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96-51 JURISDICTIONAL AMENDMENTS ACT OF 1979, S. 679

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BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

S. 679

MARCH 21, JUNE 4, and 5, 1979

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JURISDICTIONAL AMENDMENTS ACT OF 1979, S. 679

WEDNESDAY, MARCH 21, 1979

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met at 10 a.m. in room 2228, Dirksen Senate Office Building, Senator Edward M. Kennedy (chairman) presiding.

Present: Senators Kennedy, Baucus, Metzenbaum, Heflin, Thurmond, Leahy, Simpson, and Cochran.

Also present: David Boies, chief counsel and staff director; Ken Feinberg, Paul Summit, counsel, Senate Judiciary Committee; Keith O'Donnell and Margery Baker, counsel for Senator Metzenbaum; Ken Kay, counsel for Senator Baucus; and Richard Allen, Sally Rogers, minority counsel for Senator Thurmond, and Mike Klipper, counsel for Senator Mathias.

OPENING STATEMENT OF SENATOR KENNEDY

Senator KENNEDY. The committee will come to order.

Today the Senate Judiciary Committee begins hearings on S. 697, a bill to modify Federal diversity jurisdiction and eliminate the amount in controversy requirement in Federal question cases. This legislation, cosponsored by Senator Metzenbaum and Senator Domenici, has been developed in close cooperation with the Department of Justice and the House of Representatives. It has been endorsed by the President, the Chief Justice of the United States, Attorney General Bell, the National Conference of State Chief Justices, and the House of Representatives, which last year passed this bill by an overwhelming margin.

Too many cases now clogging the Federal courts involve issues of State law that would be better heard and resolved by our State courts. Abolition of Federal diversity jurisdiction is a States rights issue; State courts should decide State cases while Federal courts should retain jurisdiction over Federal matters. This legislation is compelled by the sheer volume of Federal cases flooding our Federal courts. The number of civil cases filed in the Federal district courts in 1977 was almost 131,000, an increase of over 11 percent from 1975 and of almost 50 percent from 1970. Almost 25 percent of these civil suits—nearly 30,000 cases—were based on diversity, and this number continues to grow.

At the same time, unlike the situation which existed in 1789, the Federal business of our Federal courts has substantially increased. New kinds of litigation, unforeseen by the Founding Fathers in 1789, flood the Federal judiciary. Our Federal courts can no longer afford

the luxury of retaining cases based on diversity; they must be permitted to concentrate their efforts and limited resources on cases involving matters truly Federal in nature.

Expanding the number of Federal judges is not a satisfactory solution to the problem of diversity litigation. As we increase the number of judges it becomes more and more difficult to administer the work of our Federal courts, and the resulting increased workload would raise further havoc with a Supreme Court docket already overcrowded. Nor will the transfer of such cases to local courts pose a serious problem for local judiciaries; the increased burden on the courts of any one State would be marginal. Finally, one must confront the primary argument voiced against the abolition of Federal diversity jurisdiction—the possibility of bias in a State court against an out-of-State party. Assuming that such bias does, on occasion, exist—and there is little empirical evidence to justify this argument—the answer is not to retain Federal diversity jurisdiction.

The bias most often complained about is a rural bias against urban residents. There may very well be a need to do something about this bias in certain rural courts, but the answer to that problem, if it exists, is not solved by retaining diversity jurisdiction in the courts. Why should urban residents of a given State be subjected to rural bias in that same State? The answer to this type of parochial bias lies in the development of flexible, local venue transfer rules allowing a liberal transfer from one local judicial district to another local judicial district. If, indeed, State courts do not adjudicate as satisfactorily as Federal courts, then the appropriate remedy is to improve the quality of our State courts. Ironically, continued access to the Federal courts in diversity cases may actually inhibit corrective action and obstruct efforts to improve the quality of local judiciaries.

This legislation is part of a larger comprehensive effort to redistribute the Federal caseload while improving the efficiency of our Federal court system. The bill not only modifies diversity but also abolishes the amount in controversy requirement for Federal question cases. Federal law should not attach a price tag to admission to the Federal courts when a Federal claim is raised. A comprehensive and uniform Federal question jurisdiction should be established at the same time that we modify our archaic diversity rules. This committee will hold extensive hearings on this legislation and at the same time continue its comprehensive hearings, begun yesterday, on S. 678, the Federal Courts Improvement Act. Together, these bills and others supported by the administration, signal a new awareness by the Congress of the need to reform our judicial institutions and make our courts readily accessible to all of our citizens. They are a visible sign of this committee's commitment to judicial reform.

Senator Thurmond?

OPENING STATEMENT OF SENATOR THURMOND

Senator THURMOND. Mr. Chairman, I would like to make a brief opening statement.

Mr. Chairman, during the 95th Congress, I opposed both S. 2389, which would have totally abolished diversity jurisdiction, and S. 2094, which prohibited an instate plaintiff from invoking diversity

jurisdiction. I am, however, looking forward to reading the testimony concerning S. 679 and to giving this subject my most careful consideration. I would first like to explain some of my concerns about this type of legislation.

One of the most frequently offered and compelling arguments for this change is the need to lighten the ever-increasing litigation load of the Federal courts. I am very concerned about this problem. Consequently, I supported legislation which would dramatically increase the number of Federal judges. South Carolina, for example, will now add three new judges to the five present ones. I am a cosponsor of S. 373, which provides for compulsory, nonbinding arbitration as an alternative to conventional litigation, in any district which establishes it by rule for a period of 5 years.

I strongly support the magistrates bill which significantly expands their civil and criminal jurisdiction, thus freeing the district judges to devote attention to other matters. I look forward to consideration of the proposals contained in the Federal Court Improvements Act of 1979.

Perhaps we should evaluate the impact which these pieces of legislation will have on the Federal judicial system before we make significant changes in a service which has been provided by Federal courts since the founding of our country. In other words, I believe that we should first try to increase the capacity and improve the efficiency of the Federal system itself before we take steps to eliminate the litigant from that system.

The burden of transferring this caseload from Federal judges to State court judges may not be a small one. It does sound nice to say that approximately 30,000 diversity cases per year would be distributed among 6,000 State judges, as opposed to 400 Federal judges; but the distribution would hardly be so uniform. For example, according to a recent study by the National Center for State Courts, my home State of South Carolina would need additional State court judges to handle the extra caseload.

In many of the areas in which there are serious backlogs in the Federal system, there may be even more serious backlogs in the State system. In larger metropolitan areas, litigants may have to wait significantly longer to have their case resolved in the State court rather than Federal court. If afforded a choice of forum, a plaintiff will often choose to file in the system where there is a lesser waiting time for trial. Thus, diversity jurisdiction has helped to moderate the delays in the two systems. Elimination of this type of jurisdiction would also eliminate this present flexibility.

Mr. Chairman, an additional concern which I have regarding elimination of diversity jurisdiction is the existence of local prejudice against certain litigants. The fear of bias, which many believe to explain the origin of diversity jurisdiction, is not an illusory problem. While I have the utmost confidence in the State court judges in our country, I understand that there have been instances in which a non-resident defendant or foreign corporation has not received equal or fair treatment at the county level. There have been other instances in State courts in which one attorney or a small group of attorneys have exercised undue influence over selection and decision by local juries in damage suits.

I would like to thank all of our distinguished witnesses for appearing before this committee today. I appreciate having the benefit of their comments on this legislation and hope that they will bring out every facet of this important matter.

I want to convey my appreciation to you distinguished gentlemen. I enjoyed meeting some of you at the Williamsburg Conference. After we receive this testimony I want to go study it carefully because I do not want to support anything which would be detrimental to my State and other States. If it is necessary to adopt this legislation to get the results we need, that is one thing. If it is not, perhaps we should wait a while to determine the effect of legislation such as the magistrates bill and the arbitration bill before we act.

So, I want to explain to you that there are two sides to a lot of questions, and there may be two sides to this one.

Thank you very much. Thank you, Mr. Chairman.

Senator KENNEDY. My distinguished colleague, the spearhead of this effort in the Judiciary Committee, is Senator Metzenbaum. He has been long interested in this and provided great leadership in this area. I acknowledge that leadership, it is a pleasure to work with him. We welcome his statement.

OPENING STATEMENT OF SENATOR METZENBAUM

Senator METZENBAUM. Thank you, Mr. Chairman.

Mr. Chairman, at the outset, let me tell you how pleased I am to see such expeditious hearings on this bill which I introduced last week. I believe S. 679, which would eliminate most Federal diversity jurisdiction, is essential if we are to unclog our Federal court system and return to the States responsibilities that are rightfully theirs. S. 679 is really a States rights bill. It assigns to State courts the task of deciding State law questions and leaves to Federal courts the task of deciding Federal law questions. In this manner, it permits decisions in both court systems—State and Federal—to be made more evenly, expeditiously, and efficiently.

Ever-burgeoning caseloads threaten to impair the effectiveness of our Federal court system. In 1977, the number of civil cases filed in Federal district courts reached 130,597, an increase of 11 percent over 1975. Of these cases roughly 30,000 were diversity cases decided by Federal judges in Federal courts, but which turn entirely on questions of State law. There can no longer be any justification for keeping these State cases in Federal court. Fears of local prejudice against out-of-State litigants are an anachronism. Concerns about the competence of State judiciary are ill founded and in any case do not justify Federal intervention in only those State cases where the litigants are from different States and the amount in controversy exceeds \$10,000.

Cross-fertilization of ideas between the State and Federal judicial systems will continue to take place, and in fact, may be enhanced if diversity jurisdiction is eliminated. There is little doubt that State courts can accommodate the increased caseload. The transfer of 30,000 cases to State courts, while representing tremendous relief to the 600 Federal judges, will increase State court caseloads by only 1 percent. Moreover, there is every reason to provide relief to the Federal courts.

Crowded dockets mean either that litigants face extraordinary delay in having their dispute resolved or, worse, that the courts end up raising numerous technical barriers to suits in order to clear their dockets. In either case, the system frustrates the thousands of Americans who seek to have their grievances redressed and important issues of Federal statutory and constitutional law resolved.

This bill has the strong support of President Carter, Attorney General Bell, the local justices of the 50 States, and the Judicial Conference of the United States. It passed the House of Representatives by an overwhelming margin last year, 266 to 133, exactly 2 to 1, and is moving toward a swift passage again this year. Chief Justice Warren Burger, a strong advocate for the elimination of diversity jurisdiction, stated recently, "Diversity of citizenship jurisdiction had a place at an earlier day in our history, but in the 20th century, it is an anachronism that should be eliminated." The legislation before us today also provides for removal of the \$10,000 amount in controversy requirement in all Federal question cases. This will complete the action taken by Congress in 1976, which eliminated the amount in controversy as a necessity when the defendant is the United States, a Federal agency, or a Federal official. There is no valid reason for retaining the amount in controversy requirement in any Federal question case. Elimination of this requirement will result in only a slight increase in the number of suits in Federal courts and will give every citizen the right to litigate his or her Federal claims before a Federal tribunal.

This bill recognizes that expanded access to Federal courts by citizens with Federal claims and to State courts by citizens with State claims is in the best interest of our judicial system. In the final analysis, the elimination of Federal diversity jurisdiction will undoubtedly improve the quality of justice for all our citizens, in all the courts of this country. I think it is one of a group of pieces of legislation—on which the chairman has provided the leadership—which were discussed recently at the White House to provide for reform of many of the antiquated procedures that are presently clogging our court system and are making it impossible for the average citizen to obtain his fair day in court within a reasonable period of time.

Thank you, Mr. Chairman.

Senator KENNEDY. Thank you very much, Senator Metzenbaum.

We welcome our witnesses this morning. I wonder if they would be good enough to come up together, Hon. Robert Sheran, chief justice, Supreme Court of Minnesota; Hon. Robert C. Murphy, chief judge of the Court of Appeals for the State of Maryland. I am sure that Senator Mathias would want to extend a warm word of welcome to you. As you well know, he is one of our most active and interested members of the committee.

Hon. Elmo Hunter, U.S. district judge for the Western District of Missouri. We had a very fine opportunity to hear the judge in Williamsburg, recently, speaking on this subject; and he made a very strong case.

Now we welcome a constant stalwart for this committee, Dan Meador, Assistant Attorney General with the U.S. Department of Justice.

Judge Sheran, would you be kind enough to start off?

**STATEMENT OF HON. ROBERT J. SHERAN, CHIEF JUSTICE,
SUPREME COURT OF MINNESOTA**

Chief Justice SHERAN. Mr. Chairman, on behalf of the Conference of Chief Justices I take this occasion to express our appreciation for the opportunity of appearing before the Judiciary Committee today in support of the elimination of diversity jurisdiction in Federal courts.

I have a prepared statement which, with the permission of the committee, will be filed. Also, I have written a somewhat detailed and fairly current article on the subject, and appreciate the opportunity to file it for such assistance as it may prove to be.

Senator KENNEDY. We will be glad to receive it and make it part of the record.

[The article referred to can be found in the appendix.]

Chief Justice SHERAN. Thank you, Mr. Chairman.

The interest of Congress in the elimination of diversity jurisdiction arises out of the fact that the Federal courts are overburdened with litigation.

Recently the number of Federal judges has been substantially increased, but if the increase in litigation in Federal courts continues in the future at the same rate as has been the case in the recent past, you will need, within 10 years, to double the number of Federal judges to keep current with the demands upon the Federal courts.

Even if the Federal courts were not overburdened; even if it were not true that some 25 percent of the civil cases in the Federal courts are diversity cases—and that these are among the most time-consuming of the cases—I would still argue that States courts should be given exclusive diversity jurisdiction because in these cases you are dealing exclusively with State law. State cases, under the federal system, belong in State courts.

We simply accept the argument that State courts are inferior to their Federal counterparts so far as this category of litigation is concerned. What we are dealing with here are contract cases, and personal injury cases—the routine type of cases that State courts are handling daily. In as many of these cases as not where substantial amounts of money are involved, nonresidents are involved as parties, and cases not triable or removable to Federal courts because diversity is not entire. The dramatic improvement in operation of State courts during the past 10 years, the development of national attitudes and uniform proceedings, national institutions such as the National Center for State Courts which are dealing effectively with 90 percent or more of all litigation in this country suggest to me, at least, that State courts will rise to the position where they can deal as effectively or more effectively with diversity cases as can the Federal counterparts.

Of the arguments against the elimination of diversity jurisdiction in Federal courts the one that seems to me to have the most persuasiveness is that the diversity cases tend to center in the large metropolitan areas and that in such places as Boston, New York, Philadelphia, or Chicago, the argument is made, diversity cases can be tried more quickly in Federal court than they can in State.

This assertion has been made from time to time. I challenge it. The priorities that have been established by the Congress for the handling

of cases in Federal courts—the Speedy Trial Act, for example—to handle diversity cases, ordinary contract and personal injury cases there and still maintain the congressionally prescribed priorities.

