refused to address the issue of inherent authority because such authority was not cited by the lower courts as a basis for their opinions. Id. at 1823.
The Court decided that Congress' choice of the word "request" was significant because "assignment" or "appointment" of counsel typically denotes the imposition of a duty to undertake representation that courts may enforce. The majority observed that "Congress evidently knew how to require service when it deemed compulsory service appropriate." The Court noted that various federal statutes enacted subsequent to section 1915(d) authorize courts to provide counsel in certain types of actions and use the terms "assign" and "appoint" rather than "request." For example, Congress enacted section 1915(c) concurrently with section 1915(d), and section 1915(c) uses the term "shall" in reference to the duties of court officers and witnesses.

As a final basis for the Court's interpretation of section 1915(d), Justice Brennan pointed to the statute's legislative history. At the time of the statute's enactment in 1892, at least twelve states had laws permitting their courts to "assign" or "appoint" attorneys for indigents in civil cases. In refusing to adopt the terminology of these state statutes, Congress' conscious choice of the term "request" evinced "a desire to permit attorneys to decline representation of indigent litigants if in their view their personal, professional, or ethical concerns bid them [to] do so."

In his dissenting opinion, Justice Stevens focused on an attorney's duty to represent indigents and the longstanding tradition of court-appointed assignments. He asserted that the majority's interpretation would render the statute meaningless because courts already had the authority to request attorney cooperation. He "attach[ed] no particular significance to the difference, if any, between the ordinary meaning of the word 'request' . . . and [the meaning of] 'assign' or 'appoint.' " Justice Stevens concluded that the word "request" in section 1915(d) should be construed to mean "respectfully command."

Unless an indigent litigant has a right to counsel, the issue whether a particular attorney must represent her cannot arise. Thus, the development of an indi-

21. Id. at 1820 n.4; see also United States v. 30.64 Acres of Land, 795 F.2d 796, 800 (9th Cir. 1986) ("As the terms are commonly understood, an attorney may decline a request but not an appointment.").
24. Mallard, 109 S. Ct. at 1818; 28 U.S.C. § 1915(c) (1982) ("The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.").
27. Id.
28. Id. at 1823-27 (Stevens, J., dissenting).
29. Id. at 1826 (Stevens, J., dissenting).
30. Id. at 1825 (Stevens, J., dissenting).
31. Id. at 1826 (Stevens, J., dissenting).
gent’s right to counsel was a necessary precursor to the issue raised in Mallard. Providing voluntary legal services to those unable to afford it is an ancient tradition, dating as far back as the reign of Henry VII and even to Roman times. In colonial America, courts had common law and statutory authority to assign counsel upon request for capital defendants who were unable to retain counsel. Then in 1790, Congress passed a law requiring assignment of counsel at the request of any person accused of treason or any other capital federal crime.

For the criminally accused, the right to counsel was not secured in the state and federal courts until 1963. In the 1963 decision Gideon v. Wainwright the Supreme Court declared that a criminal defendant’s constitutional right to appointed counsel is a fundamental right. As such, it is obligatory on the states through the fourteenth amendment.

Conversely, in civil cases indigents have no general right to appointed counsel. In 1892 Congress passed a statute giving federal courts the authority to allow in forma pauperis actions. The purpose of the statute was to open up the federal courts to poor persons. As introduced, it was to provide “when a plaintiff may sue as a poor person, and when counsel shall be assigned by the court.” This provision of counsel is a privilege, however, rather than a right. The statute leaves the decision whether to request counsel to the discretion of

