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DENIAL OF A PRO SE LITIGANT'S MOTION TO APPOINT COUNSEL: THE PRECLUSIVE EFFECT OF REFUSING IMMEDIATE REVIEW

INTRODUCTION

The federal judiciary, in an attempt to reduce the burden on appellate courts, has regularly invoked the final judgment rule.¹ This rule limits appeals to those from final decisions of the district courts.² The courts, however, have frequently found it difficult to harmonize this concern with their desire to avoid the hardship resulting from erroneous interlocutory orders.³ The collateral order doctrine, which permits the immediate appeal of a small class of interlocutory orders,⁴ represents an attempted resolution of this conflict.⁵ The doctrine, however, has been inconsistently applied.⁶

The appealability of the denial of an indigent's motion to appoint counsel pursuant to Title VII of the Civil Rights Act of 1964⁷ or section 1915(d) of the Judicial Code⁸ is illustrative of the judiciary's

1. See, e.g., *Will v. United States*, 389 U.S. 90, 96-98 (1967); *DiBella v. United States*, 369 U.S. 121, 126-32 (1962); *Parr v. United States*, 351 U.S. 513, 518-21 (1956); *Cobbledick v. United States*, 309 U.S. 323, 324-29 (1940).

2. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373-74 (1981); *United States v. MacDonald*, 435 U.S. 850, 853-56 (1978); *United States v. Nixon*, 418 U.S. 683, 690-92 (1974); see *infra* pt. I(A).

3. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170-71 (1974); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-54 (1964); *Dickinson v. Petroleum Conver. Corp.*, 338 U.S. 507, 511 (1950); Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 Colum. L. Rev. 89, 90-91 (1975). An interlocutory order is one rendered during the course of litigation that determines an issue other than the merits of the cause of action itself. *Gas & Elec. Secs. Co. v. Manhattan & Queens Traction Corp.*, 266 F. 625, 632 (2d Cir. 1920).

4. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374-75 (1981); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-47 (1949); see *infra* pt. I(B).

5. See *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976); *In re Continental Inv. Corp.*, 637 F.2d 1, 7 (1st Cir. 1980); *Forsyth v. Kleindienst*, 599 F.2d 1203, 1208 (3d Cir. 1979), *cert. denied*, 101 S. Ct. 3147 (1981).

6. Compare *In re Continental Inv. Corp.*, 637 F.2d 1, 4-7 (1st Cir. 1980) (order denying motion to disqualify counsel not immediately appealable), and *Armstrong v. McAlpin*, 625 F.2d 433, 437-40 (2d Cir. 1980) (en banc) (same), *vacated and remanded with instructions to dismiss appeal*, 449 U.S. 1106 (1981), with *United States v. Miller*, 624 F.2d 1198, 1199 (3d Cir. 1980) (order denying motion to disqualify counsel immediately appealable), and *Schloetter v. Railoc of Ind., Inc.*, 546 F.2d 706, 709 (7th Cir. 1976) (same).

7. 42 U.S.C. § 2000e-5(f)(1) (1976). Title VII provides for a waiver of court costs, fees or security and permits the appointment of counsel. *Id.*

8. 28 U.S.C. § 1915(d) (1976). Section 1915 also provides for proceeding *in forma pauperis*—that is, with the waiver of court costs, fees and security, *Marks v. Calendine*, 80 F.R.D. 24, 27-28, 31 (N.D.W. Va. 1978), and appointment of counsel. 28 U.S.C. §§ 1915(a), (d) (1976). Although § 1915 applies to both civil and criminal proceedings, this Note will focus only on civil actions.

ambivalence.⁹ Permitting immediate appeal increases the number of interlocutory orders on which appellate courts must rule.¹⁰ Refusing review, however, thwarts the intent of these two statutes to provide equal access to the judicial system¹¹ because it forces the movant to proceed without the aid of counsel—that is, *pro se*.¹²

A lawsuit, from pre-trial proceedings through trial and ultimately appeal, is fraught with technical rules of procedure and evidence which a layman can hardly be expected to know, let alone use to his advantage.¹³ The procurement, development and presentation of facts and applicable legal doctrines require the skills of trained counsel.¹⁴ In short, not only will a *pro se* litigant have a slim chance of

9. Compare *Bradshaw v. Zoological Soc'y*, 662 F.2d 1301, 1318 (9th Cir. 1981) (denial immediately appealable), and *Ray v. Robinson*, 640 F.2d 474, 476-77 (3d Cir. 1981) (same), with *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064, 1067 (7th Cir. 1981) (per curiam) (denial not immediately appealable), and *Cotner v. Mason*, 657 F.2d 1390, 1391-92 (10th Cir. 1981) (per curiam) (same).

10. See *Cobbledick v. United States*, 309 U.S. 323, 324-26 (1940); *McLish v. Roff*, 141 U.S. 661, 666 (1891).

11. *Bradshaw v. Zoological Soc'y*, 662 F.2d 1301, 1316-17 & n.40 (9th Cir. 1981) (Title VII); *Hilliard v. Volcker*, 659 F.2d 1125, 1128-29 & nn.24-25 (D.C. Cir. 1981) (same); H.R. Rep. No. 238, 92d Cong., 1st Sess. 12, reprinted in 1972 U.S. Code Cong. & Ad. News 2137, 2148 (same); H.R. Rep. No. 1079, 52d Cong., 1st Sess. 1-2 (1892) (predecessor to § 1915); Duniway, *The Poor Man in the Federal Courts*, 18 Stan. L. Rev. 1270, 1271-72, 1276-77 (1966) (§ 1915 and its predecessor). As Senator Javits noted in a debate over the authority of the EEOC to issue cease and desist orders, "[i]f the complainant is going to have nothing but a remedy in court [under Title VII], at least let us lock that up in the best way we can." 118 Cong. Rec. 946, 954-55 (1972) (statement of Sen. Javits). The courts have recognized a judicial duty to assist the *pro se* litigant. *Gordon v. Leeke*, 574 F.2d 1147, 1148, 1151 (4th Cir.), cert. denied, 439 U.S. 970 (1978); *Canty v. City of Richmond*, 383 F. Supp. 1396, 1399-1400 (E.D. Va. 1974), aff'd mem. sub nom. *Canty v. Brown*, 526 F.2d 587 (4th Cir. 1975), cert. denied, 423 U.S. 1062 (1976). It is well established that a *pro se* litigant's pleadings should be liberally construed so as not to defeat a potentially meritorious claim. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (per curiam). Although this "duty to 'construe liberally' and perhaps 'to advise' is the court's . . . , [t]he duty to 'present' and to 'advocate' is that of the litigant or his attorney." *Gordon v. Leeke*, 574 F.2d 1147, 1153 (4th Cir.) (Hall, J., dissenting), cert. denied, 439 U.S. 970 (1978). Therefore, no matter how liberally the court interprets its "duty to assist," the court cannot forsake its role as impartial adjudicator of disputes and undertake the role of counsel for the *pro se* litigant. *Id.*

12. Zeigler & Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. Rev. 157, 159 (1972).

13. See *Hilliard v. Volcker*, 659 F.2d 1125, 1127 & nn.9 & 14, 1128-29 & nn.20 & 25 (D.C. Cir. 1981); Zeigler & Hermann, *supra* note 12, 176-87, 201-05; Note, *The Right to Counsel in Civil Litigation*, 66 Colum. L. Rev. 1322, 1331-32 (1966) [hereinafter cited as *Right to Counsel*]; Note, *The Indigent's Right to Counsel in Civil Cases*, 76 Yale L.J. 545, 545 (1967) [hereinafter cited as *Indigent Counsel*]; cf. *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (criminal case); *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (same).

14. See *Hilliard v. Volcker*, 659 F.2d 1125, 1127-29 (D.C. Cir. 1981); *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1118 (5th Cir.), cert. denied, 449 U.S. 820

success on the merits,¹⁵ but there is also a strong possibility that he will prejudice himself in a way that cannot be corrected upon appeal from final judgment.¹⁶

The Third and Ninth Circuits, by permitting immediate appeal under the collateral order doctrine, attempt to avoid the injustice arising from an erroneous denial of a motion to appoint counsel.¹⁷ The Seventh and Tenth Circuits, on the other hand, have stressed the judicial economy fostered by finality and have forbidden immediate review.¹⁸ This Note contends that, in this instance, the emphasis on

(1980); Zeigler & Hermann, *supra* note 12, at 181-83; *Right to counsel, supra* note 13, at 1331; *Indigent Counsel, supra* note 13, at 548; *cf.* Powell v. Alabama, 287 U.S. 45, 69 (1932) (criminal case).

15. Bradshaw v. Zoological Soc'y, 662 F.2d 1301, 1310 (9th Cir. 1981); Randle v. Victor Welding Supply Co., 664 F.2d 1064, 1068 (7th Cir. 1981) (Swygert, J., dissenting); Caston v. Sears, Roebuck & Co., 556 F.2d 1305, 1308 (5th Cir. 1977); *see* Hilliard v. Volcker, 659 F.2d 1125, 1127-29 & n.24 (D.C. Cir. 1981); Zeigler & Hermann, *supra* note 12, at 201 & n.190. In 1980, 168,789 civil suits were filed in the United States district courts. Director of the Admin. Office of the U.S. Courts, Annual Report of the Director of the Administrative Office of the United States Courts table 20, at 231 (1980) [hereinafter cited as Annual Report, with parenthetical indication of year of report]. Although *pro se* applications were not separately designated in the Annual Report, civil actions are broken down into general categories, such as prisoner actions and contractual disputes. Out of these 168,789 suits, 23,287, approximately 14%, were filed by prisoners. *Id.* Because almost all *pro se* applications are brought by prisoners and, conversely, almost all prisoner actions are brought *pro se*, the statistics are a close approximation of the actual percentage of *pro se* actions. Zeigler & Hermann, *supra* note 12, at 169 n.42. Moreover, according to a former *pro se* clerk for the United States District Court for the Southern District of New York, in the five-year period from 1966 to 1971, only one *pro se* plaintiff out of 200 was able to obtain final relief. *Id.* at 201 & n.190.