I am currently trying to develop some better statistics in this regard. In the meantime I would make this challenge to those who contend that they can move more speedily in Federal courts in some places than in the States courts. Track a case filed at the same time in the State court and Federal court. Assume that the congressionally prescribed priorities will be respected in Federal courts. In such event, I submit, the State case will be called for trial before the Federal court will be able to hear it.

I will rest on my prepared statement. The return of diversity cases to State courts, where they belong, will be welcomed by the State courts, not because we are interested in taking on more work than we have, but because we feel, as a matter of State pride in State competence, that we should do the work that falls within the natural orbit of our responsibility.

Thank you.

[The prepared statement of Robert J. Sheran follows:]

PREPARED STATEMENT OF ROBERT J. SHERAN

The events of the last 2 years give further support to the basic assumptions which underly Senate bill 679:

That the burdens of the Federal courts are increasing at a rate faster than can be handled effectively by the Federal judges likely to be authorized by the Congress.

That the capacity of the State courts to accept additional responsibility is at a high level and constantly rising.

It is true, of course, that Public Law 95-486 became effective October 20, 1978, increasing the number of Federal District judges by 117 to a total of 516 and increasing the number of Federal circuit judges by 35 to a total of 132. But the history of this law in itself gives evidence of the fact that Congress is slow to permit the number of Federal judges to grow at a rate corresponding to the increase in the demands being made upon the Federal courts. The number of cases being filed there continues to increase. At the present rate of growth, 600 more Federal judges will be needed by 1988 to keep abreast of the work. Observation of the struggle involved in the enactment of Public Law 95-486 tells us that this will not occur. There is an historical reluctance on the part of Congress to increase the number of Federal judges which is easy to understand when we consider that appointments for life are irreversible; that unlimited increase in the number of Federal judges disturbs the delicate balance of power between the separate and independent branches of that Government; and that the conflicting forces which must be satisfied before legislation such as Public Law 95-486 can become law are great in number and persistence. Yet we know when we consider the causes of the multiplication of cases coming into our courts that the rate of increase will continue or accelerate.

As our population increases, litigation increases. By the year 2000 it is predicted the U.S. population will reach about 250 million, but numbers of people is only part of the story. It is the concentration ratio and movement of the population which exacerbates conflict and we know that in the United States increased urbanization and mobility are a certainty.

In the past, resort to the courts has been limited for some by lack of funds. But in the United States increasing affluence, public financing of essential legal services and the development of private plans for prepaid legal services will, in the future, make the courts more accessible more frequently to more of our citizens.

Crime, a principal cause of the increasing demands upon court resources, continues to increase and there is no indication of a likely reversal of this trend.

Public expectations of court assistance in protecting the rights of the individual have reached an unprecedented level, a trend likely to continue.

The extensions of insurance, particularly casualty insurance, serve both to protect individuals from risk of loss and invite the assertion of claims. This is a trend which has been constant over the last 40 years and is likely to continue.

Legislation enacted by the Congress and the States as, for example, in the areas of environmental protection and civil rights, and the rigorous enforcement of more ancient laws as, for example, antitrust legislation, seems responsive to public demands not likely to change in the years ahead. The conclusion seems inevitable that the annual rate of increase in litigation is likely to continue at the present rate or more.

The experiences of the last 2 years reinforce the conviction that efforts to divert controversies form the courts to other agencies for dispute resolution will not afford adequate relief. Notwithstanding increased efforts to encourage arbitration, mediation and conciliation as an alternative to resorting to the courts and increased insistence that administrative remedies be exhausted when available as a precondition to court action, the number and complexity of cases coming to the Federal courts and the "backlog" of undecided cases continue to grow.

The most logical course then, it seems to me, is to analyze the character of the cases coming to Federal courts in an effort to see if the State courts of general jurisdiction (manned by at least 10 times as many judges as are serving in the Federal judicial system) can be of greater assistance than is now the case. The principal field of inquiry must be in the area of civil as against criminal litigation. The multistate character of criminal activity increasing in volume and intensity makes it unlikely that the burdens of the Federal courts in the field of Federal criminal prosecutions can be shifted to the State courts to the extent necessary if significant relief is to be achieved. It is in the area of civil litigation that attention should be focused.

The total number of civil cases which will be filed in Federal courts in fiscal year 1978 will approximate 150,000. Of these, slightly over 50 percent will be cases involving questions of Federal statutory law. Although State courts were entrusted with cases of this type during the first 100 years of our national history, the special competence of Federal judges to handle cases involving questions of Federal law seems evident enough. The nuances of civil rights claims (10 percent), the special expertise involved in the handling of copyrights, patents and trademarks (2 percent), the unique Federal characteristics of Social Security (8 percent), the national implications of cases arising under Federal labor laws (6 percent), the complexity of some environmental cases (limited in number but great in resource demands) serve as constraints to extensive transfer of cases in these categories to State courts.

But 25 percent of the cases now being handled in Federal courts do not involve questions of Federal law in any way. These are the "diversity cases." These are the cases which Chief Justice Burger once again at Atlanta—only 5 weeks ago at the Midyear Meeting of the American Bar Association—urged the Congress to relinquish to the courts of the States. I respectfully submit that there are at least 10 reasons why this advice should be followed:

1. Article III, section 2 of the United States Constitution provides that the judicial power of the United States extend to controversies between citizens of different States and since 1789 the constitutional provision has been implemented by the provisions of congressional enactment. But the demands on Federal courts in the 18th century were limited and the trial of diversity cases was then considered more as an opportunity than a burden. This is no longer true.

2. Diversity cases involve interpretations of state law. In our Federal system State courts are the final arbiters of State law. It is an awkward situation for Federal trial judges to be interpreting State law and precedents when errors which are bound to occur cannot be corrected by the highest court of the State, the laws of which are being applied.

3. Diversity cases, for the most part, involve claims arising out of contracts or suits for damages for personal injuries, because of defective products or automobile accidents. These are the kinds of litigation which State court judges handle regularly and routinely. Federal court judges, whose major responsibilities are in other areas, have neither a special interest or expertise in cases of this kind.

4. Diversity jurisdiction attaches only if the amount in controversy exceeds \$10,000. Often the "amount in controversy" question—wholly irrelevant to the merits of the case—is challenged and valuable judicial time is wasted in a

contest over this collateral issue. Apart from this, there is no reason in principle why the \$10,000 judicial limit, or any other larger amount, should distinguish cases triable in Federal court from those which are not. The citizen's right to justice should not turn on the dollar value of his claim. The suggestion that "Federal" is "better" and that the "big" claim deserves the "better" treatment is inconsistent with accepted notions of fair play in a democratic society.

5. Diversity jurisdiction attaches only if diversity of citizenship as between the parties is entire. For example, if a resident of Minnesota sues Ford Motor Co.—a Michigan corporation—because of a claimed defect in an automobile manufactured by it, the Ford Motor Co. can, if the case is venued in Minnesota, remove the lawsuit to Federal court if the amount in controversy exceeds \$10,000, unless it has a principal place of business in Minnesota. The question of whether a place of business is a principal place of business as well as the question of whether a true diversity of citizenship exists can be placed in issue and if it is, valuable judicial time is wasted on a question having nothing to do with the merits of the case. If it is established that the Ford Motor Co., a Michigan corporation, does not have a principal place of business in Minnesota, the case is tried in Federal court. But if the plaintiff in such an action were to join a Minnesota dealer as a defendant, the case could not be removed. The requisite complete diversity of citizenship between the parties would not exist. How can it be argued that the Ford Motor Co. needs protection from Minnesota courts in the one case but not in the other?

6. In the great bulk of cases where a nonresident is a party, the case is tried in State courts and cannot be removed. The numbers of these cases in State courts have increased greatly because of the enactment of long-arm statutes which permit effective service on nonresidents. No one seriously contends that the nonresident party suffers from local prejudice in these cases because of its nonresidence. If it suffers a disadvantage because of its being a corporation, this is due to factors which apply to every business entity involved in litigation, resident or nonresident. There is no reason to give a nonresident business entity an advantage not available to the others.

7. In any event, removal to Federal court does not change the situation insofar as it is affected by claims of prejudice based on nonresidence. The jurors in Federal courts are residents of the same State as are State court jurors. Federal court judges have the same essential background as do State court judges. Many of them have served as State court judges before moving to the Federal branch. The security of life tenure of Federal judges is an irrelevant consideration in the kinds of cases (contracts and torts) where diversity jurisdiction is involved.

8. There are prejudices to be found in both State and Federal courts which impede the administration of justice; prejudice based upon hostility toward corporations; upon identification with the underdog; upon consideration of race and sometimes ethnic or religious background. But prejudice based upon State of residence is so insignificant as to be unimportant. To the extent that prejudice of any kind exists in a court system, it should be corrected. But to suggest that it can be cured even in part by permitting removal of diversity cases is to compound the problem by obscuring its cause.

9. The power to remove diversity cases from State to Federal court gives tactical advantage to the party seeking delay. This is so because given the priorities to be accorded criminal cases under the Speedy Trial Act and the pressing demands involved in many Federal question cases, the trial of diversity cases in many Federal courts is extremely difficult to achieve.

10. The implicit assumption of diversity jurisdiction that a fair trial cannot be secured in State court notwithstanding the fact that the case involves State law exclusively, demeans State court systems at a time when national efforts to improve the State courts should be recognized and encouraged. Assignment of jurisdiction of all diversity cases to State courts will stimulate the movement to strengthen and improve State judicial systems in every part of the country so that the ultimate goal of justice uniformly and expeditiously afforded will be available to every citizen of the United States.

The obligation to provide access to the courts for the resolution of disputes and controversies is neither exclusively Federal or State. It is a joint obligation best fulfilled by allocating its burdens in a responsible way between the Federal and State governments. I know that the Members of Congress are keenly interested in the effect of Federal legislation on State court systems. Your

constituents are State citizens, the same as are mine. No matter what is done with diversity cases, 90 percent of the judicial problems of the people of this country will continue to be resolved in State courts. As representatives of the States you have, I am certain, the same concern for the well-being of State courts that State jurists should have. Your kindness in inviting Chief Justice Cameron and me to appear here is evidence of your views in this regard.

I feel justified, therefore, in calling your attention to the dramatic changes taking place in the judicial systems of the States during the past 15 years which give added assurance of their competence to handle personal injury and contract cases, regardless of the citizenship of the parties:

A stringent code of judicial ethics proposed by the American Bar Association has been voluntarily adopted in almost every State.

Continuing legal education for judges and court-related personnel is generally available and is provided not only through local programs but also through national institutions such as the National Judicial College at Reno, Nevada.

Procedures for the removal and discipline of State court judges have replaced ineffectual impeachment procedures in a great part of the country.

Increasingly, the States are insisting that judges of general jurisdiction be carefully selected and well trained.

The employment of modern methods of court management and administration have become commonplace and The Institute of Court Management has been established to provide the necessary training for those involved in this work.

The National Center for State Courts has become the indispensable right arm of the Conference of Chief Justices in making essential information and services available for the improvement of State court systems.

It is interesting to note that the improvement of State court systems has been, in part at least, a reaction to the increasing responsibilities pressed upon State court judges by the Federal Government. Decisions of the U.S. Supreme Court beginning in 1963 have established new minimal standards for the trial of criminal cases in State courts by expanding the application of the due process and equal protection clauses of the Federal Constitution.

The Federal Government taking leadership in such areas as environmental protection has established a pattern which has been followed by the legislatures in most of the States. Congressional enactments giving statutory definition to individual rights provide for concurrent jurisdiction in State and Federal courts. In many instances Federal funds are made available to the States only when action is taken in State courts as a precondition of eligibility.

The Conference of Chief Justices at its recent meeting in Atlanta has committed itself to a reexamination of the appropriate relationship between the Federal Government and the States in fulfilling our joint responsibilities of affording to each person a certain remedy for the wrongs which he may receive to his person, property or character. In a democratic society which properly emphasizes the right of the individual to live and express himself freely, conflicts between persons and between individuals and the State are inevitable. The controversies generated by freedom must be settled fairly, economically and expeditiously so that the energies of our people can be directed toward constructive action and thought. If disputes, controversies and conflicts are to be settled, adjusted or resolved, the people of this Nation must have ready access to the courts.

Because Federal courts are by constitutional definition courts of limited jurisdiction and because traditionally State court systems have provided the place for resolution of most disputes, it is in everyone's interest that State court systems be made as responsible to the needs of people as possible. The support and improvement of State court systems is a responsibility of all the people in this country and their representatives whether they be acting through Federal or State governments. Article VI of the United States Constitution provides in part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made; or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.

These considerations and ever-increasing appeals to the courts for dispute resolution makes it imperative and timely that the Federal Government and the States engage in a joint effort to achieve these objectives:

1. To make the courts of our Nation, State and Federal, accessible to everyone. This means that adequate court rooms at convenient places must be available:

that well-qualified judges be selected and retained to supervise the judicial process; and that adequate legal services be provided to assist with the average person's problems at a cost which the average person can afford.

2. To divert from the courts of the country disputes and controversies which can be settled more expeditiously and effectively by other means and in other places. This objective recognizes that there are circumstances where such methods such as arbitration, conciliation and mediation work better than the formal processes of the courts. The process of identifying these cases is difficult and important.

3. To be certain that the judicial systems of the Nation function efficiently. This objective calls for emphasis on the importance of improved methods of judicial administration, the employment of modern management methods and the training of court-related personnel so that the work of the courts will be conducted as efficiently and effectively as possible.

4. To reduce the costs of dispute resolution. This objective recognizes that justice is frequently unattainable by many people because of the expense involved in obtaining access to the courts. Justice which cannot be afforded is justice denied.

5. To extend educational programs so that those who administer justice are kept fully and currently informed and those who seek justice are made aware of the availability of help through the Nation's court systems. This objective implies that the law to be applied in the resolution of disputes is constantly changing as the needs of society change and that all people concerned with justice must be continuously educated to keep abreast with the times.

6. To divide the responsibility for providing access to the court systems of the Nation between the State and Federal court systems in such a way as (a) to employ the total capacity of both systems as effectively as possible; (b) to avoid duplication and repetition of effort; (c) to keep the process of dispute resolution both civil and criminal as close to the people affected as possible; and (d) to preserve the independence and integrity of State courts. This implies that the general jurisdictional responsibilities of the court systems should be placed primarily in the courts of the States; that the Federal court system should continue to be one of limited and specialized jurisdiction; and that the efforts of both the State and Federal court systems should be coordinated and integrated in such a way as to make the system as a whole work as effectively as possible.

I respectfully submit that the allocation of all diversity cases to the courts of the several States is an appropriate beginning step in the joint Federal-State effort to improve and make more efficient the administration of our Nation's court systems.

Senator KENNEDY. Thank you very much.