32. See id. at 1824, 1825 n.5 (Stevens, J., dissenting).
33. See, e.g., Shapiro, The Enigma of the Lawyer’s Duty to Serve, 55 N.Y.U. L. Rev. 735, 739-40 (1980) (discussing the difficulties of basing arguments for compulsory service on Roman, English, and American tradition). The majority in Mallard referred to Shapiro’s article twice in its opinion. See Mallard, 109 S. Ct. at 1819-20. The Mallard dissent criticized the majority’s “reliance” on the article. Id. at 1825 n.6 (Stevens, J., dissenting).
34. See United States v. Dillon, 346 F.2d 633, 637 (1965) (the court attached to its decision portions of appellant’s brief that traced the origins and history of the attorney’s obligation to serve upon court appointment), cert. denied, 382 U.S. 978 (1966).
37. Id. at 341; see U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for the defense.”); see also Johnson v. Zerbst, 304 U.S. 458, 463-64 (1938) (in federal courts, courts must appoint counsel for defendants unable to employ counsel unless such defendants completely and intelligently waive the right to counsel); Powell v. Alabama, 287 U.S. 45, 68 (1932) (“the right to the aid of counsel is of this fundamental character”).
38. Gideon, 372 U.S. at 342-44.
39. Lassiter v. Department of Social Servs., 452 U.S. 18, 25-27 (1981); Peterson v. Nadler, 452 F.2d 754, 757 (8th Cir. 1971). In decisions subsequent to Gideon, however, the Court indicated that the right established in criminal actions could extend to the civil context in cases involving very fundamental interests. For example, a defendant may have a right to counsel in juvenile proceedings, In re Gault, 387 U.S. 1, 49-50 (1967) (even when the proceedings are civil rather than criminal, the fourteenth amendment requires that in proceedings that may result in a juvenile’s confinement to an institution, the juvenile has a right to appointed counsel); parole revocation, Gagnon v. Scarpelli, 411 U.S. 778, 790-91 (1973) (court must determine need for appointed counsel on a case-by-case basis; in some instances fundamental fairness requires appointed counsel); and parental rights actions, Lassiter, 452 U.S. at 30.
42. Id. A member of the House introduced the bill in this way. The term “assign,” however, did not appear anywhere in the bill itself.
the court, and the court will choose to appoint counsel only in extraordinary circumstances, after a careful balancing of various factors. Because this is only a privilege, an indigent cannot dispute a denial by contending that he was denied a right to counsel. He can only challenge the trial judge's decision as an abuse of discretion. Furthermore, the court's authority is a general authority to provide counsel; the question remains whether this power allows a court to "require" the services of a particular attorney.

Until Mallard the Supreme Court had never addressed the issue of compelling a particular attorney to represent an indigent. The federal courts of appeals have dealt more directly with this issue. Attorneys frequently challenge court-ordered appointments on a constitutional basis that compelling such service without compensation constitutes a "taking" of an attorney's property under the fifth amendment. Although many state courts have accepted this argument, the United States Court of Appeals for the Ninth Circuit rejected it in the leading case of United States v. Dillon. That court based its decision primarily upon what it deemed to be the tradition of the profession to serve indigents upon court order. The court stated:

representation of indigents under court order, without a fee, is a condition under which lawyers are licensed to practice as officers of the court . . . . [A]n applicant for admission to practice law may justly be deemed to be aware of the traditions . . . . Thus, the lawyer has consented to, and assumed, this obligation.

Therefore, the court held that such an assignment does not constitute a taking of an attorney's services. Although Dillon was a criminal case, the court did not

43. See, e.g., Garrison v. Lacey, 362 F.2d 798 (10th Cir. 1966), cert. denied, 387 U.S. 911 (1967); United States ex rel. Gardner v. Madden, 352 F.2d 792 (9th Cir. 1965); Sierra v. Lehigh County, 617 F. Supp. 427 (E.D. Pa. 1985).

44. United States v. 30.64 Acres of Land, 795 F.2d 796, 800 n.8 (9th Cir. 1986). Some of the various factors include the merits of the plaintiff's claim, whether representation of both sides by persons trained in presentation of evidence and cross-examination would better serve the search for truth, capability of the plaintiff to present his case, complexity of the legal issues that the claim raises, and plaintiff's working knowledge of the legal process. Maclin v. Freake, 650 F.2d 885, 887-89 (7th Cir. 1981).

45. Even when an indigent has a right to counsel rather than simply a privilege, it does not necessarily follow that the court can compel a particular attorney to represent the indigent; compulsory service is a separate inquiry. See infra notes 90-100 and accompanying text.


47. See, e.g., Scott v. Roper, 688 S.W.2d 757 (Mo. 1985); Bedford v. Salt Lake County, 447 P.2d 193 (Utah 1968).

48. 346 F.2d 633 (9th Cir. 1965), cert. denied, 382 U.S. 978 (1966). In Dillon the appointed attorney applied for compensation after representing the plaintiff in connection with proceedings to vacate a judgment of conviction. It is unclear whether the attorney originally consented to the appointment. See id. at 633-34. Other courts have followed this decision in holding that compelling attorney representation of indigents does not amount to a taking under the Constitution. See, e.g., Family Div. of Trial Lawyers v. Moultrie, 725 F.2d 693, 705 (D.C. Cir. 1984); Williamson v. Vardeman, 674 F.2d 1211, 1214-15 (8th Cir. 1982); cf. Hurtado v. United States, 410 U.S. 578, 589 (1973) ("fifth amendment does not require that the Government pay for the performance of a duty it is already owed") (witness fees).

49. Dillon, 346 F.2d at 635.

50. Id. The court quoted Powell v. Alabama, in which the Supreme Court stated that
distinguish between criminal and civil actions in its discussion of professional tradition.