16. *See* Bradshaw v. Zoological Soc'y, 662 F.2d 1301, 1310-14 (9th Cir. 1981); Randle v. Victor Welding Supply Co., 664 F.2d 1064, 1068 (7th Cir. 1981) (Swygert, J., dissenting); Hudak v. Curators of the Univ. of Mo., 586 F.2d 105, 106 (8th Cir. 1978) (per curiam), *cert. denied*, 440 U.S. 985 (1979); *cf.* United States v. Deutsch, 599 F.2d 46, 48 (5th Cir.) ("substantial possibility" that some defendants, without counsel, would prejudice themselves), *cert. denied*, 444 U.S. 935 (1979).

17. Bradshaw v. Zoological Soc'y, 662 F.2d 1301, 1305, 1319 (9th Cir. 1981); Ray v. Robinson, 640 F.2d 474, 476-77 (3d Cir. 1981). A number of other courts have also found the order to be immediately appealable but have done so with little or no discussion. *See, e.g.,* Hudak v. Curators of the Univ. of Mo., 586 F.2d 105, 106 (8th Cir.) (per curiam), *cert. denied*, 440 U.S. 985 (1978); Caston v. Sears, Roebuck & Co., 556 F.2d 1305, 1308 (5th Cir. 1977); Spanos v. Penn Cent. Transp. Co., 470 F.2d 806, 807-08, n.3 (3d Cir. 1972) (per curiam); Miller v. Pleasure, 296 F.2d 283, 284 (2d Cir. 1961) (per curiam), *cert. denied*, 370 U.S. 964 (1962); *cf.* United States v. Deutsch, 599 F.2d 46, 48 (5th Cir.) (same under Criminal Justice Act, 18 U.S.C. § 3006A (1976)), *cert. denied*, 444 U.S. 935 (1979); Rincon Band of Mission Indians v. Escondido Mut. Water Co., 459 F.2d 1082, 1083-84 (9th Cir. 1972) (same under 25 U.S.C. § 175 (1976)).

18. Randle v. Victor Welding Supply Co., 664 F.2d 1064, 1065-67 (7th Cir. 1981) (per curiam); Cotner v. Mason, 657 F.2d 1390, 1391-92 (10th Cir. 1981) (per curiam).

finality is misplaced. In every confrontation between the final judgment rule and the collateral order doctrine two important factors must be taken into consideration: the nature of the proceeding and the availability of alternative methods of review. The denial of a motion to appoint counsel, when evaluated in this context, should be immediately appealable pursuant to the collateral order doctrine.

I. FEDERAL APPELLATE JURISDICTION

A. *The Final Judgment Rule*

The final judgment rule, presently codified in section 1291 of the Judicial Code,¹⁹ is the cornerstone of federal appellate procedure.²⁰ By providing that appeals may only be taken from final decisions of the district court,²¹ the rule embodies the traditional federal policy against piecemeal review.²² The central concern of the finality re-

19. 28 U.S.C. § 1291 (1976); see *United States v. MacDonald*, 435 U.S. 850, 853 (1978); *Abney v. United States*, 431 U.S. 651, 656 (1977); *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976). Section 1291 is directly descended from the First Judiciary Act of 1789. Act of September 24, 1789, ch. 20, §§ 21, 22, 25, 1 stat. 73, 76, 79, 81 (1789). For a discussion of the historical development of the final judgment rule, see Crick, *The Final Judgment as a Basis for Appeal*, 41 Yale L.J. 539 (1939).

20. *Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962); 9 J. Moore, *Moore's Federal Practice* ¶ 110.06, at 105-07 (2d ed. 1980); Comment, *The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts*, 45 U. Chi. L. Rev. 450, 452 (1978) [hereinafter cited as *Appealability*]; see *Abney v. United States*, 431 U.S. 651, 656-57 (1977); *DiBella v. United States*, 369 U.S. 121, 124-26 (1962); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 123-24 (1945); *Cobbledick v. United States*, 309 U.S. 323, 324-26 (1940); *Heike v. United States*, 217 U.S. 423, 428-29 (1910). For a general discussion of the final judgment rule, see Crick, *supra* note 19; Redish, *supra* note 3; Note, *The Final Judgment Rule In The Federal Courts*, 47 Colum. L. Rev. 239 (1947); Note, *Appealability In The Federal Courts*, 75 Harv. L. Rev. 351 (1961) [hereinafter cited as *Federal Courts*].

21. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373-74 (1981); *Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962); *Cobbledick v. United States*, 309 U.S. 323, 324-26 (1940); see 28 U.S.C. § 1291 (1976). The right of appeal is limited to that which is expressly conferred by statute and the judicial constructions and exceptions thereto; there is no constitutional right of appeal. *Abney v. United States*, 431 U.S. 651, 656 (1977); see *Carroll v. United States*, 354 U.S. 394, 399 (1957); *Heike v. United States*, 217 U.S. 423, 428-29 (1910); 9 J. Moore, *supra* note 20, ¶ 110.01, at 47.

22. See *United States v. Nixon*, 418 U.S. 683, 690 (1974); *DiBella v. United States*, 369 U.S. 121, 124 (1962); *Catlin v. United States*, 324 U.S. 229, 233-34 (1945); *Cobbledick v. United States*, 309 U.S. 323, 324-26 (1940). This principle also extends to Supreme Court review of state court decisions. 28 U.S.C. § 1257 (1976); see, e.g., *Local No. 438 Constr. & Gen. Laborers' Union v. Curry*, 371 U.S. 542, 548-50 (1963); *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 557-58 (1963); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945); cf. *FTC v. Standard Oil Co.*, 449 U.S. 232, 238 (1980) (FTC action subject to judicial review only if it "was 'final agency action'").

quirement is to ensure a speedy, efficient and economical judicial system.²³

At the district court level, the rule eliminates repeated interruptions of the trial and reduces the waste of time and the delay in the ultimate resolution of the case which piecemeal review would cause.²⁴ At the appellate level, consolidating all issues in a single appeal limits the number of arguments, briefs and records presented and reviewed in each case.²⁵ Moreover, avoiding immediate appellate review of a disputed issue may render appellate review unnecessary if the aggrieved party ultimately prevails on the merits, or if the district court later corrects its own error.²⁶

The policy against piecemeal review also prevents the use of interlocutory appeals solely for purposes of harassment and delay.²⁷ Per-

23. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981); *United States v. Nixon*, 418 U.S. 683, 690 (1974); *Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962); *DiBella v. United States*, 369 U.S. 121, 124 (1962). Justice Frankfurter noted that finality "has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). The amount of litigation in the federal courts has been increasing steadily each year. The total number of complaints filed in all federal district courts in 1960 was 57,665. Annual Report (1960), *supra* note 15, at 74. In 1970, the total was 87,321. Annual Report (1970), *supra* note 15, table 12, at 107. The total in 1980 was 168,789. Annual Report (1980), *supra* note 15, table 13, at 217. The total number of federal appeals has increased correspondingly. In 1960, 3,899 appeals were filed. Annual Report (1960), *supra* note 15, at 68. In 1970, the total was 11,662. Annual Report (1970), *supra* note 15, table 2, at 96. Finally, in 1980, 23,200 appeals were filed. Annual Report (1980), *supra* note 15, table 1, at 198.

24. *United States v. Nixon*, 418 U.S. 683, 690 (1974); *DiBella v. United States*, 369 U.S. 121, 124 (1962); *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 178 (1955); *Redish*, *supra* note 3, at 89; *Federal Courts*, *supra* note 20, at 351.

25. *Federal Courts*, *supra* note 20, at 352.

26. *Appealability*, *supra* note 20, at 452; see *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *United States v. MacDonald*, 435 U.S. 850, 858-59 (1978); *Brown Shoe Co. v. United States*, 370 U.S. 294, 309 (1962); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); *Redish*, *supra* note 3, at 89; *Federal Courts*, *supra* note 20, at 352. Conditioning appeals on finality may promote better informed decisions at both the trial and appellate court level. *Appealability*, *supra* note 20, at 452; *Federal Courts*, *supra* note 20, at 352. The district court may act in a more deliberate and considered manner because erroneous interlocutory orders which do not constitute reversible error will never be corrected, 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction* § 3907, at 431 (1976) [hereinafter cited as C. Wright & A. Miller]; *Federal Courts*, *supra* note 20, at 352, while erroneous interlocutory orders requiring reversal will necessitate a new trial. *Id.* A consolidated review after final judgment will also enable the appellate court to assess each allegedly erroneous interlocutory order with a broader perspective. *Id.*

27. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981); *United States v. Nixon*, 418 U.S. 683, 690 (1974); *DiBella v. United States*, 369 U.S. 121, 129 (1962); *Cobbledick v. United States*, 309 U.S. 323, 325 (1940).

mitting unrestricted interlocutory appeals would allow a litigant to employ the appellate process to deplete his adversary's financial resources and thereby force a premature settlement of the litigation.²⁸ Furthermore, the final judgment rule stresses the deference that appellate courts owe to district courts as the forum "initially called upon to decide the many questions of law and fact that occur in the course of a trial."²⁹ Repeated intervention in trial court proceedings through interlocutory appeals could "undermine the independence" of and respect for the trial judge and, thereby, his ability to control the proceeding.³⁰

B. *The Collateral Order Doctrine*

While the benefits of the finality rule are numerous,³¹ its rigid and inflexible application could result in severe hardship.³² To mitigate this harshness, the Supreme Court has fashioned a number of exceptions.³³ The most important of these is the collateral order doctrine.

28. 15 C. Wright & A. Miller, *supra* note 26, § 3907, at 432.

29. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981); *Peter Pan Fabrics, Inc. v. Dixon Textile Corp.*, 280 F.2d 800, 805-06 (2d Cir. 1960) (Clark, J., dissenting).

30. *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981); 15 C. Wright & A. Miller, *supra* note 26, § 3907, at 430-32; *cf. Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (appellate court has power of review, not intervention).

31. *See supra* notes 22-30 and accompanying text.