STATEMENT OF HON. ELMO B. HUNTER, U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF MISSOURI

Judge HUNTER. Senator Kennedy and distinguished members of this committee, first I would like to thank you on behalf of the Judicial Conference of the United States for granting me this opportunity to appear here today and speak on the subject of diversity jurisdiction on what, as I recall, is the first full day of spring, a very delightful day.

I have filed, and I hope that I have your permission to do that, a full fact statement.

Senator KENNEDY. Would you just bring the mike over, Judge?

Judge HUNTER. Certainly.

Senator KENNEDY. Thank you.

Judge HUNTER. Because I have filed a full statement, I am going to shorten my time considerably and address only two or three specific items which are somewhat new in the consideration of the pros and cons of diversity jurisdiction.

Mr. Justice Sheran has covered many points. Indeed, those he has not covered, Senator Kennedy, you and Senator Metzenbaum have just covered in your opening statements. Basically, what we are trying to do is to reexamine the purpose that the Federal court serves in our democracy and to, in the overall concept of Federal-State court jurisdiction, assign to each system those cases that more appropriately belong into that particular system in the light of the basic principles of federalism. To put it in short terms, that simply means that in order to get a proper jurisdictional balance between the Federal and State courts we should follow the guiding principle that the Federal court jurisdiction should attain where Federal questions are at stake, and State court jurisdiction should attain where State questions are at stake, and the State courts are available and adequate to provide for them.

As Justice Sheran has just told you, the State courts have arrived at that place where they are available to provide an adequate forum. Rather than go into the history of article 3 in the First Judiciary Act 190 years ago that caused diversity jurisdiction to be a possibility, I simply say that in retrospect the two bases for the act are, first, prejudice based on the State or citizenship and such prejudice simply no longer exists; the second basis being a fear of a crude court because in those days the State court systems were manned mainly by laymen; the opinions were not considered worthy of publication, and a crude form of justice frequently came out which to some extent penalized the out-of-stater. That, too, is a concept of history that has passed.

So, we come really to the question of, why do we continue this type of jurisdiction. I would like to address two fairly new arguments that would support the retaining of it. First of all, the argument is made that we have pockets of prejudice now existing over the United States in the State court system, and that therefore we ought to keep the Federal system as a viable alternative, even though the price may otherwise be far too high.

The short answer to the "pockets of prejudice" argument, it seems to me, is that these pockets of prejudice have nothing to do with either one of the two original bases for diversity jurisdiction. Rather, they do involve things such as prejudice for-against claimants; for-against large corporations; for-against the rural litigant or the city litigant, as the case may be. Those pockets of prejudice are truly local problems, and they should not cause the entire Federal system to bow to them. These pockets of prejudice can be removed by simply addressing them directly and by providing appropriate change of judge, appropriate change of venue, and appropriate transfer of the case to some place that does not have that particular prejudice. Most of the States have that type of remedy available now, and certainly those that do not would quickly come to it if they could not evade the entire problem by resorting to the Federal courts.

The second and somewhat new argument comes over the recent passage of the judicial omnibus bill, adding 152 new judges to the Federal court system. The feeling is by some, "Well, let us wait and see how that works out." But I say, frankly, we cannot afford to wait because if we do so it is simply to deny justice to thousands of people who are trying to get into the Federal court system to present a Fed-

eral case. Keep in mind, these cases have no other place to go; if they cannot get into the Federal system they cannot have a day in court anywhere.

We know, and have known for some time that the Federal docket in civil cases is increasing at a rate in excess of 6 percent per year. This immediate past year, for example, it increased 6.8 percent. If you removed all of the diversity cases you would be removing about 22 percent of the Federal court caseload. It would take, at most, $2\frac{1}{3}$ years as the rate of 6.8 percent for that entire void to be refilled with Federal cases, engaging all of the time of all of the Federal judges, including the 152 which are to be added.

The picture is even a little more complicated than that. We now have a backlog within the Federal court system of over 166,000 cases. That backlog is being added to each year by a shortfall of 13,000-plus cases. We also know that it is going to take a little while to get the new judges on board, get them broken in until they are really productive. So, in less than $3\frac{1}{3}$ years we will have all of these judges with all of their time occupied by the continued increase in the size of the Federal court docket. It remains to be seen whether or not during that interval they will be able to really catch up on this enormous backlog now in the Federal court system.

To come to the bottom line, as we see it, there is not going to be any cut-down on the volume of cases that go into the Federal system. In view of our modern society and the complex social problems, and the pressure on Congress to service the people of this Nation by addressing those problems, we know that we are going to get more and more Federal question cases. We know that although the Speedy Trial Act is under substantial current criticism, that it is likely in some form to stay. We know that as long as we have a Speedy Trial Act we are going to be trying our criminal docket cases first.

That means that the cases that this Congress placed a high priority on, those civil cases that involve civil rights, that type of thing, are going to be hard pressed to find a forum in which they can be reached and tried. They have to find a Federal forum, they do not have the State forum available. The only answer to it is that we simply have to cut out of the Federal system any unnecessary intake, and to give Federal court jurisdiction based on the happenstance of Federal diversity is simply to impose on the entire system an unnecessary intake that takes over 50 percent of the trial time of the Federal judiciary, as well as taking up 22 percent of the actual case docket.

So, we come again to what we think is the final question, what is the public interest? We think the public interest is to remove from the Federal dockets those cases which do have another and very adequate place to go, and to leave to the Federal court those matters that involve Federal questions. I can assure you from personal experience, they will more than keep us busy, including the 152 new judges.

Thank you.

[The prepared statement of Judge Hunter follows:]

PREPARED STATEMENT OF ELMO B. HUNTER

By way of background, I am a district court judge in the Western District of Missouri. Since 1969 I have been a member of the Judicial Conference's Committee on Court Administration, and I served as chairman of its Subcommittee on Judicial Improvements from 1976 until January 1978, when I became Chairman of the Committee on Court Administration.

My service on the Court Administration Committee has been instructive; I believe that, in the 20 semiannual meetings which that committee has held since I joined its membership, there have only been two which have not considered the issues before this committee today. Over the years, it has been the consistent position of the Committee on Court Administration and of the Judicial Conference of the United States that diversity jurisdiction should be severely limited or entirely eliminated. Two years ago the Judicial Conference took the strong position that limitation is not sufficient and that diversity jurisdiction should be entirely eliminated except as it concerns alienage jurisdiction. Alienage jurisdiction is jurisdiction between citizens of a State and foreign states or subjects thereof. In addition to the strong endorsement of the Judicial Conference of the United States, it likewise has the strong endorsement of the Chief Justice of the United States, the Attorney General of the United States, and that of many eminent scholars and lawyers.

The Senate bill now pending, among other items, covers the subject of Federal diversity jurisdiction. In addition to abolishing all diversity jurisdiction except for alienage jurisdiction it also raises the amount in controversy for alienage cases from \$10,000 to \$25,000. Further, it abolishes totally the amount in controversy requirement for Federal question cases.

The Judicial Conference has directed me to express to this committee its continuing strong support of total abolition of diversity jurisdiction at the study made of this subject in the last session of Congress which resulted in the House of Representatives passing H.R. 9266 which provided for abolition of diversity jurisdiction.

Mr. Chairman, I would like to present in capsule form the considerations and basis for the recommendation of the Judicial Conference for total abolition of diversity jurisdiction. In the light of our evergrowing Nation and the increasing demands on its government, there is, and has been for some time, an ongoing need to examine anew the purpose the Federal courts serve and should serve in our democracy if those courts are to fulfill their constitutional function. This examination must include, as a top priority, a proper jurisdictional balance between the Federal and State court systems, and an assignment to each system of those cases most appropriate to that system in the light of the basic principles of federalism. The guiding principle is that there should be Federal court jurisdiction where Federal questions are at stake, and State court jurisdiction where State questions are at stake and State courts are available to provide an adequate forum.

I will briefly review the subject of Federal diversity jurisdiction to determine how it came to be, the purpose it serves, and whether or not it should remain as a basis for Federal jurisdiction. Such a review must include a recognition of the burden placed on the Federal courts by diversity jurisdiction and consideration of the ability of the State courts to take it over. Federal diversity jurisdiction is made possible by Article III of our Constitution which was drafted so as to permit, but not to mandate, Federal court jurisdiction based on controversies between citizens of different States and between a State or the citizens thereof and foreign states, citizens or subjects. This grant was not self-executing. Thus, the Constitution gave to Congress the power and duty to decide if there should be Federal diversity jurisdiction, and to what extent, if any.

At that early hour of our history our courts were quite different from today. In our Nation's First Judiciary Act, passed in 1789, Congress created not just one set of inferior courts, but two. Each of the twelve States was given at least one district court. Only a handful of judges were needed to man those few district courts. Congress also created three circuit courts. Judges were provided for the Supreme Court, five in number, and for the district courts, but the circuit courts were given no judges of their own. Instead the circuit courts were to hold two sessions each year within the circuit, with the circuit court consisting of two justices of the Supreme Court and the district judge of the district. Population was sparse, travel very limited, and interstate business was minimal. It was in this setting that, in the First Judiciary Act, Congress created diversity jurisdiction. The grant of that jurisdiction had a *de minimis* result as indications are that few cases were filed on that basis.

To this day there is no consensus as to why diversity jurisdiction was made a permissive basis of Federal court jurisdiction; or why Congress opted for it. It was simply not debated or explained at the time. Scholars, and others, over the years, have endeavored to come up with explanations for the congressional

action taken in 1789. The traditional explanation is a fear that State courts in those early days would be prejudiced against those litigants from out of State. Mr. Justice Marshall mentioned this as a possible explanation in an opinion of *Bank of the United States v. Deveaux* in 1809.

In a thoroughly researched book by the late Mr. Justice Robert H. Jackson, "The Supreme Court in the American System of Government," Harvard University Press, 1955, this enlightening statement is made by Mr. Justice Jackson at page 33: "The anticipated difference between the Federal courts and the local courts must have been in the exercise of the judicial function. We must remember that following the Revolution many State courts were manned by laymen, and State law and procedure were frequently in an unsettled condition. The colonial and State courts did not enjoy high prestige, and their opinions were not even deemed worthy of publication."

Mr. Justice Jackson further stated (p. 34):

"There are so many imponderables involved that I yield to the judgment of men who lived at that time that local courts so little guided by law might have been a crude and hostile forum for the stranger. I may readily believe that diversity jurisdiction had justifications in the time of its creation without believing that it has justifications now."

Whatever such prejudice as may have existed in 1789, it is acknowledged today to be either de minimis or nonexistent. Today our people travel much and freely. They reside first in one State and then another. They move as their business or personal convenience dictates. Their families, relations, business associates and friends also move often and frequently live in other States. There is no longer any real risk of prejudice based on State of residence. And today it is generally recognized that it is unrealistic to believe that prejudice against a litigant, merely because he or she is a citizen or resident of a different State, is a significant factor in arriving at justice in a case. Today's modern State courts, with their stress on objectivity and fairness, and with their sensitive appellate reviews can be relied on to be free of that type of prejudice.

What then are the arguments for retaining Federal diversity jurisdiction? Five professed arguments are offered in recent years against abolishing diversity jurisdiction.

First there is the argument that diversity jurisdiction alone provides a forum for certain cases over which no State court could obtain jurisdiction. This once remote possibility is now nonexistent in the light of our modern State long-arm statutes and State interpleader statutes, not to mention the Federal interpleader statute, Title 28, United States Code, Section 1335, which the present bill not only preserves, but quite deliberately improves, by clarifying the definition of "claimants of diverse citizenship" and the ever-continuing legislative and judicial expansion of Federal question jurisdiction. These assure that a Federal forum will always be available, even in the absence of Federal diversity jurisdiction.

A second reason sometimes mentioned is that it is a function of Federal diversity jurisdiction to assure a high level of justice to the traveler or visitor from another State. Since the Supreme Court's landmark decision in *Erie Railroad v. Tompkins* in 1938, the Federal courts are required to apply State law in diversity cases.

The Federal courts in such cases do not, however, authoritatively determine State law; only State courts do so. Thus, the diversion of State law litigation to Federal tribunals both delays the authoritative development of State law and imposes upon Federal courts the risky, laborious and wasteful task of predicting what the State law may be on issues upon which only the State courts may speak with authority. Often the Federal courts anticipate differently from what the State courts later decide. This is not the way to assure justice to the traveler or visitor from another State; it is counterproductive to the process of justice and most importantly it is an undesirable and needless interference with State autonomy. Nor is diversity jurisdiction justified in order to encourage free movement and business activity throughout the country. Abolition of diversity jurisdiction in 1979 is irrelevant to free trade and free movement and would not create any impediments to citizens' travel and business.

Now with regard to the Federal courts having to anticipate, or guess, or speculate, what the State law will be. I have been a State court judge for 13½ years and I have been a Federal judge for 13½ years. I can assure you that when you leave the State court bench and become a Federal court judge, you do not

retain an infallible memory as to just what the State law was. More to the point, State law changes rapidly as society and social needs change. It is, as a practical matter, nearly impossible for a Federal judge to keep abreast of current State law. That's simply because the average Federal judge is doing all he can do to keep abreast of the Federal law and the many changes that occur there, and process his docket. So, as a practical matter, a Federal judge after he has been on the Federal bench for a short time, simply is no longer an expert in State law, and he is going to guess wrong in a number of cases. It is not an unusual experience. And, of course, Federal appellate judges whose courts cover numerous States are even more exposed to the risk of guessing wrong on State law of States in which they have never resided or practiced.

Additionally, when a case comes into the Federal system involving State law it takes a Federal judge a substantially longer period of time to process the case than his State brother judges take. That's for the simple reason that the State judges are current on State law, whereas the Federal judge has to go back and painstakingly reeducate himself and come up to date on the particular legal problem. This is a time-consuming and somewhat wasteful effort. It causes a longer period of time for that particular case to move through the Federal system than it would if it had stayed in the State system.

Even so, some believe that the Federal courts are superior, that is, better than the State courts, and, hence, should be given jurisdiction. Certainly this attitude is unsupportable as applied to State law problems where State law controls. Such a belief, if carried to its logical conclusion, would result in the placing of all litigation in the Federal court system, and would abolish the State courts of this nation. Of course, that would be absurd. Our State courts today have exclusive jurisdiction over murder cases with the death penalty applicable; they have jurisdiction over crimes calling for sentences up to and including life; they have jurisdiction over our property rights, our marital rights; inheritance rights, et cetera. Historically they have performed capably and admittedly they have become enormously more competent in the past 14 or 15 years. To say that these State courts are not to be trusted with the trial of an automobile collision event because of happenstance of diversity of citizenship is both shocking and illogical.

Actually, in modern society, diversity jurisdiction simply provides a tactical weapon for lawyers, without advancing the cause of justice. Ingenious attorneys have invented a number of devices both to create and to defeat diversity jurisdiction, as it suits their tactical interests in the particular suit.