Because constitutional challenges to court appointments frequently are rejected, attorneys appointed pursuant to section 1915(d) often challenge their appointments on statutory grounds. They argue that the statute only authorizes a court to "request" an attorney to represent an indigent and does not authorize the court to "require" such service. Federal courts are split over the response to this argument. Some courts read the statute narrowly, as did the Mallard Court, agreeing that it authorizes the court only to request service from an attorney. Other courts have interpreted it more broadly, holding that courts can require attorneys to represent indigents.

The United States Court of Appeals for the Ninth Circuit directly addressed the issue of compelled service by a particular attorney under section 1915(d) in United States v. 30.64 Acres of Land. In 30.64 Acres plaintiff appeared pro se at a trial in which he was awarded a jury verdict of $22,240 against the United States for the taking of his land. The court of appeals reversed.

"[a]ttorneys are officers of the court, and are bound to render service when required by such an appointment." Id. (quoting Powell v. Alabama, 287 U.S. 45, 73 (1932)). Courts often quote this dictum in support of appointments. See, e.g., United States v. Accetturo, 842 F.2d 1408, 1412 (3d Cir. 1988); Caruth v. Pinkney, 683 F.2d 1044, 1049 (7th Cir. 1982), cert. denied, 459 U.S. 1214 (1983).

51. E.g., Dillon, 346 F.2d at 635-36 (no taking under fourteenth amendment); Sparks v. Parker, 368 So. 2d 528, 531-34 (Ala.) (attorney appointments do not constitute takings under the fifth amendment or involuntary servitude in violation of the thirteenth amendment), appeal dismissed, 444 U.S. 803 (1979); cf. Hurtado, 410 U.S. 578 at 588-89 (incarceration of material witnesses without just fees is not a taking under fifth amendment).

52. Compare United States v. 30.64 Acres of Land, 795 F.2d 796, 801-03 (9th Cir. 1986) (§ 1915(d) does not authorize compulsory appointments) and Caruth, 683 F.2d at 1049 (same) with Whisenant v. Yuam, 739 F.2d 160, 163 n.3 (4th Cir. 1984) (§ 1915(d) permits mandatory assignments) and Peterson v. Nadler, 452 F.2d 754, 757 (8th Cir. 1971) (same).


54. See, e.g., Peterson, 452 F.2d at 757. Many courts never reach the issue of § 1915(d)'s "request" language because they find instead that the lower court did not exercise its discretion properly in the first place. See, e.g., Hodge v. Police Officers, 802 F.2d 58, 59-62 (2d Cir. 1986) (lower court did not consider appropriate factors in exercising its discretion); McKeever v. Israel, 689 F.2d 1315, 1319-20 (7th Cir. 1982) (district court operated under mistaken impression that it had no authority to appoint counsel; therefore, court did not consider the relevant factors necessary under § 1915(d)). A trial court's exercise of discretion seldom is reversed on appeal. But see Whisenant, 739 F.2d at 163-64 (appeals court reversed trial court's denial of defendant's request for counsel; lack of counsel led to "fundamentally unfair trial"). Still other courts simply have used the terms "request" and "appoint" interchangeably and have ignored any distinction between them. See, e.g., Ehrlich v. Van Epps, 428 F.2d 363, 364 (7th Cir. 1970); Knoll v. Socony Mobil Oil Co., 369 F.2d 425, 430-31 (10th Cir. 1966), cert. denied, 386 U.S. 977 (1967). A striking number of lower courts have used the term "appoint" when referring to the court's authority under § 1915(d). See, e.g., Hodge, 802 F.2d at 60; Reynolds v. Foree, 771 F.2d 1179, 1181 (8th Cir. 1985); Maclin v. Fresa, 650 F.2d 885, 886-87 (7th Cir. 1981); Cole v. Smith, 344 F.2d 721, 723 (8th Cir. 1965); Sierra v. Lehigh County, Pa., 617 F. Supp. 427, 429 (E.D. Pa. 1985); Jackson v. United States, 221 F. Supp. 755, 755-56 (E.D. Pa. 1963).

One court went so far as to say that an attorney impliedly consented to a court appointment, even though the attorney would have been disbarred for refusal. Lewis v. Lane, 816 F.2d 1165 (7th Cir. 1987) (attorney claimed lack of competence and time to represent indigents in § 1983 action; magistrate denied attorney's request to be excused and indicated that attorney's membership in bar might be terminated if he declined the assignment).

55. 795 F.2d 796 (9th Cir. 1986).