32. *Redish, supra* note 3, at 90; Comment, *Collateral Orders and Extraordinary Writs as Exceptions to the Finality Rule*, 51 Nw. U. L. Rev. 746, 746 (1957) [hereinafter cited as *Collateral Orders*]; *Appealability, supra* note 20, at 452; *Federal Courts, supra* note 20, at 352. For example, although an order denying a motion to dismiss a subpoena *duces tecum* may force the disclosure of privileged information, review is generally available only upon final judgment. *E.g., United States v. Ryan*, 402 U.S. 530, 532-33 (1971); *Cobbledick v. United States*, 309 U.S. 323, 324-28 (1940). The subpoenaed party may obtain immediate review if he refuses to comply with the subpoena and submits himself to contempt. *United States v. Ryan*, 402 U.S. 530, 532 (1971); *Cobblestick v. United States*, 309 U.S. 323, 327-28 (1940); *see Collateral Orders, supra*, at 751 n.21. The latter alternative, however, imposes severe hardship on the subpoenaed party. To avoid such hardship, the Court, in similar instances, has applied the finality requirement pragmatically. *See, e.g., Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170-71 (1974); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-54 (1964); *Dickinson v. Petroleum Conver. Corp.*, 338 U.S. 507, 511 (1950). This "inquiry requires some evaluation of the competing considerations underlying all questions of finality—the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974) (quoting *Dickinson v. Petroleum Conver. Corp.*, 338 U.S. 507, 511 (1950) (footnote omitted)).

33. 9 J. Moore, *supra* note 20, § 110.08, at 111-13. There are also a number of statutory means for obtaining appellate review prior to final judgment. The All Writs Act, 28 U.S.C. § 1651 (1976), provides for the review of interlocutory orders by way of a writ of mandamus. The Interlocutory Appeals Act, 28 U.S.C. § 1292(b) (1976), allows the appeal, upon certification by the district and appellate court, of interlocutory orders satisfying specified criteria. These two statutes offer little assistance when

This doctrine, which allows the immediate appeal of interlocutory orders that satisfy specified criteria,³⁴ was first enunciated in *Cohen v. Beneficial Industrial Loan Corp.*³⁵ In *Cohen*, the Third Circuit had permitted an immediate appeal from the district court's denial of a motion to require the plaintiff to furnish security pursuant to a state statute.³⁶ Upon review, the Supreme Court addressed the question of whether the circuit court had acted properly in accepting the appeal.³⁷ In finding the denial immediately appealable, the Court recognized that Congress had not intended to restrict review to those decisions that terminated an action.³⁸ Because there was no assurance that the defendant, if successful, could recover his costs,³⁹ the Court concluded that appellate review of the denial did not frustrate the final judgment rule.⁴⁰

immediate appeal of a denial of a motion to appoint counsel is sought. *See infra* notes 136-45 and accompanying text. The two other provisions, 28 U.S.C. § 1292(a) (1976), which allows appeals of a number of orders, most notably injunctions, *id.* § 1292(a)(1), and rule 54(b) of the Federal Rules of Civil Procedure, which permits appeals of final orders in multi-party or multi-claim litigation, are inapplicable. The two judicially carved exceptions to the final judgment rule stem from the landmark cases of *Forgay v. Conrad*, 47 U.S. 201, 6 How. 212 (1848), and *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). In *Forgay*, the Court allowed an immediate appeal, as of right, of an order directing the immediate transfer of title to property prior to an accounting. 47 U.S. at 202-04, 6 How. at 214-16. Chief Judge Taney reasoned that the substantive issues in the case had been finally determined and that irreparable injury could result if appeal was delayed until the final accounting. *Id.* at 204, 6 How. at 216. Although the *Forgay* rationale is relevant, an exception relating solely to transfer of title is, by definition, irrelevant to the appealability of an order refusing to appoint counsel.

34. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-47 (1949).

35. 337 U.S. 541 (1949). Although some courts have treated the collateral order doctrine as an interpretation of the final judgment rule, *e.g.*, *United States v. Gurney*, 558 F.2d 1202, 1207 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *Tomlinson v. Poller*, 220 F.2d 308, 310-11 (5th Cir. 1955), the better approach is to treat it as a judicially carved exception, *see Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981); *United States v. MacDonald*, 435 U.S. 850, 854 (1978), because "it serves to permit appeal of admittedly interlocutory orders." *Redish, supra* note 3, at 111 n.120.

36. *Beneficial Indus. Loan Corp. v. Smith*, 170 F.2d 44, 49-50 (3d Cir. 1948), *aff'd sub nom. Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). In so doing the Third Circuit applied a practical approach in assessing the finality of the decision.

37. 337 U.S. at 545-47.

38. *Id.* at 545.

39. *Collateral Orders, supra* note 32, at 750 n.18; *see Federal Courts, supra* note 20, at 364.

40. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-46 (1949); *accord Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). The Court noted that it was continuing a tradition of giving finality a "practical rather than a technical construction." 337 U.S. at 546; *accord Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 375 (1981). However, a practical approach, which exclusively emphasizes the effective termination of the litigation, would not always comport with the

Four prerequisites for appeal under the collateral order doctrine can be distilled from the *Cohen* opinion. First, the order must conclusively determine the disputed question.⁴¹ Permitting appeal of inconclusive orders would necessarily involve the appellate court in trial court matters in contravention of one of the purposes of the final judgment rule.⁴² Second, the right asserted in the order must be collateral to and separable from the merits of the underlying cause of action.⁴³ Immediate appeal of non-collateral orders could lead to repetitive and unnecessary reviews of the merits.⁴⁴

collateral order doctrine, *Appealability*, *supra* note 20, at 454 n.17; *see, e.g.*, *Stack v. Boyle*, 342 U.S. 1, 6-7 (1951) (denial of motion to reduce bail within collateral order doctrine); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-47 (1949) (same with respect to denial of motion requiring plaintiff to furnish security), because the exception is intended to avoid the "legal and practical" loss of an asserted right prior to termination. *United States v. MacDonald*, 435 U.S. 850, 860 (1978).

41. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); *accord* *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *United States v. MacDonald*, 435 U.S. 850, 854-55, 858 (1978); *Abney v. United States*, 431 U.S. 651, 658-59 (1977). For example, an order denying a motion to dismiss an indictment on speedy trial grounds would not constitute a final rejection of the claim by the trial court because it necessarily involves an assessment of the facts of the case after trial. *United States v. MacDonald*, 435 U.S. 850, 858 (1978).

42. 337 U.S. at 546; *see supra* notes 29-30 and accompanying text. This is the simplest criterion and courts have had little trouble applying it. 15 C. Wright & A. Miller, *supra* note 26, § 3911, at 478-79; *see, e.g.*, *Citibank, N.A. v. Fullam*, 580 F.2d 82, 89 (3d Cir. 1978); *Western Elec. Co. v. Milgo Elec. Corp.*, 568 F.2d 1203, 1207 (5th Cir.), *cert. denied*, 439 U.S. 895 (1978); *Rodgers v. United States Steel Corp.*, 541 F.2d 365 (3d Cir. 1976).

43. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); *accord* *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *United States v. MacDonald*, 435 U.S. 850, 855, 859 (1978). The *Cohen* Court's initial description of a collateral order as one that will not "affect, or . . . be affected by, [a] decision of the merits" of the case, 337 U.S. at 546, although helpful, is somewhat misleading. All orders may be affected by a decision on the merits because the decision may render the order moot. *Redish*, *supra* note 3, at 112; *Collateral Orders*, *supra* note 32, at 749. In its subsequent discussion, the Court clarified this ambiguity by stating that a collateral order is one which embodies an issue that "is not an ingredient of the cause of action and does not require consideration with it." 337 U.S. at 546-47. To illustrate, an order denying a motion to dismiss an indictment on double jeopardy grounds is collateral because it does not enmesh the court in the merits of the underlying criminal charge, and is totally independent of the defendant's guilt or innocence. *Abney v. United States*, 431 U.S. 651, 659-60 (1977). An order denying class certification pursuant to rule 23 of the Federal Rules of Civil Procedure, however, is not collateral because it requires the court to assess the "typicality of the representative's claims or defenses, the adequacy of the representative, and the presence of common questions of law or fact." 15 C. Wright & A. Miller, *supra* note 26, § 3911, at 485 n.45; *see* *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978).

44. 15 C. Wright & A. Miller, *supra* note 26, § 3911, at 470-71; *see Federal Courts*, *supra* note 20, at 352. Some commentators have suggested that the real function of the separability criterion is to arbitrarily limit the number of appealable

Third, appellate review after final judgment must be ineffective in that, by then, the asserted right may be irreparably lost.⁴⁵ In this respect, an essential distinction must be drawn between personal inconvenience and irreparable harm. When the denial results merely in prejudice that can be corrected by a new trial, only personal inconvenience is deemed to exist.⁴⁶ In such a case, the aggrieved litigant can proceed to final judgment, appeal and obtain reversal and a new trial.⁴⁷ Although costly and time-consuming, this procedure provides an adequate remedy.⁴⁸ If, however, review after final judgment is an "empty rite"⁴⁹ in that the appellate court is powerless to correct the effect of the order, immediate appeal is justified.⁵⁰

interlocutory orders. Redish, *supra* note 3, at 112 & n.123; *Collateral Orders*, *supra* note 32, at 757; *see Federal Courts*, *supra* note 20, at 365. Therefore, they argue for a more flexible balancing of the cost and inconvenience of piecemeal review against the danger of denying justice by delaying appeal until a final judgment. Redish, *supra* note 3, at 90-92; *Collateral Orders*, *supra* note 32, at 758-60; *Federal Courts*, *supra* note 20, at 367.

45. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); *accord* *United States v. MacDonald*, 435 U.S. 850, 855, 860 (1978); *Abney v. United States*, 431 U.S. 651, 658 (1977). The collateral order doctrine's underlying intent is to provide a means for avoiding such a loss. *Forsyth v. Kleindienst*, 599 F.2d 1203, 1208 (3d Cir. 1979), *cert. denied*, 101 S. Ct. 3147 (1981); *see Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976); *Federal Courts*, *supra* note 20, at 364.

46. *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377-78 (1981); *United States v. MacDonald*, 435 U.S. 850, 860 n.7 (1978); *Abney v. United States*, 431 U.S. 651, 663 (1977); *Collateral Orders*, *supra* note 32, at 750; *Appealability*, *supra* note 20, at 456-57.

47. *Parr v. United States*, 351 U.S. 513, 519-20 (1956); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 30 (1943); *Cobbledick v. United States*, 309 U.S. 323, 325 (1940); *see Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 378 (1981); *Abney v. United States*, 431 U.S. 651, 663 (1977); *Collateral Orders*, *supra* note 32, at 750; *Appealability*, *supra* note 20, at 456-57.

48. *See Parr v. United States*, 351 U.S. 513, 519-20 (1956); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 30 (1943); *Cobbledick v. United States*, 309 U.S. 323, 325 (1940); *Collateral Orders*, *supra* note 32, at 750; *Appealability*, *supra* note 20, at 456-57.