Such things as transferring causes of action, assignments for collection purposes only, transferring small interests, changing the State of incorporation, appointing out-of-State administrators and guardians, selecting out-of-State class-action representatives are illustrative of tactical or collusive efforts to create or to defeat Federal jurisdiction.

The law books are full of such cases and our Federal courts lose much valuable time and devote substantial attention to ruling the jurisdictional questions rather than have that time to be devoted to cases more properly belonging on the Federal court's docket.

Turning to the situation of the lawyers, I call to your attention that the judges are lawyers and we understand lawyers just as lawyers understand judges. Of course, lawyers tend to prefer a choice of forums rather than be limited to a single forum. That's just human nature. If they were given a choice of three things, I suspect they would like that better than the choice of two. That, again, is human nature. But those who have examined the entire problem in depth from the standpoint of the public interest usually realize that the price of retaining such a choice of forums is simply too high, because it deprives the citizens of reasonable service and proper and prompt attention in Federal type cases; those being cases where there is no other forum available for them.

The third argument against abolition of diversity jurisdiction is that our State courts will merely be called upon to bear as heavy a burden—perhaps a heavier one—that the Federal courts bear now. This argument has a very limited application, if any. I quote from the resolution of the Conference of State Court Chief Justices adopted August 3, 1977: "Our Federal court system will continue to be overburdened unless increased recognition is given to the role of State courts." * * * "(5) Our State court systems are able and willing to provide needed relief to the Federal court system in such areas as: * * * (C) The assumption of all or part of the diversity jurisdiction presently exercised by the Federal courts." Certainly, the studies conducted by Senator Burdick when he held hearings on this matter in 1971, which suggested that the increase in the

civil business of State courts of general jurisdiction caused by the elimination of Federal diversity jurisdiction would vary from 1.5 to 2.7 percent, show the burden argument to be overstated. I refer to Burdick, *Diversity Jurisdiction Under American Law Institute Proposals; Its Purpose and Effect on State and Federal Courts*, 48 North Dakota L. Rev., 1, 14-15 (Table 4) (1971). I continue to agree with Chief Justice Robert J. Sheran of Minnesota, president of the Conference of State Chief Justices, who in speaking for that conference last summer again emphasized that the State courts have modernized to that point where they have the tools available that they can handle the additional caseload that will be thrust upon them if diversity jurisdiction is removed through this particular bill. Surely it is reasonable to believe that the over 6,000 State court judges distributed throughout 50 States can more readily handle these diversity cases (about 32,000 in number) than the less than 500 Federal court judges now handling them. This the State court judges can do even if the diversity cases tend to be filed more heavily in one area of the State than in another. In my own State of Missouri, and Missouri has had a history of being very modern in its State practice, we have for a number of years used the assignment system of judges who are not too busy, to those places that have congested dockets. I have no doubt that within the State of Missouri, the additional load that the State courts would undertake, if diversity jurisdiction is abolished, would be handled quite easily because the judges are willing to make the short trips necessary to go to the congested area places, and to give the additional manpower needed to straighten out any caseload that might tend to accumulate at those particular places. In that respect I do not think Missouri is unique.

Another argument advanced against abolition is the one most frequently voiced, the one I touched on earlier; the theory that out-of-State parties may be subjected to a prejudice in State courts by virtue of their out-of-State status. As a native of Missouri, a State well known for the special personalities of its citizenry, I would observe that the kind of bias or prejudice contemplated by this particular argument is more an imagined problem than a real one. Of course, many citizens are proud of their native States, yet today I do not believe that pride manifests itself very often in terms of antagonism against citizens of other States. The historically documented attitudes, which may have originally motivated Congress to create diversity jurisdiction appear to have disappeared. Certainly if they exist to any degree they are de minimis. The United States today is a Nation unique in citizenry mobility. The population relocation which has taken place since World War II is well documented. Our State courts today reflect that movement just as sharply and brightly as they reflect the ever-increasing quality of our State court judges. An ever greater number of our Federal judges are former State court judges. As I mentioned I am one of them, and, if I may add a personal comment, having been a State court judge for 13½ years, during which I served on all the courts of record in my State—I am baffled by the thought that I was prejudiced then but was magically purged of prejudices the day I entered Federal service. Nor do I believe we need fear generally this kind of prejudice in our jurors. Under existing law, as embodied in the Juror Selection and Service Act approved by Congress 10 years ago, those citizens called for jury duty in Federal courts are drawn basically from the same communities from which State court jurors are drawn although from a smaller area and usually by the same or similar methods.

It is noteworthy that State courts have always tried all those Federal diversity type cases where less than the required minimum amount for Federal jurisdiction is claimed, now \$10,000, plus all the other diversity type cases, regardless of the amount claimed, which are not filed in or removed to the Federal courts. There is no claim that they have not tried them well.

I turn to a new but minor argument being offered in support of diversity jurisdiction. It is that Federal diversity jurisdiction renders a Federal service in today's society. Of course, it does provide a Federal service but an unnecessary and clearly unaffordable one. Looking at the overall aspect of the situation rather than examining it in a vacuum, providing Federal diversity jurisdiction is a disservice to the American public who have Federal claims to make because it takes away the ability of the Federal courts to properly and promptly process those Federal cases and claims of citizens who must find the Federal courts available and able to handle them.

I believe that in contrast to these five arguments against abolishing diversity jurisdiction the arguments in favor of such abolition are far more compelling.

I turn first to a reason, still sufficient in itself, why Federal courts should no longer entertain diversity actions. That reason is the tremendous burden which these cases impose upon the limited judge-power of the Federal courts which should be kept free for those cases which only the Federal courts can handle, or which because of their Federal expertise, they can handle significantly better than the courts of a State.

We know only too well that the Federal courts in recent years have experienced an ever-increasing dramatic growth in volume of cases. In only 20 years the number of civil cases filed in the Federal district and appellate courts has more than doubled. No letdown is in sight. The result is a situation not capable of reasonable resolution simply by the creation of more judgeships, necessary as they are. Some reduction in unnecessary intake is imperative.

Sometimes facts in the dry form of statistics rather than rhetoric best describe the workload of the Federal Judiciary occasioned solely by Federal diversity jurisdiction. In the fiscal year ending June 30, 1978, there were 138,770 civil cases filed (up 6.8 percent from 1977) in the Federal district courts of which 30,496, or 23.1 percent were diversity cases. The total civil and criminal cases filed in the Federal district courts during the 1978 fiscal year was 174,753. Diversity cases comprised approximately 18 percent of all civil and criminal filings. The great bulk of these diversity cases were tort actions, usually personal injury actions.

For some reason all diversity cases go to full trial more often than non-diversity cases. About 12 percent of them are tried by the court or jury, while only about 7.8 percent of other Federal cases go to full trial. In other words, approximately 3,300 of them are tried each year by the Federal district courts.

The burden that diversity imposes on the Federal courts is not fully reflected by the figures on the number of cases commenced. A time study made by the Federal Judicial Center in 1969-70 showed that in that year, when diversity cases constituted 26.2 percent of civil filings in the Federal courts, they took 37.9 percent of the time the district judges spent on civil cases. Federal Judicial Center "The 1960-70 Federal District Court Time Study," 66G, table XVII (1971). And, there is support for this finding of the Federal Judicial Center in the statistics that show that the percentage of diversity cases reaching trial has consistently been higher than for civil cases generally, as has been the percentage of diversity cases in which there has been a jury trial. Shapiro, "Federal Diversity Jurisdiction: A Survey and a Proposal," 91 Harv. L. Rev. 317, 323 (1977).

Thus, diversity cases accounted for about 24 percent of all jury trials and about 66 percent of all civil jury trials. And, remarkably, a very large percent of those tried are appealed, presenting an awesome volume problem to our appellate courts. For example, in 1978 of the some 11,162 civil cases appealed to the circuit court of appeals, 1,796 were diversity cases.

The future is not bright. There was over a 47-percent increase in the number of diversity cases appealed compared to fiscal 1971. The movement seems always to be on the increase. Clearly, through sheer force of number these diversity cases tend to preempt already overcrowded dockets and to make it very difficult, if not impossible, for the Federal judiciary to give adequate and necessary time to other Federal cases that do properly belong in the Federal court system and have no other forum.

A more recent suggestion by those who oppose abolition of diversity jurisdiction is an interchange of practice between the Federal court lawyers and the State court lawyers, and that that interchange should be preserved so that each system may learn from the other. I am sure that there is an interchange of practice among lawyers. But we do not have, in this country today, any rigid group of "Federal lawyers" solely, or any rigid group that are "State lawyers" solely. Most lawyers are able and willing to go into both forums, given the opportunity and the good business that would take them there.

And, even if you abolished diversity, you would still have much of this State-Federal interchange among the lawyers. They will still have cases involving the Federal Torts Claim Act, the FELA, the Federal criminal law, civil rights, and Federal questions, as well as other sources of Federal court cases. So they will be in the Federal courts as well as in State courts regardless of the abolition of diversity. There will be a continuation of State and Federal interchange among the lawyers through such litigation, not to mention the vast amount of such interchange through legal seminars, bar association meetings and law school functions. This interchange will not stop or be impaired to any appreciable extent if diversity is abolished. So, I believe that on balance, the arguments in support of abolition are far more compelling than those against abolishing diversity jurisdiction.

A new argument to preserve diversity jurisdiction has arisen—and naturally so—in the past few months. Its proponents say there is no present need to abolish diversity jurisdiction in the light of 152 new Federal judges having been authorized by Congress. Let's wait awhile, they say, and see what happens. Perhaps those of us in the judiciary while endeavoring to obtain additional judges overstressed the statistical or caseload approach and unwittingly understressed other and, perhaps, even more basic and more compelling reasons for the total abolition of diversity jurisdiction. Aside from the enormous and punishing caseload problem, there exists the fundamental that our forefathers foresaw a time when under federalism concepts our State courts would be able to handle satisfactorily State law matters, leaving it to the Federal courts to handle Federal law matters. By returning to our basic federalism concept we would cease what in light of our modern and efficient State court systems can only be described as a needless interference with the sovereignty of our States. To provide a no longer justifiable choice of forums at the expense of the concept of federalism continues to be too high a price to pay to provide an unneeded choice of both Federal and State forums. I concede that there are pockets of prejudice or of unfairness here and there in the State court systems—no system, Federal or State, is perfect. Such small pockets as may exist usually involve claims of bias toward plaintiffs, or toward defendants; or for or against big corporations; that type of thing. These pockets do not involve prejudice based on the State residence of the parties. The proper remedy is to address the particular problem directly, and at the State and local levels, where it can be cured by appropriate State and local action. If these local "pocket" problems are not swept under the rug or dodged through the use of diversity jurisdiction, I predict the lawyers and the bar associations affected will quickly clear up the problem by appropriate local action. Certainly, these "pocket" problems would be cleaned up if consideration is given to such remedial action as providing for a change of venue or change of judge, or the transfer of cases to another place free of the particular prejudice or unfairness. The great majority, if not all, State court systems now have available authorized means for such transfers where prejudice or local unfairness is demonstrated.

At the risk of again overemphasizing the overly heavy docket and caseload problem, I remind you that diversity cases provide about 22 percent of our docket which for the past 8 or 10 years has been growing at the annual rate of at least 6 to 6½ percent. Last year our Federal docket grew 6.8 percent and increased our backlog of cases by 6.3 percent. If that rate of increase in cases continues, as it predictably will, for just the next 3½ years that increase in cases will totally replace in number those removed by abolishing diversity—6.8 percent times 3.5 years is 23.8 percent. Abolition of diversity would remove 22 percent of the docket. But in 3½ years the docket would predictably have increased more than 22 percent.

Our enormous existing backlog of cases needing processing and trial is 166,412 and it is increasing at the rate of 13,000 cases a year. Careful study of that figure in the light of the time it will take our 152 newly authorized judges to actually get on board and to become productive demonstrates that if our present caseload system did not increase but remained constant, it would take our judiciary, including its 152 new judges nearly 4 years to get rid of that backlog. Unfortunately, by that time the new rate of case filings will totally occupy the entire Federal judiciary. Other recent factors make this even more certain. Each year our cases become more complex and require more court time. The emphasis on antitrust, White-collar crime, organized crime, civil rights, class actions, and consumer rights assure new volumes of time-consuming cases.

We should not wait to see how things are going before abolishing diversity. We know enough now to be able to predict with certainty the next 4 years as they relate to our Federal caseload. To wait is to delay justice and justice delayed is justice denied.

We know that Congress is vitally interested in providing access to the Federal courts for citizens desiring relief in such areas as civil rights, consumer rights, and antitrust. Congress has evidenced this strongly by attaching priorities to many types of rights to be asserted in Federal courts. It is a well-known fact of life that because the judiciary in the light of the Speedy Trial Act tries its criminal docket first, civil cases, including those bearing a high trial priority established by Congress, simply cannot be reached for trial because of the overly crowded docket situation. It would be intolerable to continue to treat our citizens in this manner by postponing a decision to abolish diversity jurisdiction even though that decision may be unpopular with lawyers who wish the luxury of a multiple choice of forum.

Turning again to the fundamentals involved, rather than to numbers, it is clear that Congress in its servicing of the social needs of our Republic will continue to add to the Federal court caseload. The Chief Justice recently reported that over 50 bills increasing Federal court jurisdiction were enacted in the past 10 years. Each session of Congress, again easily predictable, will continue to add to that caseload in substantial amounts. Federal question cases will increase each year. If Congress wants a Federal judiciary of several thousand Federal judges, it will be so. But isn't it wiser to cut from the ever-increasing Federal docket those cases that form a substantial part of the pressure for more and more judges and that are an unnecessary part of the Federal docket—cases that can and should be returned to the States? Is it not reasonable to recognize that some reduction in unnecessary intake is imperative?

In conclusion, in all aspects of government, throughout the history of our Nation there have been numerous and repeated changes in the original laws of our Nation to meet the changes occurring in our society. The 1789 laws were never intended to be sacrosanct and to meet the needs of a 1979 society. One hundred and ninety years ago conditions were vastly different. Certain changes of law have had to occur, have often occurred, and need to occur in the future, if our Nation and its three branches of government are to survive and properly serve this Nation.

Fortunately, under our system of Government, the American people can look to their elected representatives, their Congress to be sensitive to these problem areas where change is needed and to make those changes of law which are meritorious and in the interest of the people of this Nation. The very important diversity jurisdiction problem with its adverse effect on the ability of the Federal judicial system to serve the American people obviously has not gone unnoticed or unattended. We are all indebted to this committee for its indepth, ongoing examination of the problem.