56. Id. at 797.
On remand, the district court awarded plaintiff $3,676.58. At the second trial, plaintiff filed a motion for appointed counsel, but the district court denied it without explanation, commenting only that "I know nothing in this case that allows this court to appoint ... an attorney for you." Plaintiff argued that the district court erred as a matter of law by denying his motion "on the mistaken ground that the court lacked the authority to grant it." The United States Court of Appeals for the Ninth Circuit held that section 1915(d) does not authorize courts to compel attorneys to represent indigents, so the court can only "request" such representation. The court remanded the case, however, because the trial court had not exercised discretion under section 1915(d) in determining whether to appoint counsel; the trial court erroneously had assumed that it had no authority and thus made no further inquiry. As a result, the lower court failed in its "duty under section 1915(d) to assist a party in obtaining counsel willing to serve for little or no compensation."

The 30.64 Acres court discussed the prevailing confusion over whether section 1915(d) authorizes mandatory appointments. It attributed this confusion partially to the fact that section 1915(d) motions are rare because courts will secure counsel for indigents only under exceptional circumstances. In addition, the broad discretion given trial judges makes appellate reversal of denials equally rare. Consequently, courts have little incentive to choose their language carefully in considering section 1915(d) motions. Furthermore, the court noted that many courts use the word "appoint" to designate a pro bono volunteer, thereby issuing orders "appointing" counsel when in fact the attorney already has volunteered or has agreed to represent when asked. Rejecting the reasoning of the United States Court of Appeals for the Eighth Circuit which had held that the statute authorizes appointments, the court held that the plain language of 1915(d) authorizes only a request. In support of its conclusion, the court pointed to other statutes using terms such as "appoint" and "assign" when authorizing appointment of counsel, and noted that such statutes usually provide for compensating such counsel.

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57. Id.
58. Id. at 798.
59. There was evidence that plaintiff was totally physically and mentally disabled. Id. at 797-98.
60. Id. at 798.
61. Id. at 797-98.
62. Id. at 803.
63. Id. at 804.
64. Id. (emphasis added).
65. Id. at 799.
66. Id. at 800.
67. Id.
68. Id.
69. Id. at 801; see infra notes 71-75 for discussion of the Eighth Circuit approach.
70. 30.64 Acres, 795 F.2d at 801. The court also cited the Fifth and Sixth Circuit opinions in accord with its opinion. Id. at 802 (citing Branch v. Cole, 686 F.2d 264, 266-67 (5th Cir. 1982); Reid v. Charney, 235 F.2d 47, 47 (6th Cir. 1956)). The court did not mention Dillon, also a Ninth Circuit decision, perhaps because the Dillon court did not rely on § 1915(d). See United States v. Dillon, 346 F.2d 633, 633-34 (9th Cir. 1965), cert. denied, 382 U.S. 978 (1966).
As the 30.64 Acres court noted, the Eighth Circuit Court of Appeals has taken a different approach. In *Peterson v. Nadler*\(^71\) an indigent prisoner filed suit against his former attorney alleging that the attorney had fraudulently converted his automobile by wrongfully selling it after plaintiff went to prison. The trial court permitted plaintiff to proceed in forma pauperis, and plaintiff requested a court-appointed attorney.\(^72\) The district court ruled that it had no power to appoint an attorney in a civil action.\(^73\) The court of appeals reversed and stated that under section 1915(d) federal courts possess explicit statutory authority to make compulsory appointments.\(^74\) The court simply cited the statute, however, and did not discuss any interpretation of the word "request" or the rationale for its decision that the statute granted this authority.\(^75\)

The Supreme Court in *Mallard* rejected the Eighth Circuit's approach and essentially agreed with the position and rationale of 30.64 Acres. The Mallard majority held that the statute says "request," means request, and authorizes only a request.\(^76\) The dissent, however, argued that Mallard involved more than just statutory interpretation.\(^77\) Justice Stevens focused primarily on the legal profession's tradition of court-appointed counsel for indigent representation. He stated that "a court's power to require a lawyer to render assistance to the indigent is firmly rooted in the authority to define the terms and conditions upon which members are admitted to the bar."\(^78\) Justice Stevens declined to address the issue of inherent authority, as did the majority. He reasoned that the strong tradition of the bar representing indigents upon court order compelled his conclusion that section 1915(d)'s "request" language means "respectfully command."\(^79\) Justice Stevens' reliance on tradition, however, assumes that courts have inherent authority to appoint counsel, in which case it does seem that counsel cannot refuse to serve once appointed. If courts in fact have this power already, then to say that section 1915(d) authorizes appointments would be to say that the statute adds little, if anything, to the court's pre-existing authority.