49. *Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684, 689 (1950); *accord* *Abney v. United States*, 431 U.S. 651, 660-62 (1977); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

50. *See Abney v. United States*, 431 U.S. 651, 660-62 (1977); *Stack v. Boyle*, 342 U.S. 1, 12 (1951) (Jackson, J., concurring); *Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684, 689 (1950). Although the *Cohen* court did not explicitly state that the basis for its decision was the need for immediate appeal to avoid irreparable harm, this urgency is the focus of the doctrine. *In re Continental Inv. Corp.*, 637 F.2d 1, 6-7 (1st Cir. 1980); *see Armstrong v. McAlpin*, 625 F.2d 433, 439 n.11 (2d Cir. 1980) (en banc), *vacated and remanded with instructions to dismiss appeal*, 449 U.S. 1106 (1981); *Forsyth v. Kleindienst*, 599 F.2d 1203, 1208 (3d Cir. 1979), *cert. denied*, 101 S. Ct. 3147 (1981).

Fourth, the order must present a "serious and unsettled question"⁵¹ that is "too important to be denied [immediate] review."⁵² This requirement has been interpreted to mean that the question must be one of law which goes to the district court's power to render the interlocutory order.⁵³ In the most recent applications of *Cohen*, the Supreme Court has abandoned the serious and unsettled question criterion.⁵⁴ Instead, it has applied the first three criteria,⁵⁵ emphasizing the personal importance of the order and the right it embodies.⁵⁶

This resultant three-pronged approach is preferable because a serious and unsettled question requirement severely restricts the applica-

51. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 547 (1949); *accord Appealability*, *supra* note 20, 455 & n.22.

52. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); *accord* 9 J. Moore, *supra* note 20, ¶ 110.10, at 133; 15 C. Wright & A. Miller, *supra* note 26, § 3911, at 471; *Appealability*, *supra* note 20, at 455 & n.22; *cf.* *Stack v. Boyle*, 342 U.S. 1, 13 (1951) (Jackson, J., concurring) (Supreme Court only grants certiorari if case represents a general and important problem). The issue presented must be one of public importance extending beyond the scope of the particular litigants. 9 J. Moore, *supra* note 20, ¶ 110.10, at 133; *Appealability*, *supra* note 20, at 455 n.22; *see* *Donlon Indus., Inc. v. Forte*, 402 F.2d 935, 937 (2d Cir. 1968).

53. *Donlon Indus., Inc. v. Forte*, 402 F.2d 935, 936 (2d Cir. 1968); 9 J. Moore, *supra* note 20, ¶ 110.10, at 133; 15 C. Wright & A. Miller, *supra* note 26, § 3911, at 471.

54. *See, e.g.*, *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 375 (1981); *United States v. MacDonald*, 435 U.S. 850, 855, 860 (1978); *Abney v. United States*, 431 U.S. 651, 663 (1977). The federal courts of appeals disagree on the vitality of the serious and unsettled question criterion. *Compare* *United States v. Greger*, 657 F.2d 1109, 1110 (9th Cir. 1981) (not required), *and* *Armstrong v. McAlpin*, 625 F.2d 433, 448 (2d Cir. 1980) (en banc) (Mulligan, J., concurring in part and dissenting in part) (same), *vacated and remanded with instructions to dismiss appeal*, 449 U.S. 1106 (1981), *with* *In re Continental Inv. Corp.*, 637 F.2d 1, 4-5 (1st Cir. 1980) (required), *and* *Armstrong v. McAlpin*, 625 F.2d 433, 439-40 (2d Cir. 1980) (en banc) (same), *vacated and remanded with instructions to dismiss appeal*, 449 U.S. 1106 (1981).

55. *See, e.g.*, *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 375-78 (1981); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468-69 (1978); *United States v. MacDonald*, 435 U.S. 850, 855-61 (1978); *Abney v. United States*, 431 U.S. 651, 658-63 (1977).

56. *See, e.g.*, *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981); *United States v. MacDonald*, 435 U.S. 850, 855, 860 (1977); *Abney v. United States*, 431 U.S. 651, 658 (1977); *cf.* *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (loss of freedom prior to trial threatened); *Roberts v. United States Dist. Court*, 339 U.S. 844 (1950) (possible loss of right of equal access to the courts); *Flowers v. Turbine Support Div.*, 507 F.2d 1242, 1244 (5th Cir. 1975) (same). Prior to these decisions, the Supreme Court had inconsistently applied the *Cohen* criteria. *Compare* *Roberts v. United States Dist. Court*, 339 U.S. 844, 845 (1950) (ignoring criteria), *with* *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 172 (1974) (applying first two prongs), *and* *Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684, 689 (1950) (applying second and third prongs).

bility of the collateral order doctrine.⁵⁷ For example, an order that is discretionary in nature usually hinges on an evaluation of the facts and policy considerations of each case and rarely presents a serious and unsettled question.⁵⁸ Although a requirement that limits the number of appeals is not totally undesirable,⁵⁹ the concern for judicial economy should assume a secondary role if an important right is threatened.⁶⁰ The collateral order doctrine is explicitly grounded on preventing the loss of important rights⁶¹ and should not be formulated in a way that would defeat this purpose.⁶²

57. 9 J. Moore, *supra* note 20, ¶ 110.10, at 136; 15 C. Wright & A. Miller, *supra* note 26, § 3911, at 471; *see* *Weight Watchers of Phil., Inc. v. Weight Watchers Int'l, Inc.*, 455 F.2d 770, 773 (2d Cir. 1972); *Appealability*, *supra* note 20, at 461.

58. *See Appealability*, *supra* note 20, at 455 n.22. Such an evaluation may also run afoul of the separability requirement. *See supra* notes 43-44 and accompanying text.

59. *See* *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 547 (1949) (applicability of state statute requiring security presents serious and unsettled question, whereas a dispute over the amount of security required does not). *But see* *Donlon Indus., Inc. v. Forte*, 402 F.2d 935, 937 (2d Cir. 1965) (ruling on motion to require security discretionary and not appealable).

60. *See* *Armstrong v. McAlpin*, 625 F.2d 433, 439 n.11 (2d Cir. 1980) (en banc), *vacated and remanded* with instructions to dismiss appeal, 449 U.S. 1106 (1981); 15 C. Wright & A. Miller, *supra* note 26, § 3911, at 500; Note, *Appealability of Orders Denying Attorney Disqualification Motions in* *Armstrong v. McAlpin*, 1981 Det. C.L. Rev. 151, 165. Moreover, one of the main purposes of the serious and unsettled question of law requirement was to "settle a point once and for all." *Weight Watchers of Phil., Inc. v. Weight Watchers Int'l, Inc.*, 455 F.2d 770, 773 (2d Cir. 1972). The Interlocutory Appeals Act, 28 U.S.C. § 1292(b) (1976), however, accomplishes this purpose, by providing for immediate appeal of controlling questions of law. *See In re Continental Inv. Corp.*, 637 F.2d 1, 7 (1st Cir. 1980). Therefore, there is no real need for this requirement today.

61. *In re Continental Inv. Corp.*, 637 F.2d 1, 6-7 (1st Cir. 1980); *see* *Armstrong v. McAlpin*, 625 F.2d 433, 439 n.11 (2d Cir. 1980) (en banc), *vacated and remanded with instructions to dismiss appeal*, 449 U.S. 1106 (1981); *Forsyth v. Kleindienst*, 599 F.2d 1203, 1208 (3d Cir. 1979), *cert. denied*, 101 S. Ct. 3147 (1981).

62. *See* *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976); *In re Continental Inv. Corp.*, 637 F.2d 1, 7 (1st Cir. 1980); *Forsyth v. Kleindienst*, 599 F.2d 1203, 1208 (3d Cir. 1979), *cert. denied*, 101 S. Ct. 3147 (1981). The Second Circuit, while requiring the presence of a serious and unsettled question, has acknowledged that immediate appeal from orders involving factual issues has been granted where the loss of an important right was threatened. *Armstrong v. McAlpin*, 625 F.2d 433, 439 n.11 (2d Cir. 1980) (en banc), *vacated and remanded with instructions to dismiss appeal*, 449 U.S. 1106 (1981); *accord In re Continental Inv. Corp.*, 637 F.2d 1, 7 (1st Cir. 1980); 9 J. Moore, *supra* note 20, ¶ 110.10, at 133-34. Where the loss of an important right is not threatened, however, the *Cohen* criteria are not satisfied regardless of the existence of a serious and unsettled question. *See* *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 375-78 (1981).

II. APPOINTMENT OF COUNSEL AND THE COLLATERAL ORDER DOCTRINE

Two strong federal policies conflict when a motion seeking the appointment of counsel is denied and immediate review is sought. The denial of immediate review serves the historical policy against piecemeal review,⁶³ while permitting the appeal furthers the court's desire to prevent the imposition of unnecessary hardship on the appellant.⁶⁴ In *Bradshaw v. Zoological Society*⁶⁵ and *Ray v. Robinson*,⁶⁶ the Ninth and Third Circuits, respectively, resolved this conflict in favor of immediate review,⁶⁷ recognizing that, as a practical matter, the litigation would be terminated upon the denial and that delayed review is inherently prejudicial.⁶⁸ In *Randle v. Victor Welding Supply Co.*⁶⁹ and *Cotner v. Mason*,⁷⁰ on the other hand, the Seventh and Tenth Circuits stressed the concern for judicial economy and, consequently, denied review.⁷¹

63. See *supra* notes 22-23 and accompanying text.

64. See *supra* notes 59-62 and accompanying text.

65. 662 F.2d 1301 (9th Cir. 1981).

66. 640 F.2d 474 (3d Cir. 1981).

67. *Bradshaw v. Zoological Soc'y*, 662 F.2d 1301, 1320 (9th Cir. 1981); *Ray v. Robinson*, 640 F.2d 474, 477 (3d Cir. 1981). Other courts have also allowed the appeal, but with little, if any, discussion. See, e.g., *Hudak v. Curators of the Univ. of Mo.*, 586 F.2d 105, 106 (8th Cir. 1978) (per curiam), *cert. denied*, 440 U.S. 985 (1979); *Caston v. Sears, Roebuck & Co.*, 556 F.2d 1305, 1308 (5th Cir. 1977); *Spanos v. Penn. Cent. Transp. Co.*, 470 F.2d 806, 807 n.3 (3d Cir. 1972) (per curiam); *Miller v. Pleasure*, 296 F.2d 283, 284 (2d Cir. 1961) (per curiam), *cert. denied*, 370 U.S. 964 (1962).