Complete abolition of diversity is in the public interest. That is, the interest of the people of this Nation. We know that our Congress is ever alert to the needs of the people who are served by our State and Federal legal systems, and that you are always striving to improve the judicial process and the quality of justice within our Nation. We of the judiciary are confident that your indepth study will convince you that the time has come to completely abolish diversity jurisdiction.

I would like to close with quotations from two very responsible Americans. From Mr. Justice Frankfurter's concurring opinion in *Lumbermen's Mutual Casualty v. Elbert*, 1954, 75 S.Ct. 151, 348 U.D. 48, 58-59:

Madison believed that Congress would return to the State courts judicial power entrusted to the Federal courts "when they find the tribunals of the State established on a good footing." 3 Elliot's Debates 536 (1891). Can it fairly be said that State tribunals are not now established on a sufficiently "good footing" to adjudicate State litigation that arises between citizens of different States, including the artificial corporate citizens, when they are the only resort for the much larger volume of the same type of litigation between their own citizens? Can the State tribunals not yet be trusted to mete out justice to nonresident litigants; should resident litigants not be compelled to trust their own State tribunals? In any event, is it sound public policy to withdraw from the incentives and energies for reforming State tribunals, where such reform is needed, the interests of influential groups who through diversity litigation are now enabled to avoid State courts?

And, from Mr. Justice Jackson in his book titled, "The Supreme Court in the American System of Government," page 38:

In my judgment, the greatest contribution that Congress could make to the orderly administration of justice in the United States would be to abolish the jurisdiction of the Federal courts which is based solely on the ground that the litigants are citizens of different States.

I thank you for this opportunity to appear before you and to present these views of the Judicial Conference of the United States.

Senator KENNEDY. Thank you very much, Judge.
Daniel Meador, we will hear from you.

STATEMENT OF DANIEL J. MEADOR, ASSISTANT ATTORNEY GENERAL, OFFICE FOR IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE, DEPARTMENT OF JUSTICE

Mr. MEADOR. Thank you, Mr. Chairman.

It is a privilege to be here today to present the views of the Department of Justice in support of S. 679. I also want to add my words of gratitude and commendation to the chairman of the committee, and to Senator Metzenbaum and all the members of the committee for moving so expeditiously to take up this bill which concerns a longstanding subject before the Congress.

It is difficult at this late date in the debate to add anything new. There have been hearings in both the House and Senate subcommittees within the past year. This committee has available to it a document which I have here, over 400 pages of hearings conducted last year by Senator DeConcini as chairman of the Subcommittee on Improvements in Judicial Machinery. The House has published hearings. There are many other sources and documents available, including the testimony this morning and the excellent statements of Senator Kennedy and Senator Metzenbaum, both this morning and recently in the Congressional Record at the time this bill was introduced. I have also submitted a written statement today, which I would like to ask be included in the record of the hearing.

Senator KENNEDY. It will be so included.

Mr. MEADOR. One new development of recent time that might be underscored was mentioned earlier by the chairman, and that is, the President of the United States has now expressly endorsed this bill. That adds his personal endorsement to the already impressive array of other support. It is rare that a bill concerning the jurisdiction of the Federal courts has such united support among all three branches of the Federal Government and among the State courts.

I will be brief and simply mention two or three points that may not have been sufficiently stressed along the way. The question before the Congress here is one of the appropriate allocation of judicial business among the State and Federal courts. That, in turn, involves the question of the contemporary utility of the peculiar diversity of citizenship jurisdiction authorized in article 3 of the Constitution.

It must always be remembered that we are dealing here with State law cases. We are not concerned with Federal questions; we are not concerned with cases arising under the Federal law—they are pre-eminently appropriate, of course, for the Federal courts. We are talking about State business, State law; matters that one would normally think of as being in the province of State courts; indeed, this business has been the province of State courts since before the formation of the Constitution.

I would submit that the guiding principle on this question of allocation of judicial business is simply this, that generally speaking, State law matters belong in the State courts, and Federal law matters belong in the Federal courts. To paraphrase an ancient statement from high authority, "We should render unto the State that which is State, and unto the Federal that which is Federal."

Now, it may be that there are unusual circumstances and exceptional situations where we deviate from that proposition; there are such scattered here and there in the law. But on each one the Congress should think about what is the exceptional and peculiarly justified circumstance that calls for a deviation. Our submission is that in contemporary American society the general diversity jurisdiction as presently authorized in section 1332 of title 28 does not serve a useful contemporary function. Moreover, it is beset with difficulties that impede the fair administration of justice.

There are a couple of illustrations of how the diversity jurisdiction can serve a useful contemporary purpose. Indeed, I think it is fortunate that the Founding Fathers included in article 3 of the Constitution a diversity of citizenship provision which authorizes Congress to make choices about this matter and to utilize diversity of citizenship as a means of serving a good, contemporary purpose.

One good illustration of this already in the law is the statutory interpleader in section 1335. You have a situation where there is a stakeholder with some money or property being claimed by numerous persons. He owes it to one, but not to all. We have the general equity interpleader practice, but the problem confronted was that the multiple claimants may be scattered across many States, and therefore there is no one State forum where they can all be gathered in so that one lawsuit can be conducted. A single lawsuit would not only avoid a multiplicity of suits, but also it would avoid inconsistent results. So, Congress utilized the diversity jurisdiction to authorize a special interpleader procedure to take care of that situation. That makes practical, functional sense in light of present-day circumstances.

Another illustration of a possible use of diversity jurisdiction would be in the so-called mass tort cases. The easy example is the commercial airline crash where many persons are injured or killed, persons who reside in many States. The diversity jurisdiction might be utilized there through a carefully designed statute to make available a Federal trial forum for the litigation of that event, so that all the claims could be gathered into a single forum, enhancing economy of litigation, economy in the use of judicial resources, and consistency of result. We have no such statute today, and I am not in a position to say that the Department of Justice would either support or not support such a proposal. I am simply mentioning it as a possible illustration of how, through a well-designed, narrowly drawn statute, the diversity of citizenship jurisdiction could be put to good use to meet modern needs.

The fact is, though, the general diversity statute is not so tailored. One type of situation that has been often mentioned in the hearings and debates of recent times runs something like this. You have, for example, a truck owned by a large corporation which runs over a pedestrian in a small town. The injured person files suit against the trucking company. The argument is made that in that locality, in the State court where the event occurred, there is a risk of unfairness to the trucking company in this litigation with the local resident. Now, it has been pointed out several times, both in the chairman's statement this morning and by Judge Hunter here a few minutes ago, that whatever problems we have in this situation they are not problems arising from the diversity of citizenship. They derive from other things which may get in the way of a fair administration of justice.

Indeed, I would say that the general diversity jurisdiction as it presently exists under section 1332 is whimsical, arbitrary, and borders on a denial of equal protection of the law. This situation provides a good illustration of that. If this pedestrian who has been run over by the truck should sue that trucking company, and if it happens that the trucking company has out-of-State incorporation papers and has its principal place of business somewhere other than that State where the event occurred, the Federal court is available, both to the trucking company and to the injured local resident. The plaintiff has the choice of forum there. If the plaintiff should sue in the State court, the trucking company has an option to remove to the Federal district court. If the identical model of truck ran over another pedestrian in the same town, on the same day, a block away, and if that trucking company had its incorporation papers taken out in that same State or had its principal place of business in that same State, there would be no choice of forum for either the plaintiff or the defendant. So, the whimsical, almost fortuitous happenstance of where the incorporation paper is taken out, or where the company happens to have its central place of business either allow, or do not allow a choice of forum.

Now, I would submit that is an irrational basis on which to construct a fair judicial system. If there is a problem there, it ought to be addressed forthrightly for what it is, and not indirectly through an ill-drawn diversity statute such as that which we now have. The present statute is both too broad and too narrow to meet the kinds of problems of this sort which people are concerned about. It is too broad because it allows into the Federal court a great many cases where there is no real justification or actual reason; and it is too narrow because it keeps out others where there might be some justification, in the interest of fairness, for providing a Federal forum. The remedy in our view is to repeal the general diversity jurisdiction as it now exists in section 1332, plus perhaps also to continue scrutiny of these special situations of unfairness or special needs where the diversity jurisdiction might be narrowly and more fairly tailored to the problems.

Indeed, I would stress that the repeal of the general diversity jurisdiction could work positive benefits for the improvement of justice in this country. It would do that because it would focus, as never before the interest of the bar and influential litigants on improving the State systems, as providing better procedural arrangements within the State system for transfer of cases, for changes of venue, and indeed for improvement of the quality of the system at all levels in both rural and urban settings. As it is now, the diversity jurisdiction allows a whimsical kind of escape route for many influential litigants and lawyers, and thereby detracts attention from the real problems that may exist in pockets here and there in our State court systems.

With that, Mr. Chairman, I will submit my written statement and be happy to answer questions.

Senator KENNEDY. You have been very helpful. I think all three panelists so far have talked about different features of this issue, and it has been most valuable.

Judge Murphy, would you like to make any comments? Could I ask you just to hold up for a minute, Senator Laxalt is going to have to leave, and he has some questions.

Senator LAXALT. Thank you, Mr. Chairman. I apologize to the panel, I must leave in a little while and I do have a couple of questions I wanted to ask you in particular, Mr. Meador.

I have practiced law, principally on a trial basis for many years, and I have been living with recommendations as a member of this committee about this particular piece of legislation. The thing that strikes me is that by and large the reactions I have received from the people who are in the "pit," so to speak, who are trying the cases, they are almost uniformly opposed to tinkering with diversity in any substantial degree. They raise points which on the surface, at least, appear to be somewhat valid.

First of all, caseload. It is contended here, and it may be valid, that one of the reasons why we should consider it is to shift the work burden from the Federal courts to the State courts. That may be justified; except that I am told by some very fine lawyers that in States like California and New York, some of our busy States, they are already overburdened, and all we are going to do with this type of legislation is to add to that burden of the people in these busy States. Do you have any comment on that at all, Mr. Meador?

Mr. MEADOR. Yes; the relative burden problem. First I would say that the situation varies from State to State and city to city around the United States. It is not possible to make a generalized accurate observation about that condition nationwide. In some places the State court dockets are in far better position than the Federal, and in other cases vice versa. In some places a trial and disposition can be handled quickly in the State courts; in others, it can be handled more quickly in the Federal district courts.

We have looked into that and find it difficult to get comprehensive, reliable data. We have sketchy data, and the data that we can get suggests exactly what I said, that the situation varies from one place to another. You hear from the lawyers in one place and they will be reporting what exists in their locality. I would submit that the committee and the Congress ought not to decide this question on that basis for the reason that it is a variable situation from place to place, and indeed, it changes from year to year. The situation today in one locality may not be the same as the situation in that locality 3 years from now. I simply submit that is a mixed picture nationwide, and a decision on the merits of the bill really ought not to turn on that question.

Senator LAXALT. I agree with that. I, for one, would not make the judgment as a member of this committee on that ground. This is one of several points that is being raised by lawyers. Tell me, Mr. Meador, why is it that almost uniformly the lawyers oppose it?

Mr. MEADOR. I am abundantly aware of that argument, and I will be glad to give you my answer. I say this with all due respect to the bar, with no imputation whatsoever of any kind of unethical, or dishonest, or improper conduct. I practiced law myself as a litigator before I went into law teaching, and I have kept in close contact with the litigating segments of the bar through the years.

I believe the answer is that, the trial lawyers, litigating lawyers always prefer as wide a choice of forum as possible, and they are extremely reluctant to give up any options which they presently have. They have these options now in some situations—whimsically and arbitrarily, as I have suggested—but nevertheless, they are there. In

many situations they have two choices, State or Federal court. They do not want to give up these choices. Three choices, or even five, would be better.

So that is what they want—and I know how it is, I have been there myself. When you have a case and a client, you look around, and you want to proceed in any forum which in your judgment is an adequate one and will produce the most favorable result for your client. A choice allows an assessment, tacitly, depending on a lot of factors, as to where you can best proceed. As I say, there is nothing wrong with that: that is a lawyer's job. But it does not follow that Congress must leave those options available if the sound administration of justice suggests narrowing them.

Senator LAXALT. In terms of the administration of justice in a given situation, and you have already touched on this, saying the solution may be in improved State administration. But in a case where the State administration may not be all that it is, the Federal side is in better shape, does it not add to the administration of justice to leave that lawyer that option where he is going to be best served by the administration of justice?

Mr. MEADOR. My answer to that is this. First, as I touched on in my opening statement, it seems to me unfair—and indeed arbitrary—to allow that option to be available to some clients in some cases on the fortuitousness of the citizenship of the parties in modern circumstances, whereas the clients in an identical case in the same town, all of the factors being identical except citizenship of one of the parties, do not have that option. That is one answer. The other is simply, it seems to me better to focus attention directly on those problems, rather than to allow an escape hatch in the patchwork way which diversity jurisdiction does. Let us get on to those real problems and focus attention on them and cure them.

Senator LAXALT. Just a couple of other questions, Mr. Meador, then the other members of the panel, feel free to respond if you wish.

It is contended also, I think, by lawyers in support of their position, that Federal judgments—and I think that is probably the case—are far more easily and effectively enforced than State judgments.

Mr. MEADOR. I am not quite sure I understood your question.

Senator LAXALT. In other jurisdictions Federal judgments are more easily imposed.

Mr. MEADOR. Yes, I suppose there is a bit to that. You can take a Federal judgment from one district court and register it in another and proceed to enforce it there, whereas a State judgment—depending on the law of the State to which you seek to go to enforce it—may be somewhat difficult. I think that situation, though, has considerably improved. Justice Sheran might elaborate on the subject a bit more. We have now the Uniform Enforcement of Judgments Act, that has improved the situation. So I would not put a great deal of weight on that point.

Senator LAXALT. It has been suggested to perhaps alleviate that, that a State judgment be registered as a Federal judgment and then use the enforceability process. Has this been contemplated at all?

Mr. MEADOR. Well, I think it is a good idea. We have not pursued it. I think this is an excellent idea of how Congress through its powers

can address a lot of these problems that are raised by lawyers here, but can address them more forthrightly for what they are.

Senator LAXALT. Let me ask you one other question, Mr. Meador. If we are going to elevate the Federal judges to decide substantial Federal questions on the policy level—I do not know if we are going all that way with this kind of legislation, but I think we go much of the way, some of the lawyers contend, and probably some of the judges share the concern, that they no longer will be people judges. They are primarily going to be discussing important policy questions and will not be able to touch the real world, and as a result thereof the Federal judiciary's responsiveness is going to be reduced somewhat.

Mr. MEADOR. Yes; I would have two responses. First, if that happened to the Federal judiciary, I think the problem should be looked into directly if, somehow, they are turning into something other than judges who decide cases under the law.