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71. 452 F.2d 754 (8th Cir. 1971).
72. Id. at 755-56.
73. Id. at 756.
74. Id. at 757.
75. Id.
77. Id. at 1823 (Stevens, J., dissenting) ("this case involves much more than the parsing of the plain meaning of the word request"). The dissent noted that statutes cited by the majority as evidence that Congress used different language, such as "appoint" or "assign," when it intended to authorize compulsory service, such as 18 U.S.C. § 3006A (1982), were enacted because of defects in the system in which courts did not appoint attorneys until the defendant was arraigned. Therefore, Justice Stevens argued, these statutes cannot support the proposition that Congress in 1892 did not intend to give the courts authority to require representation of indigents. *Id.* at 1826 & n.8 (Stevens, J., dissenting).
78. Id. at 1824 (Stevens, J., dissenting).
79. Id. at 1826 (Stevens, J., dissenting). One commentator suggests that "although frequently urged as rooted in the firmest of traditions, the 'duty to serve' in fact has a history shrouded in obscurity, ambiguity and qualification," and hence should not be used as the primary justification for forcing attorney service. Shapiro, supra note 33, at 738; see also Note, *Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance*, 81 COLUM. L. REV. 366, 373-76 (1981) (rejecting the proposition that the "officers of the court" doctrine may provide authority for subjecting attorneys to an otherwise unconstitutional burden to carry out court appointments). See *infra* notes 108-112 and accompanying text for further discussion.
This is exactly the dissent's criticism of the majority's opinion. Again, Justice Stevens argued that under the majority's interpretation the statute is rendered "virtually meaningless,"\(^8\) granting the courts no more power than they already possess.

As the majority noted, however, "statutory provisions may simply codify existing rights or powers. . . . Section 1915(d) plays a useful role in the statutory scheme if it informs lawyers that the court's requests . . . are appropriate requests."\(^81\) Although it may seem that a court can request anything of an attorney, some requests might be improper. For example, the majority pointed out that a judge cannot "request to cut short cross-examination so that he can go fishing."\(^82\) Granted, a request that an attorney represent a litigant does not seem as unreasonable as the majority's example. Absent statutory authority, however, an attorney may experience real anxiety over whether the judge may make such a request and whether she may refuse. The statute, therefore, legitimizes a court's request to an attorney to represent a poor litigant.\(^83\) The majority's interpretation, even if it adds little to the courts' power, is at least consistent with the plain, ordinary meaning of the statute's operative term "request."

Conversely, the dissent's explanation of why Congress used the word "request" if it meant "require" is unpersuasive. Justice Stevens stated that "[i]t is evident that the drafters of this statute understood these terms [request and assign] to impose similar obligations and simply assumed that members of our profession would perform their assigned tasks when requested to do so by the court."\(^84\) He based this contention on the fact that the statute was introduced as "[a]n Act providing when plaintiff may sue as a poor person and when counsel shall be assigned by the court."\(^85\) The word "assign," however, does not appear anywhere in the statute itself and the majority believed that the statute's text controlled.\(^86\) Moreover, as Mallard noted in his brief, this was not the official title of the bill—it was simply the way the bill was introduced on the floor.\(^87\)

Although the Court left many questions unanswered, the Mallard Court properly interpreted the plain language of the statute. Although there are, and should be, strong ethical obligations on the part of attorneys to represent indigents, Congress chose not to enforce them through court order in section 1915(d). Not only did the 1892 Congress decline to use the term "require" or "assign" in the statute, since then Congress has passed up several opportunities

\(^{80}\) Mallard, 109 S. Ct. at 1826 (Stevens, J., dissenting).

\(^{81}\) Id. at 1821.

\(^{82}\) Id.

\(^{83}\) See id.

\(^{84}\) Id. at 1826 (Stevens, J., dissenting).

\(^{85}\) Id. (Stevens, J., dissenting).

\(^{86}\) Id. at 1820, n.4.

\(^{87}\) Reply Brief for Petitioner at 6 n.7, Mallard (No. 87-1490). Mallard argued that Congress surely chose the textual language of the bill more carefully than the proponent of the statute chose when introducing the bill on the floor of the House. Id. Furthermore, Mallard noted that Congress did not pass the bill based upon its general description as uttered by the person who introduced it. The legislators voted on the basis of the statutory language itself. Id.
to revise the language of the statute to include these terms if it so intended.\textsuperscript{88}

Although the \textit{Mallard} Court correctly decided the narrow statutory interpretation issue, it failed to address any of the important constitutional issues surrounding compulsory attorney service.\textsuperscript{89} As a result, the decision gives little guidance to the states in framing and amending their indigent representation laws. If forcing attorney service is unconstitutional, the Supreme Court is allowing the practices of some states to go unchecked. Because the Court limited its decision to an interpretation of a federal statute only, the state statutes remain unaffected.