68. *Bradshaw v. Zoological Soc'y*, 662 F.2d 1301, 1310-14 (9th Cir. 1981); see *Ray v. Robinson*, 640 F.2d 474, 476-77 (3d Cir. 1981).

69. 664 F.2d 1064 (7th Cir. 1981) (per curiam).

70. 657 F.2d 1390 (10th Cir. 1981) (per curiam).

71. See *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064, 1065-67 (7th Cir. 1981) (per curiam); *Cotner v. Mason*, 657 F.2d 1390, 1391-92 (10th Cir. 1981) (per curiam). Both courts based their decisions on the assumption that an order refusing to appoint counsel "does not end the litigation on the merits." *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064, 1065 (7th Cir. 1981) (per curiam); *accord Cotner v. Mason*, 657 F.2d 1390, 1391 (10th Cir. 1981) (per curiam). Instead, they assumed that the *pro se* litigant is capable of presenting his claim and appealing any adverse final judgment. *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064, 1065 (7th Cir. 1981) (per curiam); *Cotner v. Mason*, 657 F.2d 1390, 1391 (10th Cir. 1981) (per curiam). Although the appointment of counsel is authorized under two different statutes, 28 U.S.C. § 1915(d) (1976) and 42 U.S.C. § 2000e-5(f)(1) (1976), the same appealability analysis is applicable because the same right to counsel and the corresponding right of equal access to the courts is protected by both statutes. See *supra* notes 7-8, 11 and accompanying text. Moreover, both statutes utilize basically the same test in determining whether appointment is warranted. See *infra* notes 81, 85.

A. Separability

A number of courts have had little difficulty finding the denial of a motion to appoint counsel separable from the merits of the underlying cause of action.⁷² The dissenting opinion in *Bradshaw*, however, contended that review of the denial would force the appellate court to become enmeshed in the factual and legal issues of the claim;⁷³ the order, therefore, was not collateral to the underlying claim.⁷⁴ This conclusion, however, is erroneous. As the majority in *Bradshaw* pointed out, there are instances in which the appellate court becomes minimally involved in the merits of the case, yet the order remains collateral within the meaning of the *Cohen* exception.⁷⁵

For example, in *Stack v. Boyle*,⁷⁶ the Court stated that an immediate appeal of an order refusing to reduce bail was proper.⁷⁷ Such orders require a court to consider the "nature and circumstances of the offense charged"⁷⁸ as well as "the weight of the evidence against the accused."⁷⁹ Despite this determination involving the merits, Justice

72. See, e.g., *Cotner v. Mason*, 657 F.2d 1390, 1391 (10th Cir. 1981) (per curiam); *Ray v. Robinson*, 640 F.2d 474, 476-77 (3d Cir. 1981); *Caston v. Sears, Roebuck & Co.*, 556 F.2d 1305, 1308 (5th Cir. 1977); *Spanos v. Penn. Cent. Transp. Co.*, 470 F.2d 806, 807 n.3 (3d Cir. 1972) (per curiam). There is little doubt that the denial of a motion to appoint counsel constitutes a final rejection of the right asserted. *Bradshaw v. Zoological Soc'y*, 662 F.2d 1301, 1306 (9th Cir. 1981); *Ray v. Robinson*, 640 F.2d 474, 476-77 (3d Cir. 1981); *Cotner v. Mason*, 657 F.2d 1390, 1391 (10th Cir. 1981) (per curiam).

73. See *Bradshaw v. Zoological Soc'y*, 662 F.2d 1301, 1321-22 (9th Cir. 1981) (Wallace, J., dissenting).

74. See *id.*

75. *Bradshaw v. Zoological Soc'y*, 662 F.2d 1301, 1307-10 (9th Cir. 1981). When a district court erroneously denies the motion on the grounds that it lacks the power to appoint counsel in a civil case, there is no separability problem because the denial is made without reference to the merits. See *Ray v. Robinson*, 640 F.2d 474, 476-77 (3d Cir. 1981); cf. *In re Nine Applications for Appointment of Counsel in Title VII Proceedings*, 475 F. Supp. 87, 88-92 (N.D. Ala. 1979) (denial on grounds that counsel appointed without pay constitutes involuntary servitude), *vacated and remanded sub nom.* *White v. United States Pipe & Foundry Co.*, 646 F.2d 203 (5th Cir. 1981).

76. 342 U.S. 1 (1951).

77. *Id.* at 6. In so doing, the court relied on *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). *Id.* at 12 (Jackson, J., concurring). Although review of bail orders is now covered by 18 U.S.C. § 3147 (1976), *Stack's* reasoning retains its vitality.

78. 18 U.S.C. § 3146(b) (1976).

79. *Id.* The statute also requires the court to consider such other relative factors as "the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings." *Id.*; see *Stack v. Boyle*, 342 U.S. 1, 8 (1951) (Jackson, J., concurring) (discussing similar language in former Fed. R. Crim. P. 46(c)).

Jackson, in a concurring opinion, had no difficulty finding that the order was "entirely independent of the issues to be tried."⁸⁰ A motion to appoint counsel is similarly independent because it involves only a preliminary procedural determination of whether the movant will proceed with or without counsel.⁸¹ Furthermore, under the circuit courts' interpretation of the Supreme Court's decision in *Roberts v. United States District Court*,⁸² the denial of a motion to proceed *in forma pauperis* has generally been deemed within the *Cohen* doctrine and, therefore, immediately appealable.⁸³ The appeal is allowed even though the appellate court often reviews the entire record to determine whether the movant's claim has merit. Only when the claim is not plainly frivolous will he be permitted to proceed *in forma pauperis*.⁸⁴ Motions to appoint counsel demand an identical determi-

80. *Stack v. Boyle*, 342 U.S. 1, 12 (1951) (Jackson, J., concurring). It should be noted that Justice Jackson was the author of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

81. *Bradshaw v. Zoological Soc'y*, 662 F.2d 1301, 1308 (9th Cir. 1981). The movant's claim must be meritorious both in fact and law, *Smith v. Fleming Co.*, 3 Fair Empl. Prac. Cas. (BNA) 568, 569 (W.D. Mo. 1969) (Title VII); see *Peterson v. Nadler*, 452 F.2d 754, 757-58 (8th Cir. 1971) (per curiam) (§ 1915(d)), and not plainly frivolous. *Maclin v. Freake*, 650 F.2d 885, 887 (7th Cir. 1981) (per curiam) (§ 1915(d)); *Robinson v. Western Elec.*, 3 Fair Empl. Prac. Cas. (BNA) 846, 847 (7th Cir. 1971) (Title VII). This determination is limited to a cursory examination of the record and is not dispositive of the litigation; the issue is whether a colorable claim exists and not whether it will be successful. *Bradshaw v. Zoological Soc'y*, 662 F.2d 1301, 1308-09 (9th Cir. 1981) (Title VII); see *Knighton v. Watkins*, 616 F.2d 795, 799 (5th Cir. 1980) (§ 1915(d)); *Peterson v. Nadler*, 452 F.2d 754, 757-58 (8th Cir. 1971) (per curiam) (§ 1915(d)). Moreover, the court must keep in mind that *pro se* complaints, unlike those of counsel, are "typically inartful," *Knighton v. Watkins*, 616 F.2d 795, 799 (5th Cir. 1980), and, therefore, should be liberally construed. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (per curiam).

82. 339 U.S. 844 (1950) (per curiam).

83. *E.g.*, *Sinwell v. Shapp*, 536 F.2d 15, 16 (3d Cir. 1976); *Flowers v. Turbine Support Div.*, 507 F.2d 1242, 1244 (5th Cir. 1975); *Kitchens v. Alderman*, 376 F.2d 262, 263 (5th Cir. 1967) (per curiam); *Smart v. Heinze*, 347 F.2d 114, 116 (9th Cir.), *cert. denied*, 382 U.S. 896 (1965); *Anderson v. Heinze*, 258 F.2d 479, 480 n.1 (9th Cir.), *cert. denied*, 358 U.S. 889 (1958). *But see, e.g.*, *Lamarche v. Sunbeam Television Corp.*, 446 F.2d 880, 880 (5th Cir. 1971) (per curiam); *Gomez v. United States*, 245 F.2d 346, 347 (5th Cir. 1957); *Higgins v. Steele*, 195 F.2d 366, 368 (8th Cir. 1952). The precise holding of *Roberts v. United States Dist. Court*, 339 U.S. 844 (1940), is unclear. *Roberts*, a prisoner, sought to proceed as a pauper but the district court denied the motion on the grounds that he was not a "citizen" for the purposes of § 1915. *Id.* The Court could have limited its holding to such circumstances but, instead, broadly stated that "[t]he denial . . . of a motion to proceed *in forma pauperis* is an appealable order." *Id.* at 845; see 15 C. Wright & A. Miller, *supra* note 26, § 3911, at 472-73 & n.16.

84. *Bradshaw v. Zoological Soc'y*, 662 F.2d 1301, 1308-09 & n.18 (9th Cir. 1981); see 28 U.S.C. § 1915(d) (1976). Section 1915, due to its structure, requires an initial showing of indigency to be granted pauper status. *Id.* § 1915(a). After pauper status has been granted, if it appears that the claim is frivolous, or the affidavits showing poverty are untrue, the court should dismiss the claim. *Id.* § 1915(d). Most

nation.⁸⁵ Because this determination does not interfere with the trial court's consideration of the merits,⁸⁶ the majority in *Bradshaw* was correct in concluding that the denial satisfied the separability requirement.⁸⁷

B. Effective Review After Final Judgment

The real source of disagreement among the circuits is whether the denial satisfies the third prong of the collateral order doctrine: the availability of effective appellate review after final judgment. The Seventh and Tenth Circuits have categorized the effect of an errone-

courts follow this procedure. *E.g.*, *Sinwell v. Shapp*, 536 F.2d 15, 18-19 (3d Cir. 1976); *Watson v. Ault*, 525 F.2d 886, 890-91 (5th Cir. 1976); *West v. Procnunier*, 452 F.2d 645, 646 n.2 (9th Cir. 1971) (per curiam); *Forester v. California Adult Auth.*, 510 F.2d 58, 60 (8th Cir. 1975). Other courts, however, simultaneously consider the movant's indigency and the frivolousness of his claim when ruling on the motion. *See, e.g.*, *Wartman v. Branch 7*, 510 F.2d 130, 132-34, (7th Cir. 1975); *Smart v. Heinze*, 347 F.2d 114, 116 (9th Cir.), *cert. denied*, 382 U.S. 896 (1965); *Loum v. Underwood*, 262 F.2d 866, 867 (6th Cir. 1959) (per curiam). "Perhaps the best way to characterize [both procedures'] requirement relating to meritoriousness . . . is to say that the petition must be non-frivolous," *Bradshaw v. Zoological Soc'y*, 662 F.2d 1301, 1308 n.18 (9th Cir. 1981), and should not be converted into a "preliminary showing of any particular degree of merit." *Ellis v. United States*, 356 U.S. 674, 675 (per curiam) (1958).