But, second, I would say that the growth in Federal substantive legislation in recent years has been such that Federal judges, even if they decide nothing but Federal law questions, are indeed deciding a great many questions of the sort which in the past would have come into Federal court only through the diversity jurisdiction. For example, FEELA cases, Jones Act cases—these are nothing but garden variety personal injury cases, just like automobile accidents and others. Cases arising under OSHA and a dozen other regulatory statutes involve very individualized personal problems of harm, damage, controversy between people on a personal level, people in business, and people in Government. I really do not see any major problem there today.

Fifty years ago, or seventy years ago that point would have had a great deal more force to it than it does today, in my judgment.

Senator LAXALT. There was reference made, Mr. Meador, in your statement that the proposed legislation, relieving the Federal courts of these many cases, is going to result in cost efficiency. Would you elaborate on that point?

Mr. MEADOR. Yes, but I cannot elaborate a great deal at the moment. We have a report under preparation in my office which I would like to submit to the committee when it is completed within a few days. In my written statement I have attempted to extract a few highlights that are now available from the data. Two things are indicated in the sketchy data available to me at this moment. One is that diversity litigation consumes a disproportionate amount of time and resources in the Federal courts compared to other civil litigation. The figures indicate that diversity cases tend to settle less quickly, they stay in the system longer, they take up more jury trial time, and so on. Translating that into dollars, the figure provides the basis for an estimate that on the order of \$9 million might be saved by the Federal judiciary if general diversity jurisdiction were removed.

All of this will be elaborated in greater detail in the report I hope to submit to the committee within the next several days.

Senator LAXALT. Thank you very much.

Mr. Chairman, that is all I have at the moment, thank you for your indulgence.

[The prepared statement of Daniel J. Meador follows:]

PREPARED STATEMENT OF DANIEL J. MEADOR

It is a privilege to appear before the Judiciary Committee of the Senate to submit the views of the Department of Justice in support of S. 679 which would eliminate the general diversity of citizenship jurisdiction in the Federal courts.

With the passage of the first Judiciary Act nearly two centuries ago, the Federal trial courts were granted original jurisdiction in some cases between citizens of different States. That jurisdiction was very limited; a Federal trial court was made available, on diversity grounds, only where one party was a citizen of the State where the suit was brought, and as a practical matter this meant the Federal court in the home State of the defendant. The major historical justification for this jurisdiction was the apprehension that State courts would be prejudiced against out-of-State plaintiffs. It was believed that if such prejudice existed, it would deter interstate travel and commerce, and thus hinder national expansion.

The continuing need for diversity jurisdiction, especially in its expanded scope, has been the subject of debate for decades. In recent years there has been a renewed effort to amend or repeal the diversity statutes, an effort that has won broad support within most segments of the legal community. The focus of the debate has been on the question how best to amend the diversity statutes. The bills considered in this and past Congresses range from the very modest proposal to raise the jurisdictional amount to proposals to abolish completely all of the diversity jurisdiction.

During the last Congress, the Department of Justice proposed legislation that would deny a plaintiff the opportunity to invoke diversity of citizenship jurisdiction in his home State. Federal law has long recognized the lack of justification for permitting a resident defendant to invoke the Federal diversity jurisdiction in his home State; such defendants are prevented from removing cases brought against them in their own State courts. 28 U.S.C. § 1441(b). It was our view that resident plaintiffs should be treated equally and that they likewise should be required to use their State courts when suing in their home States. The House of Representatives determined, however, that the time was ripe for complete abolition of the general diversity jurisdiction, and, by a substantial vote, it passed a measure that would accomplish that result (H.R. 9622); interpleader jurisdiction in diversity cases, under 28 U.S.C. § 1335, was left intact. We noted at that time that although we continued to adhere to the position set forth in our own proposal, we had "no problem in supporting H.R. 9622 as well."

Since the passage of H.R. 9622, we have continued to evaluate the various proposals in light of other information that has become available. We have concluded that the action taken by the House in the last Congress is a sound approach. Accordingly, we endorse S. 679 and its House counterpart, H.R. 2202, which are essentially identical to the measure that passed the House during the 95th Congress. Several reasons have led us to this position.

One of the most important is the immediate and quite real effect of diversity cases on Federal district court congestion. The number of civil filings in our district courts has doubled in the past 15 years. For several years diversity cases have accounted for approximately 23 percent of all civil case filings. There is little evidence that, absent jurisdictional modifications, this trend of increased volume of civil filings will be checked or reversed.

At the request of the chairman of the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice we have attempted to determine with some degree of specificity "the cost of diversity cases to the Federal judicial system and the amount of time expended on these cases."¹ We have prepared a report in response to that request, and I will submit a copy of it for inclusion in the record. At this time I would like to share some of the highlights with you.

The data show that diversity cases, as opposed to civil cases in general, are likely to remain in the system for longer periods of time, to require more pretrial proceedings, to go to trial rather than to be settled, and by an overwhelming number to require a jury trial. During fiscal year 1978, for example, 25 percent of the civil cases terminated in the district courts were diversity cases. Yet diversity cases accounted for only 13 percent of the civil cases terminated prior to pretrial. On the other hand, of the civil cases terminated after pretrial, 43

¹ Letter to Patricia Wald, Assistant Attorney General, Office of Legislative Affairs, from Representative Robert W. Kastenmeier, chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Jan. 15, 1979.

percent were diversity cases. Further, 39 percent of the cases that went to trial and 64 percent of the civil jury trials were diversity cases. Twelve percent of all diversity cases were terminated by a trial—a rate twice that for all other civil cases. Based on these data, it seems clear that diversity of citizenship cases occupy the time and resources of the Federal judiciary out of proportion to their numbers.

In addition to figures showing time and resources expended on these cases, it is also possible to show this impact in dollar amounts. In the report being submitted, estimates are included from the Administrative Office of United States Courts on the saving that will be realized if diversity jurisdiction is eliminated. These estimates are based upon the anticipated reduction in jury and personnel costs currently devoted to the processing of these cases. The Administrative Office estimates that once all of the pending diversity cases are terminated, the actual money savings will be nearly \$9 million annually. Thus, whether expressed in terms of resources or money, abolition of diversity jurisdiction can be expected to provide substantial relief to the Federal courts, as well as to the Federal taxpayers.

Further evidence of the burdens and difficulties cast upon the Federal courts by diversity cases can be found in a study recently completed by Prof. Thomas D. Rowe, Jr., of the Duke Law School, under a contract from the Department's Office for Improvements in the Administration of Justice. This study examines some of the nonobvious effects of diversity cases—effects that would disappear entirely from the Federal judicial system if the cases were filled in State courts. As Professor Rowe notes, Federal judges must spend considerable time determining the actual State citizenship of the parties, attempting to identify manipulation or collusion designed to invoke or defeat Federal diversity jurisdiction, determining the proper alignments of parties, sorting out the jurisdictional problems encountered by party joinder and intervention, and dealing with the troublesome separate-claim removal provision (28 U.S.C. § 1441(c)). The study makes a convincing case for the abolition of the general diversity jurisdiction. It is scheduled for publication in the March 1979 issue of the *Harvard Law Review*.

The creation of 152 new judgeships under the Omnibus Judgeship Act² has led some persons to suggest that the Federal courts will be in a better position to handle their caseloads and that this removes the need to curtail the diversity jurisdiction. But that view is illusory. The new judgeships do not diminish the desirability of placing the diversity cases in the State courts.

In 1970, the last time additional judges were authorized, the average civil filings per district judgeship was 218 cases—a number that was then considered to be manageable. By 1978, the number of civil filings per judgeship had increased by nearly 60 percent to 348 filings per district judgeship. Projections for 1979 indicate that, even with 117 new district judges, the number of civil filings will be in excess of 280 cases per authorized judgeship—nearly 30 percent more than was the case in 1970.

The history of growth in Federal dockets, together with contemporary conditions in American society, strongly indicate that case filings in the Federal district courts will continue to increase, as they have over the past 15 years. Moreover, the Speedy Trial Act of 1974 requires judges in many districts to devote increased time to criminal cases, thereby causing backlogs and delays in civil cases. Unless other steps are taken promptly, it is likely that even with the new judges, the Federal dockets will again, within a few years, be back in the unmanageable condition of recent years.

Indeed if the number of civil case filings continues to increase at the current rate, we can expect that by 1983 the number of civil filings will again reach the level that existed last year (348 filings per judgeship) before the increase in judges authorized by the Omnibus Judgeship Act. At that time Congress would again face pressures to create still more judgeships. The only way to prevent that course of events and to enable the judiciary to handle its business more effectively is to adopt measures such as the curtailment of the diversity jurisdiction.

The effect on Federal judicial business is not, however, the only reason to amend the diversity statutes. Diversity suits are cases that involve State law only. Under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), Federal judges cannot give authoritative interpretations of State law. Moreover, in a Federal system

² Public Law No. 95-486.

such as ours, State law cases ought to be tried in State courts.³ To allow these cases to remain in the Federal courts should require some overriding justification. We submit that in contemporary American society there is no such justification for the general diversity jurisdiction as defined in 28 U.S.C. § 1332.

The elimination of these cases from the Federal courts would not have an appreciable adverse effect on the State courts. A recent article in the *State Court Journal* points out that the States would experience an average 1.03 percent increase in civil filings if Federal diversity jurisdiction is abolished.⁴ Some States would be affected more than others, and a few might have to increase the number of trial judges in some localities. For the vast majority of the States, however, abolition of diversity will have little or no effect on State judicial business.

Further evidence that the elimination of the Federal diversity jurisdiction would pose no serious problems for the State courts can be found in the position taken by the Conference of Chief Justices. This Conference is composed of the Chief Justices of all the 50 States. At its meeting in August 1977, the Conference adopted the following resolution:

Our State court systems are able and willing to provide needed relief to the Federal court system in such areas as:

* * * * *

The assumption of all or part of the diversity jurisdiction presently exercised by the Federal courts.

This and the above statistics provide an effective answer to any argument that withdrawal of Federal diversity jurisdiction will create unmanageable difficulties for the State courts.

When hearings were conducted on this subject during the last Congress, testimony or statements were received from dozens of witnesses representing the bench, the bar, academia, the Department of Justice, and several public interest groups. Nearly all of the witnesses supported either complete abolition or substantial curtailment of diversity jurisdiction.

The arguments in opposition can be summarized as follows: (1) a choice of forum between Federal and State courts in State law cases is an important right that should be preserved; (2) the Federal courts administer a higher quality of justice than the State courts; (3) diversity jurisdiction provides a worthwhile means of exchanging ideas and procedures between State and Federal courts, while (4) abolition would create a specialized bar; and (5) out-of-State litigants will be the victim of bias and prejudice at the hands of State courts.

The arguments are neither new nor do they withstand close scrutiny. Both Judge Henry Friendly and Prof. Charles A. Wright in their testimony before the House subcommittee considered some or all of these arguments and demonstrated how lacking in substance they are.⁵ With respect to the interplay between the two systems, Judge Friendly noted, and I agree, that the growth of Federal litigation insures that lawyers of every sort will increasingly find themselves in Federal court without the aid of diversity jurisdiction.⁶ Moreover, abolition or curtailment of diversity jurisdiction will undoubtedly cause those attorneys who have previously confined their practice to Federal court to appear more frequently in State court or else lose their clients.

Equally without merit is the notion that a litigant has some fundamental right to a choice of forum. Even under current law, there is no choice except by

³ An example of the problems encountered by the existence of diversity jurisdiction can be found in *Ann Arbor Trust Co. v. North American Co.*, 527 F. 2d 526 (6th Cir. 1975), cert. denied, 425 U.S. 993 (1976). There the district court was called upon to interpret a suicide clause in a life insurance policy. The question was governed by State law. Four policies were litigated in the district court under diversity jurisdiction, while five other policies were litigated in the State court because diversity was lacking. Since the issue involved was a novel one, the district court was forced to make an "educated guess" concerning the proper interpretation of State law. The court of appeals felt obliged to remand the case with instructions that the case be retained on the district court docket until an authoritative decision was rendered by the State supreme court. It is clear that the difficulties encountered by the two Federal courts in this case were solely the product of diversity jurisdiction. The case involved State law only and, accordingly, should have been litigated in a State court.

⁴ Flango & Blair, "The Relative Impact of Diversity Cases on State Trial Courts, *State Court Journal*," 20 (summer 1978).

⁵ Diversity of Citizenship Jurisdiction/Magistrate Reform: Hearings Before Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on Judiciary, 95th Cong., 1st sess., 205-206, 220-221 (1977) (statements of Judge Henry Friendly and Prof. Charles Wright).

⁶ *Id.* at 205.

accident of geography. Further, as Judge Friendly has noted, the "Federal courts were intended from the outset to be courts of severely limited jurisdiction. Lawyers and clients are not entitled to go there unless there is some good reason why a Federal court rather than a State court should hear the case."⁷

Arguments over whether the Federal courts afford a better quality of justice than the State courts, or vice versa, are unrewarding and inconclusive. The real question is whether the State courts administer an inferior or inadequate brand of justice in cases resting on State law where there are parties from different States. The answer is that the State courts decide a large number of cases of that sort as a matter of routine, and they have done so for many years in a sound and fair manner. Many of these cases involve less than \$10,000, and consequently they cannot gain access to the Federal courts. However, many other cases involving more than \$10,000, with citizens of different States as opposing parties, are filed in the State courts and are not removed to the Federal courts.

The quality of the State courts and of State judicial personnel has improved markedly in the last 20 years. This has resulted from a number of developments, including the following:

The rapid growth of judicial education. The concept of continuing professional education for judges was almost nonexistent until the last two decades. Since that time, the National Judicial College has been created. It offers numerous short courses of 1 or 2 weeks as well as month-long courses, principally for State trial judges. Through these courses, the college presents educational programs to approximately 2,500 State judges annually. Some 8,798 State trial judges of general jurisdiction have completed the full month-long resident course at the college. In addition to the college, there are numerous other educational programs for State judges, including a variety of short courses, covering subject matter that is both generalized and specialized, offered by the American Academy of Judicial Education. Moreover, a number of States have their own judicial colleges or offer special short courses for their judges. As a result, most State judges today participate in periodic educational programs.

Improved quality of State judges. The first State judicial nominating commission implementing merit selection of judges was adopted in 1940. Today, nominating commissions with statewide merit selection procedures for some or all State judges exist in about 25 States. To these improved selection procedures, one must add the fact that the overall quality of legal education in the United States has improved substantially in the last 20 years. Thus, increasingly, persons appointed to the State courts possess sound formal educational backgrounds and solid career experiences.

Improved procedures in State courts. At least 30 States today have rules of procedure that are substantially identical to the Federal Rules of Civil Procedure. Furthermore, over the last 2 decades, bar associations, law schools, and other groups have given increased attention to reforms in State court procedures.

Improved court management. The movement toward effective court administration and court management has blossomed within the last two decades. Until well after the Second World War, very few States had effective state-wide systems of court administration. Yet today, most States have offices of management or administration, staffed by trained professionals. In addition, there is now an Institute for Court Management, established in 1970, which continually trains professionals to enter court administrative offices.