The most frequently raised constitutional challenge to compulsory appointments is that such appointments constitute "takings" of attorneys' property without compensation, in violation of the fifth amendment.\textsuperscript{90} The Supreme Court has never defined the term "taking" precisely.\textsuperscript{91} Indeed, the Court has expressly refused to adopt any rigid rules or a formula to use in making the determination whether a taking has occurred.\textsuperscript{92} The general purpose of the clause, however, is to prevent the "'[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"\textsuperscript{93} Forcing attorneys to bear the burden of representing indigents falls squarely within this proscription.

A determination of taking involves two elements: a finding that the appropriated subject is property and a determination that the government has taken the property. Although the amendment's proscription applies most clearly in the context of governmental acquisition of private property,\textsuperscript{94} courts have extended it to a variety of contexts including personal property\textsuperscript{95} and intangibles.\textsuperscript{96} Most courts that have considered the issue have held that an attorney's services constitute property.\textsuperscript{97} Her ideas, knowledge, and services are

\textsuperscript{88} Congress has amended the statute periodically since 1892; however, the term "request" remains unchanged. \textit{See supra} note 23.

\textsuperscript{89} The Court stated that because the parties did not raise these issues in the lower courts, it would not address them. \textit{Mallard}, 109 S. Ct. at 1823.

\textsuperscript{90} \textit{See U.S. CONST.} amend. V ("nor shall private property be taken for public use, without just compensation").

\textsuperscript{91} \textit{See Annotation, Supreme Court's Views as to What Constitutes "Taking" Within Meaning of Fifth Amendment's Prohibition Against Taking of Private Property for Public Use Without Just Compensation, 89 L. Ed. 2d 977, 983 (1988).}


\textsuperscript{94} \textit{See Penn Cent. Transp. Co., 438 U.S. at 124 ("A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government . . . ").}

\textsuperscript{95} United States v. 19.86 Acres of Land in East St. Louis, 141 F.2d 344 (7th Cir. 1944) (factory building); Iowa Elec. Light & Power Co. v. City of Fairmont, 243 Minn. 176, 67 N.W.2d 41 (1954) (condemnation of utility gas company authorized even though its properties consisted of about 90% personal property).

\textsuperscript{96} The Supreme Court has extended the concept of property to include intangibles. \textit{See}, e.g., City of Cincinnati v. Louisville & Nashville R.R., 223 U.S. 390, 400 (1912) (chose in action); United States v. Burns, 79 U.S. (12 Wall.) 246, 252 (1870) (patent rights); \textit{see also} City of Thibodaux v. Louisiana Power & Light Co., 126 So. 2d 24, 31 (La. Ct. App. 1960) (franchises).

her stock in trade. The product of her labor takes the form of opinions, advice, and advocacy. These are intangible property, but property nonetheless.98 Furthermore, the Supreme Court appears to have accepted that personal services can constitute property that may be subject to taking by the government.99

As for the taking element, if the government forces an unwilling attorney to provide her services for the public benefit, under threat of sanctions, her property has been taken. As one commentator aptly noted, "[a]n obligation to perform certain work, backed by the sanction of contempt, professional discipline, or loss of livelihood, is about as direct an invasion of a person's control over his labor as can be imagined."100 Once the government appropriates and uses a person's labor, there clearly has been a "taking."

Finally, in the case of compulsory assignments in civil cases, unless a statute provides for it, an attorney is not guaranteed any compensation for her services. Zero compensation certainly cannot qualify as "just compensation." Accordingly, in a case like Mallard's, the district court's holding that it had the authority to force Mallard to represent the indigents would be unconstitutional under the fifth amendment.

There are, however, arguments as to why such an appointment should not be considered unconstitutional. In its influential decision,101 the Dillon102 court focused on tradition and an implied consent theory in rejecting the constitutional "taking" challenge to attorney appointment without compensation.103 The court argued that

[a]n applicant for admission to practice law may justly be deemed to be aware of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order. Thus, the lawyer has consented to, and assumed, this obligation and when he is called upon to fulfill it, he cannot contend that it is a "taking of his services."104

Underlying this consent theory is the alleged strength of tradition and duty associated with court appointments for indigents. The Dillon court referred to the "ancient and established tradition"105 of such appointments. The Court ar-