85. *Bradshaw v. Zoological Soc'y*, 662 F.2d 1301, 1308-09 & n.18 (9th Cir. 1981). Title VII and § 1915(d) provide a means for indigents to obtain counsel. The district court is not required to appoint counsel, but is only authorized to do so if, in the exercise of its discretion, it deems it just. *Id.* at 1318 & n.43 (Title VII); *Ray v. Robinson*, 640 F.2d 474, 477-78 (3d Cir. 1981) (§ 1915(d)). Certain predominant factors and principles have developed under each statute. The factors considered by a court in a motion to appoint counsel pursuant to Title VII were first enumerated in *Caston v. Sears, Roebuck & Co.*, 556 F.2d 1305 (5th Cir. 1977), and are the movant's financial resources, his efforts to secure counsel and the merits of his claim. *Id.* at 1308-10; *accord White v. United States Pipe & Foundry Co.*, 646 F.2d 203, 205 (5th Cir. 1981); *Luna v. International Ass'n of Machinists Local 36*, 614 F.2d 529, 531 (5th Cir. 1980); *Beckett v. Kent County*, 488 F. Supp. 70, 73 (W.D. Mich. 1980). In addition, some courts consider the public benefit to be derived from the suit. *E.g.*, *Edmonds v. E.I. duPont deNemours & Co.*, 315 F. Supp. 523, 525 (D. Kan. 1970); *Petete v. Consolidated Freightways*, 313 F. Supp. 1271, 1272 (N.D. Tex. 1970) (mem.). While no court has established specific guidelines in § 1915(d) cases, the factors distilled from the case law are similar to those required in Title VII actions. *E.g.*, *Maclin v. Freake*, 650 F.2d 885, 887-89 (7th Cir. 1981) (per curiam); *Shields v. Jackson*, 570 F.2d 284, 286 (8th Cir. 1978) (per curiam); *Peterson v. Nadler*, 452 F.2d 754, 757-58 (8th Cir. 1971) (per curiam). Some courts also consider the possible benefits accruing to the litigant, the court and the judicial system from the appointment of counsel. *See, e.g.*, *Kennedy v. Meacham*, 540 F.2d 1057, 1062 (10th Cir. 1976); *Alexander v. Ramsey*, 539 F.2d 25, 26 (9th Cir. 1976) (per curiam); *Peterson v. Nadler*, 452 F.2d 754, 757-58 (8th Cir. 1971) (per curiam).

86. *Bradshaw v. Zoological Soc'y*, 662 F.2d 1301, 1308-09 (9th Cir. 1981).

87. *See id.* at 1310.

ous denial of a motion to appoint counsel as mere inconvenience.⁸⁸ The Third and Ninth Circuits, on the other hand, have recently held to the contrary⁸⁹ and require only the unavailability of meaningful review in order to justify immediate appeal.⁹⁰ At the core of this dispute is the failure of the Seventh and Tenth Circuits to correctly interpret this element of the collateral order doctrine and its relationship to the recent Supreme Court decision in *Firestone Tire & Rubber Co. v. Risjord*.⁹¹ These circuits interpret *Firestone* as allowing immediate appeal only when any other review is *impossible*.⁹²

Neither finality nor the collateral order doctrine are fixed, invariable formulas requiring rote application.⁹³ The effectiveness of appellate review after final judgment should not be determined in a vacuum but, rather, should depend upon the type of case,⁹⁴ the availability of alternative methods of review,⁹⁵ and the nature and underlying policies of the particular motion.⁹⁶

88. See *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064, 1066-67 (7th Cir. 1981) (per curiam); *Cotner v. Mason*, 657 F.2d 1390, 1391-92 (10th Cir. 1981) (per curiam).

89. *Bradshaw v. Zoological Soc'y*, 662 F.2d 1301, 1320 (9th Cir. 1981); *Ray v. Robinson*, 640 F.2d 474, 476-77 (3d Cir. 1981).

90. See *Bradshaw v. Zoological Soc'y*, 662 F.2d 1301, 1310-12, 1314 (9th Cir. 1981); *Ray v. Robinson*, 640 F.2d 474, 477 (3d Cir. 1981).

91. 449 U.S. 368 (1981).

92. *Cotner v. Mason*, 657 F.2d 1390, 1392 (10th Cir. 1981) (per curiam). Although the Seventh Circuit did not explicitly rely on this interpretation, it is clear that it requires a strong showing of harm in order to justify immediate appeal. See *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064, 1066-67 (7th Cir. 1981) (per curiam).

93. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 471 (1978); *Abney v. United States*, 431 U.S. 651, 657, 663 (1977); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170-71 (1974); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964); *Dickinson v. Petroleum Conver. Corp.*, 338 U.S. 507, 511 (1950); *Bradshaw v. Zoological Soc'y*, 662 F.2d 1301, 1314 n.35 (9th Cir. 1981); *United States v. Greger*, 657 F.2d 1109, 1112 (9th Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3607 (U.S. Jan. 19, 1982) (No. 81-1357).

94. Compare *Abney v. United States*, 431 U.S. 651, 662 (1977) (double jeopardy claim must be reviewable prior to trial or right is destroyed), with *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377-78 (1981) (denial of motion to disqualify counsel can be effectively reviewed after final judgment).

95. Compare *United States v. Ryan*, 402 U.S. 530, 533 (1971) (traditional contempt alternative available; exception to finality only where any review impossible), and *Bradshaw v. Zoological Soc'y*, 662 F.2d 1301, 1324-25 (9th Cir. 1981) (Wallace, J., dissenting) (majority ignores availability of mandamus and instead relaxes requirement of effective unreviewability to "possibility of some prejudice"), with *United States v. Nixon*, 418 U.S. 683, 691-92 (1974) (immediate appeal allowed where traditional contempt alternative unavailable due to unique circumstances), and *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064, 1068 (7th Cir. 1981) (Swygert, J., dissenting) (no alternatives available, unlike other cases where "the Supreme Court has denied immediate review of collateral orders").

96. Compare *United States v. MacDonald*, 435 U.S. 850, 861-62 (1978) (right to a speedy trial frustrated if immediate review allowed), with *Abney v. United States*,

1. A Distinction between Civil and Criminal Proceedings

In criminal cases, interlocutory review is particularly disfavored because delay could violate the sixth amendment guarantee of a speedy trial.⁹⁷ Therefore, the harm that would result from delaying review until final judgment should be one which destroys the legal and practical value of the right asserted.⁹⁸ This requires a strong showing of harm. The mere act of proceeding to trial must eviscerate the right and the policies it embodies.⁹⁹

Harm of this magnitude was present in *Stack v. Boyle*,¹⁰⁰ in which denial of a motion to reduce bail threatened not only the right to be free from confinement prior to conviction, but also the presumption of innocence.¹⁰¹ Similarly, immediate appeal from the denial of a motion to dismiss an indictment on double jeopardy grounds was allowed in *Abney v. United States*¹⁰² because review was necessary to protect against twice being tried for the same crime.¹⁰³ The Supreme Court, in *United States v. MacDonald*,¹⁰⁴ however, denied immediate review of an order refusing to dismiss an indictment on speedy trial grounds alone because the degree of harm could be assessed only after trial.¹⁰⁵ Moreover, permitting interlocutory review in such an instance would frustrate the very right at issue—the right to a speedy trial.¹⁰⁶

In civil cases, however, finality is not subject to such a constitutional mandate and, therefore, should be adhered to less stringently.¹⁰⁷ Although mere inconvenience remains insufficient to war-

431 U.S. 651, 660-63 (1977) ("special considerations permeating claims of [double jeopardy] justify a departure from the normal rule of finality").

97. *United States v. MacDonald*, 435 U.S. 850, 853-54, 861-62 (1978); *Will v. United States*, 389 U.S. 90, 96 (1967); *DiBella v. United States*, 369 U.S. 121, 126-27 (1962); see *Abney v. United States*, 431 U.S. 651, 657 (1977); *United States v. Ryan*, 402 U.S. 530, 532-33 (1971).

98. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 376-77 (1981); *United States v. MacDonald*, 435 U.S. 850, 860-61 (1978); *Abney v. United States*, 431 U.S. 651, 660-62 (1977); *Stack v. Boyle*, 342 U.S. 1, 4 (1951); cf. *Will v. United States*, 389 U.S. 90, 97-98 (1967) (same rule applies to mandamus).

99. *United States v. MacDonald*, 435 U.S. 850, 860-61 (1978); *Abney v. United States*, 431 U.S. 651, 660-62 (1977); see *Stack v. Boyle*, 342 U.S. 1, 4 (1951); cf. *Helstoski v. Meanor*, 442 U.S. 500, 507-08 (1979) (challenge to validity of indictment of a representative on the grounds that it violated the speech and debate clause).

100. 342 U.S. 1 (1951).

101. *Id.* at 4.

102. 431 U.S. 651 (1977).

103. *Id.* at 660-62.

104. 435 U.S. 850 (1978).

105. *Id.* at 860-61.