The National Center for State Courts. This national center was created in 1971 to provide a wide variety of services to the judicial systems of the 50 States, the District of Columbia, and a few other jurisdictions. It is an informational clearing house for developments and improvements in all court systems. In addition, it provides technical assistance to the courts of the States and conducts research in State court problems. A permanent headquarters building for the Center was dedicated in Williamsburg in March 1978, and it is likely that this organization will provide increasing benefits and an increasing array of services to the State courts. This in turn will enhance the quality of the State judiciaries at all levels.

Federal funding and miscellaneous other assistance. Ten years ago, no Federal funds flowed to the courts of the States. Since that time, at least

⁷ Id. at 206.

\$229 million of Federal funds have gone directly or indirectly to these courts. Most of this funding has come through the Law Enforcement Assistance Administration. These funds have provided assistance to the State courts in developing new procedures, in restructuring and reorganizing themselves, in training personnel, in improving court technology, in conducting research to improve State court processes, and in a variety of other ways.

The Department of Justice supports Federal funding for the benefit of the State courts at least at the present levels. Collectively, these developments mean that the judicial systems of the States today are far different from those that existed as recently as 20 years ago. Impressions of the State courts, and historical assumptions about these courts, which made comparisons to the Federal courts unfavorable, are increasingly inaccurate. Today State courts are better financed, better organized, and better administered than they have been at any time in the past. Moreover, their personnel, both judicial and administrative, are of far higher quality than ever before. All indications are that movement in this direction is almost certain to continue and that we may count on an ever-higher quality of justice through the courts of the States. There need be no fear that litigants of diverse citizenship in civil cases will, on the whole, get any reduced quality of justice by reason of their diverse citizenship than they would get in the Federal district courts.

As to the bias argument, Professor Wright noted in his testimony, it is "doubtful in the extreme that prejudice against a person because he is from another State is any longer a significant factor."⁸ Even if there be some residue of such bias, it would not likely be eliminated by litigating the case in a Federal district court sitting in the same locality as the State court. Differences between State and Federal courts sitting in the same State are considerably less today than they were some years ago. Juries today in the Federal district courts and in State trial courts of general jurisdiction are drawn largely from the same population pools and include the same types of persons. Further, in any given State, the State and Federal trial judges have typically been the product of the same State legal system and have similar backgrounds. As Judge Elmo Hunter remarked last year at the Williamsburg seminar:

It is strange to me as one who has been a State court judge for 13½ years and one who has sat on all the courts of record in his State * * * that I have been susceptible of such prejudice then but have been purged of it for the 12 years I have been a Federal judge.

Thus, in juries, procedures, and judges, the Federal and State courts sitting in the same geographical territory do not, in general, differ as much as perhaps they once did, and a Federal district court is unlikely to afford substantially different treatment for litigants in State law cases.

The kinds of prejudice which may exist do not derive ordinarily from the fact that a party has a State citizenship different from that of the opposing party. In over 70 percent of the diversity cases, one or both of the opposing parties is a corporation. Prejudice, if it exists at all, is likely to be directed to the corporate party simply because of its nature, irrespective of whether it is a home State or out-of-State litigant. In suits between individuals, the bulk of the cases are personal injury actions where the jury knows that the real party in interest on the defendant's side is almost certain to be an insurance company; any prejudice will stem from that factor and will exist in equal measure in Federal court.⁹

Concern has been voiced by some persons about the litigation of so-called mass torts if the general diversity jurisdiction is eliminated. The most common example is the commercial airline crash; however, there are other types of mass injury cases that would also be affected such as bus or train accidents. It is argued that Federal court jurisdiction and the use of the multidistrict panel procedures are necessary to make possible the litigation of such cases in a single court, thereby reducing expense and avoiding conflicting results. The injured persons in these occurrences typically reside in numerous States, and given the modern reach of in personam jurisdiction, suits could be filed in many jurisdictions. If these suits were confined to State courts there would be no way to gather them all into a single forum. This is a situation in which there is a substantial functional justification, in light of contemporary needs, for making a Federal forum available. But to do this it is not necessary to preserve the general diversity jurisdiction.

⁸ Id. at 220.

⁹ Friendly, "Federal Jurisdiction: A General View," 148 (1972).

There are basically two ways in which a Federal trial forum can be provided for these mass tort cases. One is to federalize the substantive law; Congress could enact a statute creating a Federal cause of action in these situations. The litigation could then be initiated in the Federal district courts under the Federal question jurisdiction. The other way is to draft a special statute based on the article 3 grant of diversity jurisdiction conferring jurisdiction on the Federal district courts to entertain these mass tort cases where there are widely scattered plaintiffs. If the committee is interested in pursuing these possibilities, the Office for Improvements in the Administration of Justice will cooperate in developing a suitable bill.

Statutory interpleader under 28 U.S.C. § 1335 is another good example of a sound functional use of diversity jurisdiction in contemporary circumstances. We endorse the retention of that provision. That use of the diversity jurisdiction continues to have substantial practical benefits by permitting disputes with widely scattered claimants to be litigated in one forum. This avoids a multiplicity of actions with possible conflicting results.

S. 679 also eliminates the jurisdictional amount from 28 U.S.C. § 1331, thereby removing that monetary requirement from all Federal question cases with the exception of those brought pursuant to the Consumer Product Safety Act. Because most Federal question cases already come into the Federal courts under jurisdictional statutes that do not require any monetary amount, this amendment would cause only a relatively slight increase in the number of cases filed in the Federal courts. We also support that change.

The likelihood that any increase in Federal caseloads resulting from the elimination of the jurisdictional amount will be slight is reinforced by an examination of the effects of the 1958 change in the jurisdictional amount. In that year the jurisdictional amount was increased from \$3,000 to \$10,000 for both diversity and Federal question cases. With respect to diversity cases, the change had the apparent effect of decreasing filings the following year by over 30 percent. On the other hand, Federal question filings decreased by less than 1 percent. We conclude from this that the number of Federal question cases affected by the jurisdictional amount in 28 U.S.C. § 1331 would be few. As to those few cases, we believe there should be no price on entrance to the Federal courts for a case that arises under the Constitution, laws, or treaties of the United States.

Enactment of this bill eliminating the general diversity of citizenship jurisdiction will enable the Federal courts to deal more effectively with their caseloads and will be a significant step toward obviating the need to create additional judgeships within a few years. Moreover, passage of the bill will produce the salutary effect of having most State law issues decided in State courts and most Federal law issues decided in Federal courts. For these reasons, the Department of Justice urges prompt enactment of S. 679.

Senator KENNEDY. Judge Murphy, we would welcome your comments.

STATEMENT OF HON. ROBERT C. MURPHY, CHIEF JUDGE, COURT OF APPEALS, STATE OF MARYLAND

Judge MURPHY. Mr. Chairman, very briefly, the Maryland judiciary strongly supports the pending legislation and all that has been said today in support of its adoption.

I will not take the committee's time by repeating the substance of what you have already heard. I was interested, however, and I called the clerk of the Federal District Court in Maryland yesterday to find out how many cases in civil cases are settled out prior to trial. I was somewhat astonished to find that of the 2,146 civil cases filed in the District Court in Maryland last year, 92.4 percent of them were settled prior to trial. I tried to get a breakdown of how many of those were diversity cases and was not able to do so, but an intelligent esti-

mate of that was 75 percent, which indicated to me a terrible waste of very valuable Federal judiciary time.

Diversity cases take perhaps longer to settle and involve more extensive pretrial than any of the other kind. It seems to me that the bottom line is that these cases are not going to trial and the Federal court is being abused under existing law—it has for many years. But again, I think it is a wasteful use of scarce Federal judicial resources, and I think the State is well able to handle that. Under existing law, as you know, in some States a procedure for certification of State law questions is being utilized. This is a cumbersome procedure which actually slows down the pace of litigation. It is not an infrequent occurrence to have a Federal judge certify a question to a State court when the lawyers feel the State law is fairly well settled, and that does slow the process down somewhat. But again I say, I am simply very supportive, the Maryland judiciary is, of the pending legislation and hope it will be adopted.

Senator KENNEDY. Thank you very much.

Perhaps we could use this opportunity, Judge Sheran, to raise a question which has been raised on another matter which of course is related to this, and that is the scope of Federal jurisdiction in the Criminal Code.

Do we need to try all bank robberies in the Federal courts, or is it appropriate to give some thought to some of those matters being decided within the State courts as well? Should not the new Federal code narrow Federal jurisdiction and place more Federal crimes, such as bank robbery, in local courts?

Justice SHERAN. I do have some thoughts on it, although they are probably not as carefully formulated, Mr. Chairman, as they could be, given more time.

I believe that all criminal prosecutions that can be handled effectively in State court should be handled in the State court, on the principle that we should bring the exercise of the powers of government as close to the people as we possibly can and still deal with the problems effectively. Now, the reason that the robbery of banks insured by the Federal Deposit Insurance Corporation, or national banks, have been prosecuted principally in Federal court in recent time is because of the belief that the investigative capacity of the Federal Government, through the Federal Bureau of Investigation and other Federal agencies was at a higher level than in the States.

My impression is that through such Federal programs as the LEAA, for example, the investigative capacity and potential of the States has greatly increased and so has the capacity for dealing with these problems. There are many forms of crime that have multi-State facets that can be handled more effectively through the Federal investigative agencies than the States'. But there are many kinds of prosecutions—interstate transportation of stolen automobiles, for example—that have been handled as Federal matters, that could be handled as well or better in a State court.

Senator KENNEDY. Judge Hunter, would you like to add something to that? You have been both a State judge and a Federal judge. Would you care to give us your views on that?

Judge HUNTER. I address the subject of the quality of the State court system—Justice Sheran is perhaps modest—but those of us who

have stayed close to the development of the modern State court and I have done so not simply as a judge in both the State and Federal court systems, but also during the time when I was very active in the American Jurists Society and served as president and chairman of the board of that society. I have become aware of the fact that the State court systems today in a general way have become very moderate, and they are quickly acquiring, if they have not already acquired, all the tools they need to do a very effective job indeed.

It is to their credit that they want to address all of these local problems that are somewhat swept under the rug by the application of Federal diversity jurisdiction. It is to their credit that they are now paying very close attention to State sovereignty matters and federalism.

From where I sit, and I lunch daily with my brother State court justices and judges to this day, there is no doubt in my mind but what the State court system can provide a very adequate forum indeed for these 30,000 to 32,000 Federal diversity cases that are floating around. These diversity cases can very well be folded into a State court system that has in excess of 6,000 basic trial court judges; much better, really, if they are given the opportunity, than they could fit into our Federal system of less than 500 judges who are always under pressure of new social type jurisdiction.

So, if I have a bottom line, I simply say that the State court judges are being very modest about their abilities.

Senator KENNEDY. One of the points that has been raised by a member of the committee, that I wish you would address—Senator Heflin, who is unable to be here and will submit written questions—concerns the impact of enactment of arbitration legislation on the diversity issue. If we abolish diversity cases, does that not remove the primary cause of action which would be subject to arbitration, particularly when it raises the questions of second-class justice. Would you address that issue?

Mr. MEADOR. In our view the enactment of S. 679 eliminating diversity jurisdiction would not eliminate the desirability of enacting the presently pending bill that authorizes the use of arbitration in the district court. It is true that many of the cases which would go to arbitration under a court-annexed arbitration plan would be diversity cases. It is difficult to estimate exactly what that figure would be. We have tried to do so. In our best judgment, the figure is somewhere in the neighborhood of 60 percent. I think it is fair to say it would probably be a majority of the eligible cases, but how large a majority is unclear. It would probably depend on the exact design of the particular district's arbitration plan. These plans can vary and would vary from district to district in this regard. But in any event, my first point is, that there still would be a substantial number of cases—not an insignificant number but a substantial number of other nondiversity cases—eligible for arbitration, which would make the passage of the bill and the adoption of the plan quite worthwhile.

There are numerous types of Federal question cases today which are very similar to diversity cases in that they present factual controversies and disputes over the amount of money owed. As I mentioned a moment ago in response to Senator Laxalt, today—as contrasted with, say, a half century or more ago—Federal substantive law has extended

so far in so many areas of life and is regulating so many activities that the controversies arising under Federal law are not that different from a great array of controversies arising under State law. So, it is our view that there are still a significant number of these cases, a sufficient number of cases to make it worthwhile for Congress to authorize district courts to adopt court-annexed arbitration plans. Furthermore, it has to be remembered that the arbitration bill does not mandate arbitration anywhere. It is merely an authorizing bill which gives a district court, acting through a majority of its active judges, the authority to adopt a plan for arbitration within the framework of the bill.

Senator KENNEDY. Senator Thurmond?

Senator THURMOND. I have just a few questions here for Mr. Meador, and he can answer them for the record, to save time.

Mr. Meador, if you would like to answer these for the record, I am due in another meeting concerning the Indians from my State. They are claiming a lot of land down there that is worth a lot of money now, and I think I need to get over there.

[The questions submitted by Senator Thurmond and the answers of Mr. Meador can be found in the appendix.]

Senator THURMOND. Could Mr. Meador just answer these questions for the record?

Senator KENNEDY. I do not know, before the Senator departs, whether Mr. Meador could perhaps elaborate a bit. The question is of very central concern to members of the committee, and that is how you deal, if we pass this legislation, with this issue of bias, if it does exist. How would the States deal with that? What would you feel would be more incentives for the States to deal with it if we actually pass this legislation?

Mr. MEADOR. Yes, sir. There are several ways the States themselves could deal with it. One could be, for example, by careful moderation of their change of venue laws to take into account more directly these sorts of problems. That is one way.

Another way, of course, is simply to upgrade generally the quality of the State court systems. I have listed in my testimony a number of developments in recent years which are moving fast and hard toward a better quality of State courts in general. I expect all of these to continue to accelerate, and I think you will have better State court systems.

On the change of venue point, it may be that the State could design a provision to allow a change of venue on a fairly weak showing of prejudice. That would take care of the situation that does bother a lot of people and is troublesome to me, too, where you have something of a one-sided situation, so to speak, in a particular State trial forum, where the cards are stacked against one party. Usually though, I repeat, this is not because of State citizenship but because of something else. It is usually because of the corporate nature of one party as against an individual who is the opponent, or because one party is a popular local citizen and the other comes from somewhere else—maybe two countries away, as well as a State or two away. The prejudice may be religious, ethical, racial, all of these factors are in their polluting the stream of justice, so to speak. States might give more express attention to a shift of forum to increase fairness in that situation.

But there is also the possibility, although we have not explored it very far, of enacting a Federal statute which could allow—upon a requisite showing of some type of prejudicial situation—for removal of a case into the Federal district court. I am not prepared to advocate that. It would be difficult, I think, to design a statute which would be workable in letting into the Federal court what you want to let in, and yet keeping out what you did not want in. But that is a possibility some people have suggested.

