Frequently Asked Questions About
The Fair Access to Legal Counsel Act (FALCA)

How does 28 U.S.C. § 1915 work?

Every other federal statute governing access to counsel for pro se litigants specifies that a court can or must "appoint" counsel in various circumstances. But 28 U.S.C. § 1915 says a federal court may "request" that an attorney represent a pro se civil litigant. Because the statute uses the word "request", the Supreme Court has held that a court cannot "appoint" an attorney, but rather can only recruit an attorney who is willing to serve.

The statute also does not provide any guidance to federal courts as to when they should exercise their discretion to request counsel. In the absence of guidance, the federal courts have developed their own standards, and in about half the circuits, the courts:

- Require litigants to demonstrate "exceptional circumstances" and find that almost no case meets this standard;
- Summarily deny requests for counsel with little to no explanation;
- Hold in some cases that if a complaint is well-reasoned and has clear claims, the litigant does not need counsel, yet hold in other cases that if a complaint is incoherent and/or does not clearly assert a viable claim, the litigant does not deserve counsel;
- Categorically refuse to rule on a request for counsel until after ruling on dispositive motions, like a motion to dismiss or for summary judgment (and then, after granting summary judgment against the unrepresented litigant, hold that the right to counsel claim has become moot);
- Rely on a litigant's access to a "jailhouse lawyer";
- Dismiss a request on the grounds that litigants have failed to attempt to contact a sufficient number of private attorneys to see if they are interested in the case, without telling the litigant in advance what number of contacts is sufficient;
- Suggest that if private attorneys turn down the case, the case must lack merit and therefore the litigant should not be provided counsel;
- Require litigants with cognitive disabilities to provide extensive documentation not only of the disability, but also how it specifically affects their ability to litigate;
- Utilize stock language denying counsel that is cut/pasted into every order.

In circuits using standards like these, counsel is virtually never provided. A survey by the Federal Judicial Center found that only half the circuits reported ever recruiting counsel for litigants, which is consistent with a review of the reported decisions.

Why is appointment of counsel in federal court important?

First, pro se litigants in federal court are often asserting very significant civil rights claims, such as employment discrimination, disability access, or (in the case of prisoners) deliberate indifference to medical needs or safety. These are complex matters, and the litigants are typically facing off against a government entity or well-resourced opponent, meaning there is a significant imbalance of power. Pro se litigants have great difficulty clearly explaining their claims and establishing credibility, and incarcerated pro se litigants in particular have access limitations that make it difficult or impossible for them to secure documents, question witnesses, and otherwise prepare the case.

Second, pro se litigants place a significant burden on all court personnel. The Federal Judicial Center survey reported that the demands on court staff and the unreadability of pro se complaints have been listed by court staff as high priority issues to address.

What changes does this bill make to the statute?

First, the bill provides the courts with the authority to "appoint" counsel, which puts the statute in line with all of its other federal counterparts such as Title VII/VIII, the Indian Child Welfare Act, the Serviceman Relief Act, and 18 U.S.C. § 983 (which governs appointment in civil forfeiture proceedings).

Second, the bill provides a series of factors (all of which are used by various federal courts around the country) that courts must consider on the record, but does not instruct the courts as to how to weigh any particular factor.

Third, the bill limits the ability of courts to refuse to consider the request for appointment of counsel on the grounds that the court has not yet ruled on motions to dispose of the case (such as a motion to dismiss), since such motions are one of the very things for which unrepresented litigants need counsel.

Lastly, the bill authorizes the courts to appoint counsel on a provisional basis if the court sees a specific need for appointed counsel but is not yet sure if such counsel will be needed for the duration of the case.

How will this bill affect legal services organizations?

The bill should have no effect on legal services organizations. First, the bill does not risk drawing funds away from the Legal Services Corporation or anywhere else because it does not contain an appropriation; rather, it relies on federal courts utilizing their existing pro bono programs (most of the federal courts have developed such programs, which operate on either a voluntary or mandatory basis). To the degree that federal courts pay recruited attorneys for their costs or fees, such money typically comes from the court's "library fund", a non-appropriated fund typically generated from CLE and pro hac vice fees. Second, the attorneys who participate in the federal court pro bono programs are overwhelmingly law firm attorneys, not legal aid attorneys, which is unsurprising because the vast majority of civil legal aid attorneys practice in state court, not federal court.