106. See *id.* at 861-63.

107. See *DiBella v. United States*, 369 U.S. 121, 126 (1962); *United States v. Greger*, 657 F.2d 1109, 1112 (9th Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3607 (U.S. Jan. 19, 1982) (No. 81-1357); 9 J. Moore, *supra* note 20, ¶ 110.07, at 109-11.

rant immediate appeal, the harm required need not approach the level necessary in the criminal context.¹⁰⁸ When proceeding to trial will not completely destroy the right asserted but will, nonetheless, render meaningful review improbable, interlocutory review should be granted.¹⁰⁹

If, in *Cohen v. Beneficial Industrial Loan Corp.*,¹¹⁰ the Supreme Court had denied immediate review and the defendant corporation had eventually prevailed on the merits, the defendant would have been forced to appeal and then seek a personal judgment against a potentially insolvent plaintiff.¹¹¹ Similarly, in *Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A.*,¹¹² the possibility that the ship would later be outside the United States' jurisdiction justified immediate appeal of an order vacating the attachment of a foreign vessel.¹¹³ In *Eisen v. Carlisle & Jacquelin*,¹¹⁴ the Court extended the collateral order doctrine to an order imposing ninety percent of the costs of notifying absent class members on the defendant.¹¹⁵ In the absence of immediate review, the defendant would have been forced to bear the costs of notice and after reversal of the order seek restitution with no assurance of success.¹¹⁶ Finally, circuit courts have permitted immediate appeal from the denial of a motion to proceed *in forma pauperis*¹¹⁷ because the order will effectively terminate the litigation if the movant is unable to secure court costs from another source.¹¹⁸

108. Compare *Abney v. United States*, 431 U.S. 651, 660-62 (1977) (mere proceeding to trial will destroy right asserted in criminal case), with *Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684, 689 (1950) (appeal after final judgment may be an "empty rite" in civil litigation). The Supreme Court has not, however, abandoned the distinction between irreparable harm and inconvenience. In *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), the Court declined to extend the collateral order doctrine to an order refusing to certify a class action because the representatives were free to pursue their respective claims individually and appeal the denial after the final judgment. See *id.* at 469.

109. See *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377-78 (1981); *Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684, 689 (1950); *Ray v. Robinson*, 640 F.2d 474, 477 (3d Cir. 1981).

110. 337 U.S. 541 (1949).

111. *Collateral Orders*, *supra* note 32, at 750 n.18; see *Federal Courts*, *supra* note 20, at 364.

112. 339 U.S. 684 (1950).

113. *Id.* at 689; see *Collateral Orders*, *supra* note 32, at 750.

114. 417 U.S. 156 (1974).

115. *Id.* at 169-72.

116. 15 C. Wright & A. Miller, *supra* note 26, § 3911, at 476. Although the Supreme Court did not address this issue, it is clear that the defendants would not have been able to recover the costs after final judgment if the plaintiffs were insolvent. See *id.*

117. See *supra* note 83 and accompanying text.

118. See *Bradshaw v. Zoological Soc'y*, 662 F.2d 1301, 1308 n.17 (9th Cir. 1981); *Flowers v. Turbine Support Div.*, 507 F.2d 1242, 1244 (5th Cir. 1975); 9 J. Moore, *supra* note 20, ¶ 110.10, at 133-34.

These cases demonstrate that although injury in civil cases may be less certain than in criminal cases, it is nevertheless sufficiently probable that review after final judgment would be meaningless.¹¹⁹ Indeed, the *Firestone* Court found immediate appeal from an order that denied a motion to disqualify counsel unwarranted because the opportunity for "meaningful review" had not been lost.¹²⁰ The courts in *Ray* and *Bradshaw* were correct in concluding that because the denial of a motion to appoint counsel cannot be effectively reviewed after final judgment, the order should be immediately appealable.¹²¹ Proceeding without counsel is "inherently prejudicial"¹²² and, for all practical purposes, terminates the litigation.¹²³ This harm is more than sufficient to invoke the collateral order doctrine in a civil case.

In *Cotner v. Mason*,¹²⁴ the Tenth Circuit grounded its refusal to permit an immediate appeal from an order denying the appointment of counsel on *Firestone's* "impossibil[ity of] any review" language.¹²⁵ This reliance was, however, misplaced. The discussion in *Firestone* dealt with interlocutory review in the criminal context.¹²⁶ The quoted language was taken from *United States v. Ryan*,¹²⁷ which involved the appealability of the denial of a motion to quash a subpoena *duces tecum* in a tax evasion prosecution.¹²⁸

Although *Firestone* was a civil case,¹²⁹ its reliance on *Ryan* was not entirely inappropriate. Both cases involved the same type of harm: the disclosure of privileged material.¹³⁰ In *Ryan*, such harm would have resulted from the denial of a motion to quash the subpoena,¹³¹ while

119. See *Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684, 689 (1950); *Collateral Orders*, *supra* note 32, at 750 & n.18.

120. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377-78 (1981).

121. *Bradshaw v. Zoological Soc'y*, 662 F.2d 1301, 1314 (9th Cir. 1981); see *Ray v. Robinson*, 640 F.2d 474, 477 (3d Cir. 1981).

122. *Bradshaw v. Zoological Soc'y*, 662 F.2d 1301, 1312 (9th Cir. 1981); cf. *Ray v. Robinson*, 640 F.2d 474, 477 (3d Cir. 1981) (appointment of counsel must occur before trial to be of any practical value).

123. See *Bradshaw v. Zoological Soc'y*, 662 F.2d 1301, 1310-14 (9th Cir. 1981).

124. 657 F.2d 1390 (10th Cir. 1981) (per curiam).

125. *Id.* at 1392 (emphasis deleted) (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 376 (1981)).

126. 449 U.S. at 376-77.

127. 402 U.S. 530, 533 (1971).

128. *In re Ryan*, 430 F.2d 658, 659 (9th Cir. 1970) (per curiam), *rev'd sub nom.* *United States v. Ryan*, 402 U.S. 530 (1971).

129. 449 U.S. at 369.

130. See *id.* at 376, 378; *United States v. Ryan*, 402 U.S. 530, 532 n.3 (1971); *Armstrong v. McAlpin*, 625 F.2d 433, 438 (2d Cir. 1980) (en banc), *vacated and remanded with instructions to dismiss appeal*, 449 U.S. 1106 (1981); *Appealability*, *supra* note 20, at 456-58 & n.35.

131. 402 U.S. at 530-33; *accord Appealability*, *supra* note 20, at 457-58.

in *Firestone* it would have followed from the denial of a motion to disqualify counsel on conflict of interest grounds.¹³²

The harm that will result from the lack of immediate review of a denial of a motion to appoint counsel is however, different in kind and far more severe than the harm that flows from the non-appealability of an order refusing to disqualify counsel. In the former, because the *pro se* litigant is effectively incapable of pursuing his claim, or avoiding prejudicial error, the litigation is, for all practical purposes, terminated.¹³³ The latter, however, results at most in a tainted proceeding.¹³⁴ Cotner's suggestion that *Firestone* established a more stringent and universal standard¹³⁵ is, therefore, unjustified.

2. Availability of Alternative Methods of Review

The Seventh and Tenth Circuits' reliance on *Firestone*, and their consequent implicit dependence on *Ryan*, is also misplaced because in those cases alternate methods of review were available. In *Ryan*, immediate review of the subpoena *duces tecum* was available if the subpoenaed party submitted himself to contempt and appealed the contempt decree.¹³⁶ Similarly, the *Firestone* Court explicitly noted that a number of alternatives, including a protective order, were available to the movant.¹³⁷ The possibility of adequate alternatives heightened each court's reluctance to permit interlocutory review.¹³⁸

132. 449 U.S. at 370-71 & n.6, 376; accord *Appealability*, *supra* note 20, at 456-57. The only harm that could possibly accrue from the erroneous denial is the disclosure of confidential information by counsel in a position of confidence. *Id.* But see *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 492 (7th Cir. 1970) (per curiam), *aff'd mem. by an equally divided Court*, 400 U.S. 348 (1971).

133. See *Bradshaw v. Zoological Soc'y*, 662 F.2d 1301, 1310-12 (9th Cir. 1981); *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064, 1068 (7th Cir. 1981) (Swygert, J., dissenting); *Caston v. Sears, Roebuck & Co.*, 556 F.2d 1305, 1308-09 (5th Cir. 1977).

134. See *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 376, 378 (1981); *Armstrong v. McAlpin*, 625 F.2d 433, 438 (2d Cir. 1980) (en banc), *vacated and remanded with instructions to dismiss appeal*, 449 U.S. 1106 (1981); *Appealability*, *supra* note 20, at 456-58 & n.35. But see *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 492 (7th Cir. 1970) (per curiam), *aff'd mem. by an equally divided Court*, 400 U.S. 348 (1971).

135. See *Cotner v. Mason*, 657 F.2d 1390, 1392 (10th Cir. 1981) (per curiam); accord *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064, 1066 (7th Cir. 1981) (per curiam).

136. *United States v. Ryan*, 402 U.S. 530, 532 (1971); accord *Cobbledick v. United States*, 309 U.S. 323, 328 (1940); *Alexander v. United States*, 201 U.S. 117, 121 (1906); *Collateral Orders*, *supra* note 32, at 751 n.21.

137. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 378 n.13 (1981).

138. See 449 U.S. at 378 n.13; accord *United States v. Ryan*, 402 U.S. 530, 532-34 (1971).

In *Bradshaw*, the dissent suggested that the writ of mandamus could serve as an adequate alternate remedy.¹³⁹ Issuance of mandamus, however, is discretionary¹⁴⁰ and limited to "exceptional circumstances amounting to a judicial 'usurpation of power'"¹⁴¹ by the district court.¹⁴² This rigid and narrow standard¹⁴³ for invoking mandamus will rarely aid the *pro se* litigant. An order refusing to appoint counsel generally does not involve a judicial usurpation of power.¹⁴⁴ Moreover, the importance of the right asserted and the consequence of delaying review necessitate mandatory rather than discretionary methods of review.¹⁴⁵ The refusal to immediately review a denial of a motion to appoint counsel, unlike the situations which existed in *Firestone* and *Ryan*, leaves an indigent with no viable alternative.

139. *Bradshaw v. Zoological Soc'y*, 662 F.2d 1301, 1324 (9th Cir. 1981) (Wallace, J., dissenting). In its search for effective alternatives to immediate review under the collateral order doctrine, a court might consider the Interlocutory Appeals Act. 28 U.S.C. § 1292(b) (1976). This, however, is not a viable option. In order to invoke the Act, the district court must certify that the order satisfies specified standards. *See id.* This certification requirement has provided district courts with a means of limiting reversals of their orders and has thereby reduced the Act's effectiveness. Redish, *supra* note 3, at 108-09. In addition, the appellate courts are given unfettered discretion to reject a certified application for appeal without providing any reasons. S. Rep. No. 2434, 85th Cong., 2d Sess. 3, reprinted in 1958 U.S. Code Cong. & Ad. News 5255, 5257. Moreover, it is highly unlikely that a denial of a motion to appoint counsel will be a controlling question of law as required by the Act. *See* 28 U.S.C. § 1292(b) (1976). Rather, the denial involves a question of judgment, *see supra* notes 76-81, 85 and accompanying text; the Act cannot be invoked merely "to test the propriety of a district judge's exercise of discretion." *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 765 (3d Cir.) (Seitz, C.J., dissenting), *cert. denied*, 419 U.S. 885 (1974); *accord Garner v. Wolfenbarger*, 433 F.2d 117, 120 (5th Cir. 1970); *United States v. Salter*, 421 F.2d 1393, 1394 (1st Cir. 1970).