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98. See supra note 96.
99. See United States v. Robel, 389 U.S. 258, 265 n.11 (1967) ("the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the "liberty" and "property" concepts of the Fifth Amendment") (quoting Greene v. McElroy, 360 U.S. 474, 492 (1959)); Butler v. Perry, 240 U.S. 328, 333 (1916) (conceding that "for some purposes labor must be considered as property").
100. Shapiro, supra note 33, at 774.
101. Subsequent opinions often cite or quote Dillon without discussion. See, e.g., Family Div. Trial Lawyers v. Moultrie, 725 F.2d 695, 705 (D.C. Cir. 1984); Tyler v. Lark, 472 F.2d 1077, 1079 (8th Cir.), cert. denied, 414 U.S. 864 (1973); Dolan v. United States, 351 F.2d 671, 672 (5th Cir. 1965); State v. Ruiz, 602 S.W.2d 625, 627 (Ark. 1980).
102. See supra notes 48-50 and accompanying text for further discussion of Dillon.
103. Dillon, 346 F.2d at 635-36.
104. Id. at 635.
105. Id.
gued that attorneys are licensed to practice as "Officers of the Court." Presumably the role places attorneys in a unique relationship with the court. Consequently, they are entitled to certain benefits and are in turn burdened with certain duties. As a result of this relationship and the accompanying benefits, attorneys have an obligation to accept compulsory appointments.

This notion of consent is problematic, however. First, it is a dubious assumption that an attorney understands when he becomes a member of the bar that he sometimes will be forced to represent a client that he does not want to represent without compensation. One hopes that prospective attorneys understand that the profession has a strong tradition of providing pro bono service. Most attorneys probably understand this tradition, however, as an ethical obligation, not a mandatory requirement. Even if an attorney knows that he will be listed in his jurisdiction as available for court assignments, he might not know that he could be compelled to accept a particular assignment.

Moreover, the tradition underlying this consent theory is the product of a misleading analogy. The court's power over an officer of the court dates back to the early English system in which attorneys were considered officers of the court and were subject to the court's discipline, just as members of its clerical staff. These attorneys did not plead or defend clients; instead, they primarily performed ministerial tasks. In contrast, English barristers pleaded and defended suits and were admitted to practice by self-regulating professional organizations. As opposed to the attorneys, barristers were never considered officers of the court. American attorneys more closely resemble these English barristers, who owed duties to the King, not to the court. A privately practicing attorney is not an employee of the government or of the court and is simply not an "officer of the court" in the traditional sense. Therefore, the officer of the court doctrine does not support a court's authority to compel attorney service. Although a tradition exists, this is not necessarily an "ancient and established" tradition understood by all those who join the bar.

Another justification for the assertion that there has been no taking of an attorney's property is the fact that attorneys receive reciprocal benefits as a result of state licensure. Other professionals, however, also must be licensed by the state, yet no one has suggested that these professionals therefore owe the state a duty to provide their services free of charge to indigents. For example,
physicians are not required to treat poor persons without receiving compensation for their services. By singling out attorneys from the rest of society, the state is putting a burden on select individuals rather than on all members of society. This selectivity is exactly what the fifth amendment prohibits.\textsuperscript{114}

The notions of tradition and duty are not strong enough to refute that compelling attorney service without compensation constitutes a clear form of taking. It is difficult to imagine anything closer to the proscription of the fifth amendment than forcing someone to work for the government for free—not only failing to receive compensation, but forgoing income as well. Granted, the government may determine that it needs a person's property or services in order to provide for a public need, and it may take that property or those services. The fifth amendment, however, requires the government to compensate the person whose property has been appropriated.

A system for providing representation for indigents that passes constitutional muster is possible.\textsuperscript{115} Yet the question remains whether, as a matter of policy, attorneys should be compelled to represent indigents who are unable to secure counsel. The American Bar Association's periodic proposals for mandatory \textit{pro bono} service requirements in its Canons of Professional Ethics evidence the ongoing debate over this issue.\textsuperscript{116} The A.B.A., however, has never fully accepted or implemented these proposals.\textsuperscript{117}

In addition to upholding a noble tradition of the profession,\textsuperscript{118} there is a valid public interest in assuring that poor persons have the same access to the legal system as the more fortunate. Because they have more at stake due to their limited means, the poor may have an even stronger interest in having court access. Providing an ample supply of attorneys through mandatory service requirements would help to ensure that the poor have this access to the legal system.

Although a mandatory \textit{pro bono} service requirement may be good policy, it

\footnotesize{\textsuperscript{114} The state has the power to extract certain minimal services from its citizens as a whole. See, e.g., Hurtado v. United States, 410 U.S. 578, 588-89 (1973) (statute providing incarcerated witnesses only a dollar per day for the period before trial held constitutional); Butler v. Perry, 240 U.S. 328, 333 (1916) (statute requiring all able-bodied men to work on public roads held constitutional). These types of burdens however, fall on all citizens, not just a select group. Perhaps a small amount of service extracted from an attorney, with or without compensation, could be compared to this type of civic duty.}

\footnotesize{\textsuperscript{115} See infra notes 122-25 and accompanying text.}

\footnotesize{\textsuperscript{116} See Shapiro, supra note 33, at 735-38.}

\footnotesize{\textsuperscript{117} See id. at 738. Currently, the A.B.A.'s \textit{Model Code of Professional Responsibility} currently provides that "[t]he ultimate responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer . . . . Every lawyer . . . should find time to participate in serving the disadvantaged . . . . Every lawyer should support all proper efforts to meet this need for legal services." \textbf{\textit{Model Code of Professional Responsibility}} EC 2-25 (1981) (emphasis added). The A.B.A. \textit{Model Rules} provide that "[a] lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or to charitable groups . . . ." \textbf{\textit{Model Rules of Professional Conduct}} Rule 6.1 (1983) (emphasis added). Most importantly, the Comment to the \textit{Model Rules} provides that Rule 6.1 expresses the policy of providing public service, "but is not intended to be enforced through disciplinary process." \textit{Id}. comment.}

\footnotesize{\textsuperscript{118} See Mallard, 109 S. Ct. at 1823 (Kennedy, J., concurring) ("it is precisely because our duties go beyond what the law demands that ours remains a noble profession").}
does not follow that courts should require a particular attorney to represent a particular person in a particular case. Forcing an attorney to accept a case that he does not want to accept seems unwise and is certainly undesirable. The disinterested attorney would be less likely to devote an adequate amount of time and energy to a forced representation. Thus, the litigant probably would not receive the quality of representation that she deserved.

In addition, it is inefficient to require a particular lawyer to take on a particular case. In *Mallard* the court wanted to force Mallard, who was experienced in bankruptcy and securities law, to represent inmates in a complex section 1983 action. Mallard responded that he was not a litigator by training or temperament and therefore would not be able to provide effective representation. Given the abundance of lawyers in the country today and the wide diversity of their practices, the court easily could have found an attorney with at least some familiarity in such matters. An attorney familiar with civil rights cases under section 1983 arguably would have provided better representation to Mallard's clients. It is more practical to allow attorneys to choose *pro bono* assignments in areas and actions in which they are interested or experienced. It is also more efficient because lawyers would not waste time and resources gaining competency in unfamiliar areas of law. If an attorney is working on a case that involves an area of the law in which he has experience, and if he has accepted it because he is interested in the cause, he is far more likely to represent the client's interests zealously and competently than if a court forces an unwanted case upon him. Such a forced relationship is contrary to the interests of both the attorney and the indigent. This analysis necessarily assumes that willing attorneys are available. Although this may be an overly optimistic assumption, the foregoing points are important considerations.

A reluctance to force attorneys into service is understandable. In criminal actions, courts justify such forced service on the ground that the strong interests and liberties at stake in criminal actions outweigh the possible detriment to an attorney forced to represent a defendant in a criminal case. In addition, such representation usually is compensated. On the other hand, in civil actions these interests are not as vital because there is no threat to the indigent's personal liberty. Thus, courts should give considerable weight to the burden that is placed on the attorney, especially if he is uncompensated.

By providing an in forma pauperis statute, our society has made a value judgment that an indigent with a valid claim should be represented by counsel. In most instances, inadequate representation is better than no representation at all. If the poor are being denied access to the courts, Congress' original intent for the in forma pauperis statute is not being realized and Congress should consider modification.

119. The attorney's conduct may raise questions of malpractice or discipline for neglect and incompetency, but it is a realistic assumption that his preparation would be less thorough if he were not interested in the case.
In light of the constitutional difficulties, any extension of section 1915(d) to mandate representation by an unwilling attorney will require legislative action. One possible solution is to establish a fund to ensure that appointed attorneys are compensated. North Carolina, for example, has a fund set up as part of its indigent representation system and requires indigent litigants to reimburse the fund when at all possible. Another possibility is to impose a tax on all citizens that would subsidize such representation. Under either approach, if a court had to resort to appointing an attorney to represent an indigent, the attorney would be compensated, and there would be no taking of his services. Although the details of any proposal would need to be worked out by the legislature, it is possible for a system of attorney appointments in civil actions to survive constitutional scrutiny. The tradition of indigent representation is a noble one, however, the state must be mindful of the constitutional rights of those who carry on that tradition.

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122. In addition, state legislatures should amend statutes that would be rendered unconstitutional under this analysis.


124. See, e.g., Shapiro, supra note 33, at 781-786. Professor Shapiro explored the possibility of a tax on attorneys, as well as the possibility of having the adversary party pay the litigation expenses.

125. Appointment might still be necessary in the case of an indigent with an unpopular cause that no attorney wants to take.