140. *Kerr v. United States Dist. Court*, 426 U.S. 394, 403 (1976); *see* 28 U.S.C. § 1651(a) (1976); 9 J. Moore, *supra* note 20, ¶ 110.26, at 283-84; Redish, *supra* note 3, at 114-15; *Appealability*, *supra* note 20, at 472-73.

141. *Will v. United States*, 389 U.S. 90, 95 (1967) (quoting *DeBeers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945)); *accord Kerr v. United States Dist. Court*, 426 U.S. 394, 402 (1976).

142. *Will v. United States*, 389 U.S. 90, 95 (1967); *accord* 9 J. Moore, *supra* note 20, ¶ 110.01, at 50-51; Redish, *supra* note 3, at 115.

143. *See Helstoski v. Meanor*, 442 U.S. 500, 505-06 (1979); *Kerr v. United States Dist. Court*, 426 U.S. 394, 402-03 (1976).

144. *Compare La Buy v. Howes Leather Co.*, 352 U.S. 249, 255-60 (1957) (writ issued because of persistent disregard for the Federal Rules of Civil Procedure), *and United States v. United States Dist. Court*, 334 U.S. 258, 262-65 (1948) (writ necessary to confine district court to terms of appellate court's mandate), *with Kerr v. United States Dist. Court*, 426 U.S. 394, 395-96, 404-06 (1976) (refusal of appellate court to issue writ compelling district court to vacate two discovery orders held proper), *and Will v. United States*, 389 U.S. 90, 91, 107 (1967) (writ to compel district court to vacate a portion of pre-trial order in a criminal case held improperly issued).

145. *See Bradshaw v. Zoological Soc'y*, 662 F.2d 1301, 1316-17 (9th Cir. 1981).

3. Nature of the Order

An additional reason for enforcing the ban on interlocutory appeals is the potential for abuse and harassment that some motions and their immediate review afford.¹⁴⁶ Not only is a motion to disqualify counsel often used improperly¹⁴⁷ but it is also an especially obstructive litigation device because it can separate a party from his chosen counsel.¹⁴⁸ Thus, the opportunity for immediate review of the motion's denial would merely compound the likelihood of abuse and needless delay.¹⁴⁹ Although the *Firestone* Court did not explicitly rely on the potential for misuse of a disqualification motion in denying review, circuit courts have done so.¹⁵⁰

In contrast, a motion to appoint counsel has little potential as a device for harassment and delay.¹⁵¹ Rather, the presence of counsel, by placing the indigent on equal footing with his adversary,¹⁵² will facilitate the speedy resolution of the litigation.¹⁵³ Section 1915(d) and, to a greater extent, Title VII are designed to reduce the inequities present when an indigent seeks to redress a violation of his rights.¹⁵⁴ As a practical matter, however, this intent is thwarted when a motion

146. *E.g.*, *In re Continental Inv. Corp.*, 637 F.2d 1, 6 (1st Cir. 1980); *Armstrong v. McAlpin*, 625 F.2d 433, 437-38 (2d Cir. 1980) (en banc), *vacated and remanded with instructions to dismiss appeal*, 449 U.S. 1106 (1981); *Appealability*, *supra* note 20, at 450.

147. *See, e.g.*, *In re Continental Inv. Corp.*, 637 F.2d 1, 6 (1st Cir. 1980); *Armstrong v. McAlpin*, 625 F.2d 433, 437-38 (2d Cir. 1980) (en banc), *vacated and remanded with instructions to dismiss appeal*, 449 U.S. 1106 (1981); *see also Appealability*, *supra* note 20, at 450-51 (potential for abuse with such motions).

148. *Appealability*, *supra* note 20, at 450.

149. *See sources cited supra* note 147.

150. *See, e.g.*, *In re Continental Inv. Corp.*, 637 F.2d 1, 6 (1st Cir. 1980); *Armstrong v. McAlpin*, 625 F.2d 433, 437-38 (2d Cir. 1980) (en banc), *vacated and remanded with instructions to dismiss appeal*, 449 U.S. 1106 (1981); *Melamed v. ITT Continental Baking Co.*, 592 F.2d 290, 295 (6th Cir. 1979). Although the Supreme Court permitted the immediate appeal of the denial of a motion to dismiss an indictment on double jeopardy grounds in *Abney v. United States*, 431 U.S. 651, 662 (1977), it recognized the possibility of dilatory appeals. *Id.* at 662 n.8. The Court, however, did not deem this possibility sufficient grounds to deny the appeal. *See id.* The Court probably reached this conclusion because proceeding to trial after an erroneous denial would totally destroy the right asserted. *See id.* at 660-62.

151. *Bradshaw v. Zoological Soc'y*, 662 F.2d 1301, 1315 (9th Cir. 1981).

152. *See supra* notes 11-16 and accompanying text.

153. *Bradshaw v. Zoological Soc'y*, 662 F.2d 1301, 1315-16 (9th Cir. 1981); *Knighton v. Watkins*, 616 F.2d 795, 799 (5th Cir. 1980); *see Gordon v. Leeke*, 574 F.2d 1147, 1154-55 (4th Cir.) (Hall, J., dissenting), *cert. denied*, 439 U.S. 970 (1978).

154. *Bradshaw v. Zoological Soc'y*, 662 F.2d 1301, 1316-17 & n.40 (9th Cir. 1981) (Title VII); *Hilliard v. Volcker*, 659 F.2d 1125, 1128 & n.24 (D.C. Cir. 1981) (Title VII); H.R. Rep. No. 238, 92d Cong., 1st Sess. 12, *reprinted in* 1972 U.S. Code Cong. & Ad. News 2137, 2148 (Title VII); H.R. Rep. No. 1079, 52d Cong., 1st Sess. 1-2 (1892) (predecessor of § 1915); *Duniway*, *supra* note 11, at 1271-72, 1276-77 (§ 1915 and its predecessor).

to appoint counsel is erroneously denied and immediate and certain review is unavailable.¹⁵⁵ Even if this motion and its subsequent appeal might be taken for improper and dilatory purposes, the consequences of an erroneous denial are more than sufficient to justify immediate review.¹⁵⁶

Analogous judicial precedent buttresses this conclusion. An order denying pauper status is immediately appealable¹⁵⁷ because it deprives the movant of his right of access to the courts.¹⁵⁸ This is equally true when the erroneous denial of a motion to appoint counsel is deemed non-appealable. In the first case, denial of immediate review results in an actual bar,¹⁵⁹ while in the second, a de facto barrier is created.¹⁶⁰ As the *Bradshaw* court noted,

[b]ecause the likelihood that an [indigent] will be unable to proceed through trial and obtain effective review of the order is so high, and the prejudice inherent in proceeding to trial without counsel is so great, we do not view the injury that would inevitably result from a refusal to review the order before us as speculative or hypothetical.¹⁶¹

The court therefore concluded that "it is not difficult to imagine—indeed, it is impossible to ignore—the irreparable injury that would result from a refusal to review [immediately] an order denying [an indigent] appointed counsel."¹⁶²

155. See *Bradshaw v. Zoological Soc'y*, 662 F.2d 1301, 1310-14 (9th Cir. 1981); *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064, 1068 (7th Cir. 1981) (Swygert, J., dissenting); *Ray v. Robinson*, 640 F.2d 474, 477 (3d Cir. 1981); *Caston v. Sears, Roebuck & Co.*, 556 F.2d 1305, 1308-09 (5th Cir. 1977); *Miller v. Pleasure*, 296 F.2d 283, 284 (2d Cir. 1961) (per curiam), cert. denied, 370 U.S. 964 (1962).

156. *Bradshaw v. Zoological Soc'y*, 662 F.2d 1301, 1315-18 (9th Cir. 1981); see *supra* notes 13-16, 122-23, 133 and accompanying text. The motion requires the speediest resolution possible if the relief sought is to be of any value. See *Ray v. Robinson*, 640 F.2d 474, 477 (3d Cir. 1981). Title VII's legislative history is replete with evidence of congressional recognition of the speed necessary to effect the Act's policies. See, e.g., 118 Cong. Rec. 942 (1972) (statement of Sen. Williams); *id.* (statement of Sen. Dominick); *id.* at 942-43 (statement of Sen. Javits); *id.* at 943-44 (statement of Sen. Talmadge).

157. See *supra* note 83 and accompanying text.

158. See *supra* notes 11, 118 and accompanying text.

159. See *supra* note 118 and accompanying text.

160. See *supra* notes 13-16, 122-23, 133 and accompanying text. An order granting a motion to disqualify counsel has also been found to be immediately appealable because it "may effectively terminate the litigation if the [movant] cannot afford to hire new counsel." *Armstrong v. McAlpin*, 625 F.2d 433, 441 (2d Cir. 1980) (en banc) (dictum), vacated and remanded with instructions to dismiss appeal, 449 U.S. 1106, (1981). But cf. *United States v. Greger*, 657 F.2d 1109, 1113 (9th Cir. 1981) (criminal case, therefore counsel appointed if indigent), petition for cert. filed, 50 U.S.L.W. 3607 (U.S. Jan. 19, 1982) (No. 81-1357). An indigent, almost by definition, will find his litigation terminated when he cannot immediately appeal the erroneous denial of a motion to appoint counsel.

161. *Bradshaw v. Zoological Soc'y*, 662 F.2d 1301, 1312 (9th Cir. 1981).

162. *Id.*

CONCLUSION

The final judgment rule and the collateral order doctrine are fluid concepts that embody often conflicting but important considerations: the concern for judicial economy and the desire to avoid injustice. The emphasis given to each policy in a particular setting will necessarily depend upon the character of the case, the availability of alternatives and the nature of the order. The application of this analysis to a motion to appoint counsel pursuant to section 1915(d) or Title VII conclusively demonstrates that the order falls squarely within the parameters of the collateral order doctrine.

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