There is another proposal with which the committee may be familiar. It was put forth by Prof. David Shapiro of Harvard Law School, and it has been cited in past hearings. He has suggested that Congress could make the diversity jurisdiction optional, district by district; that is, he would allow the district court to decide whether the relevant kind of prejudice within that particular district was sufficient to justify making a Federal diversity forum available. Again, I do not endorse that, I simply mention it as an idea.

Senator KENNEDY. Senator Leahy?

Senator LEAHY. I would like to ask a couple of questions, Mr. Chairman. In Mr. Meador's statement on page 17 he talks about a 1958 change in jurisdictional amount.

You said:

In that year the jurisdictional amount was increased from \$3,000 to \$10,000 for both diversity and Federal question cases. With respect to diversity cases, the change had the apparent effect of decreasing filings the following year by over 30 percent. On the other hand, Federal question filings decreased by less than 1 percent.

Let me just think out loud a little bit, and anybody from the panel feel free to answer.

If we were to take the jurisdiction amount for diversity cases and increase it very, very substantially, would that remove the problem, or would that simply add to it?

Mr. MEADOR. Would you like me to respond?

Senator LEAHY. Yes.

Mr. MEADOR. I think a substantial increase in the jurisdictional amount could have an effect in reducing the number of diversity cases. I should say first, though, that to accomplish this result, the increase would have to be very substantial. Raising it to something on the order of, say, \$25,000—as has been suggested—doubt would have a great impact. For one reason, a lot of diversity litigation is for unliquidated damage and it is not difficult for a plaintiff's lawyer to claim a large amount of money in good faith, and that is really the test. It is difficult to defeat the claim of amount for jurisdictional purposes, as a practical matter.

Senator LEAHY. You never put a limit on the amount that you really would like to recover, especially in a tort case, you obviously put it higher.

Mr. MEADOR. Moreover, with inflation running high—and I see no sign that it is going to go away entirely—if that continues in year ahead, any amount you fix now would be overrun in a very few years and might not accomplish much.

It is for these reasons that we have not seriously considered raising the amount as a satisfactory solution to the diversity problem. More-

over, there is a factor about it that bothers some people, and that is that it would more and more tend to make the Federal courts—at least in the diversity cases—the courts for the wealthy, for the big claim, with too little attention being paid to the smaller but important case.

Senator LEAHY. How many instances have you seen where parties get into Federal court by making artificial diversity. Is that practice prevalent around the country?

Mr. MEADOR. Yes; over the years there has been a good deal of jockeying for a position of that sort. In my testimony I cite a study done by Professor Row, that is scheduled for publication in the Harvard Law Review in this month's issue. He attempts to analyze features of diversity that flow from that sort of jockeying to show the extensive time taken by Federal judges over the years, collectively, to wrestle with those problems.

There has been a chain of cases in the fourth circuit over the past 10 years, dealing with exactly the problem you point out, mainly the appointing of guardians or administrators solely to create diversity. The third circuit also has had a series of cases of that kind, and the court has attempted to deal with the problem and resist those maneuvers. But collectively, they add up to a substantial amount of litigation over the years of a counterproductive or dysfunctional variety.

Senator LEAHY. I recall a Federal judge exploding periodically in Federal court, saying that he was tired of municipal court cases being brought into Federal court, in instances where a guardian was appointed just to get the diversity. He probably had further stress where a jury came up with a \$3,000 award where a \$25,000 prayer was made in the complaint. His concern was, that such matters should have been handled in State court.

Have there been discussions by any of the State court associations? How do the States feel about this? What kind of reaction do you receive from State courts to remove diversity?

Mr. MEADOR. I will defer to the State judge on that.

Justice SHERAN. With respect to State courts, the Conference of Chief Justices which is made up of the chief justice of each of the 50 States, adopted a resolution August 3, 1977, declaring that in our judgment the State courts are ready, willing and able to take over cases which we consider to be in our proper area of responsibility.

I think the feeling on it is pretty well epitomized by a conversation I had yesterday with Chief Justice Givan of Indiana. During the course of the conversation he said that he felt in Indiana the State court could absorb all the diversity cases without even feeling the shift. In Indiana, he told me, they have seven Federal judges and something over 200 State court trial judges.

Senator LEAHY. But not in the same jurisdiction.

Justice SHERAN. That would be true. But his view of the thing is, there are something over 200 that would be competent to handle contract cases and personal injury cases in that State. So, it is his best estimate that they could absorb these cases without difficulty.

It is true, it has been suggested that the jurisdictional amount could be increased from \$10,000 to \$25,000, and that that might bring an end to the problem from the standpoint of the Federal Government and the standpoint of the attorneys who have special reasons for wanting to be in Federal court.

From the standpoint of State courts this is not a satisfactory answer. It suggests that State courts have the competency to handle the great bulk of contract and personal injury cases where the amount in controversy is not too much, but when it gets a little higher, then a Federal forum is needed for the resolution of the case. State court judges generally find this attitude to be somewhat demeaning.

Senator LEAHY. Are you saying that in very similar automobile accident cases, one where damages are low and another where damages are high, that from a judge's standpoint the cases are virtually the same?

Justice SHERAN. It is the same, Senator. I have had 15 years of experience as a judge and 25 years of experience as a trial lawyer. Based upon my experience as a trial lawyer I am satisfied that there are no differences, particularly in the negligence case, between the case where the damages are over \$25,000 and those where they are less.

It seems to me there are some pretty serious questions about the acceptability of a line of demarcation between State and Federal courts that turn on the amount of money that is involved. So, we would certainly prefer that this would not be the case.

Senator LEAHY. If we were to remove diversity, would most of the actions that end up in State court be negligence cases?

Justice SHERAN. The bulk of the cases, according to the statistics that I have read, are either contract cases or personal injury cases. There may be as many as 10 percent in other categories, but I doubt there would be more than that.

Senator LEAHY. One of the reasons trial lawyers wanted to use the Federal court is that by and large the verdicts were high. Do we know if that is still a factor; are verdicts generally higher?

Justice SHERAN. This varies so much from State to State that it would be difficult to draw a conclusion that would be reliable.

The State court administrator of the State of Pennsylvania advised our State court administrator this past week that in the past there was some thought that in parts of Pennsylvania the State courts tended to be more conservative than their Federal counterparts.

But given the fact that in a general way the Federal juries and the State court juries should be chosen—

Senator LEAHY. They are the same people.

Justice SHERAN [continuing]. From the same background, I think it would be very difficult to make a valid case for that position statistically.

Senator LEAHY. I understand, Mr. Chairman, just one more question, if I may.

What do you estimate the removal of diversity would do to criminal dockets, what kind of improvement would that make in Federal courts; and what kind of improvement would that make in increasing the ability to get a speedy trial in Federal courts? Conversely, what might it do to hinder the trial of criminal cases in State courts. Does anybody have a feeling on it?

Judge SHERAN. The transfer of the diversity cases would not have any significant impact in Minnesota.

Senator LEAHY. Your criminal courts and your civil courts are separate?

Justice SHERAN. They are the same.

Senator LEAHY. They are the same?

Justice SHERAN. Right. The 400 diversity cases that are presently pending in our Federal courts could be absorbed by our State court system without any serious impact. The methods of administration which have been developed in our State and others during the past 10 years makes this possible.

Now, from the standpoint of the Federal court it would be quite different. Minnesota, for example has requirements of the Speedy Trial Act, requirements that priorities be given to civil rights cases and other Federal question cases. It is just about impossible to get a diversity case tried in the Federal court within any reasonable period of time. When a case is removed from State court to Federal court (unless the judge can be persuaded that there is something about the case that calls for a threshold attention) it does not get tried.

Senator LEAHY. Is there a feeling in the Federal system that the removal of diversity cases would improve the ability to have a speedy trial in criminal cases?

Judge HUNTER. The way it really works out is, under the Speedy Trial Act the Federal judges try their criminal docket first.

Senator LEAHY. So, removing them may just mean a civil case may not get tried at all, it may sit forever.

Judge HUNTER. I think that is right. We had a speech that was made before one of our local bar associations recently, and the title of the speech was, "The ordinary civil case—the bastard child of the system," and the thrust of the speech simply was that there is no attention being given any more in large metropolitan areas particularly, to the routine civil case, particularly one that comes by diversity simply because it is at the bottom of the line and cannot be reached.

I would like to also make the comment that in talking about a statute to transfer or to put certain kinds of criminal cases in the State system rather than in the Federal system, I am sure Mr. Meador can address it much more specifically than I, we are already getting a good deal of that through the policy that comes down through the local U.S. district attorney from the Department of Justice.

We find that there has been a tremendous lessening of the Federal Government's prosecution of certain types of criminal cases, in favor of increasing the prosecution on white collar crime cases, organized crime cases, the types of cases that are complicated and likely to run through two or more States and take a national approach.

The Attorney General is obviously paying more attention to that class of criminal activity and less attention to other kinds of local criminal activity. So, we are reaching that position now. My final comment on that is that the kind of case that the Attorney General is now addressing his attention to through the local U.S. district attorneys is the kind of criminal litigation that is very time consuming and usually rather complicated.

So, I do not believe that timewise we are going to be spending any less time on criminal matters, even though we might have less volume.

Senator LEAHY. I understand. I remember after spending 3 years in civil practice and then 9 years as a prosecutor, that I found it rather a thrill in the latter capacity, to try cases where all of the witnesses were still available. In civil cases that had been on the docket for years, however, witness were often not available.

Thank you, Mr. Chairman.

Senator KENNEDY. Senator Baucus?

Senator BAUCUS. I have no questions.

Senator KENNEDY. Senator Heflin?

Senator HEFLIN. I am delighted to see four long-time friends. I apologize for not being here earlier, I had to preside in the Senate this morning, but you are friends that I certainly enjoy being with.

I have recently been discussing with Chief Justice Sheran, Judge Hunter, and Professor Meador, some of the problems of the judicial system; but I have not seen my friend Bob Murphy for a good while. I am delighted to see you, Bob.

I may have missed something that you may have in the record, but I would like to direct your attention to the question of the constitutionality of the abolition of the diversity cases.

The Constitution, of course, gives specific jurisdiction to the Federal court. Would you address the constitutionality of the proposed Diversity Act?

Mr. MEADOR. Who would you like to respond to that?

Senator HEFLIN. Well, all of you.

Mr. MEADOR. Do you want me to start?

I will open up with a brief comment. I would state the question you raised something like this: Does the Constitution require Congress to vest in the Federal district courts all of the jurisdiction listed in article 3? My answer to that question is, no, and I base it on both history and authority. The leading advocate, I guess, for the proposition that the Congress must vest all of that jurisdiction in the Federal courts was Justice Story, but he stands almost alone in that view. Custom and practice since the beginning as well as other authority, all stand against him.

Even the first Congress, which is often looked to as an authoritative reflection of the meaning of the Constitution because so many of its members were members of the constitutional convention, even that Congress did not vest in the district courts all the jurisdiction listed in article 3. Indeed, as to the diversity of citizenship jurisdiction, the first Congress, in the Judiciary Act of 1789, vested a very narrow diversity jurisdiction.

In fact, if diversity jurisdiction were today as it was in the first Judiciary Act, we might not be here because there might not be much of a problem. In that first Judiciary Act the Federal jurisdiction was limited to cases where one of the parties was a citizen of the State where the suit was brought. Given the very narrow concept of in personam jurisdiction at that time, as a practical matter, that statute meant a Federal court was available only where an out-of-Stater sued a defendant in the defendant's State. There would be much less of a problem today if that were all. Later, Congress broadened it.

But to get back to the main question, we have many illustrations, if you come down through all time in our country, where pieces and portions of the article 3 jurisdiction are not vested anywhere in the Federal courts. It is my view that history and authority have the better argument, and the Congress has an option. It may grant or withhold portions of the article 3 jurisdiction as in its judgment it thinks best from time to time in light of circumstances. Therefore, it could abolish all of the diversity of citizenship jurisdiction in the Federal district courts today.

Justice SHERAN. Senator Heflin, I would like to respond to your question. It could be argued that under article 3 there is a constitutional obligation on the Congress to open the door of Federal courts to all diversity cases. The result would be that the great bulk of the contract and personal injury cases would have to be tried in Federal courts.

And yet we know, and particularly since the "long arm" statutes have become effective, that the great bulk of this jurisdiction is exercised in the State courts. No one has seriously argued that the cases presently being tried in State courts where non-residents are involved, should be brought into Federal court.

That, to me, suggests two things. One, that there is no such constitutional obligation; and second, that the State courts are functioning effectively in cases where one or more of the parties are not residents.

The only court that is established by the terms of the Federal Constitution is the U.S. Supreme Court. Congress could, if it desired to do so, eliminate the Federal trial courts. This being the case, I suggest it was at least within the vision of the framers of the Constitution that the great bulk of the controversies arising in this country should be settled in State courts, as they are in over 90 percent of the cases.

This leads me to believe that it is and should be in the interest of Congress to aid in the development of the capacity of State courts to deal with all kinds of litigation, including the limited portion of the diversity cases now in the Federal courts. Putting these cases in State courts would be a significant symbolic step in that direction.

Judge HUNTER. I do not want to eliminate myself from trying that question if it ever comes along—it would be a lot easier than most. But I would like to call your attention to a quote from an opinion by Mr. Justice Frankfurter in *Lumberman's Mutual Casualty v. Elbert*, that is a 1975 Supreme Court 171 report. Justice Frankfurter was talking about the abolition of diversity jurisdiction and he said this—he was recounting the history of it—he said, Madison believed that Congress would return to State courts judicial powers entrusted to Federal courts, "when they found the tribunals of the State courts established on good footing." That has really been the question, have the State courts reached the point where they are established on good footing.

I have already said that I think the State courts are very modest in appraising their own talents. They are indeed well established.

Senator HEFLIN. Let me ask you, Judge Murphy, if you would care to reply to that.

Judge MURPHY. I have three such good lawyers preceding me, I rest on what they said.

Senator HEFLIN. I agree with you, they are very able.

Let me ask you this, I gather from your written statement—I was not here—but most of you are assuming the position that bias does not exist any longer in the State courts. But I assume that this is a controversial issue; some people will take the position that it does still exist.

I have been toying with some ideas, and I do not make this in the form of a suggestion at this stage, but I have an idea that there could be changes of venue established within the State courts as a matter of

right of a nonresident defendant. There are several alternatives to that approach. One would be that you would not abolish diversity but instead would in effect hold that most cases would be presumptively transferable to the State courts after they came into the Federal court, whether by removal to Federal court or by original filing.

Most cases would be, presumptively transferable to the State courts, but with a right of a defendant, a nonresident to select a State court different from the court in which the case would have normally originated.

Now, that is one alternative in the selection. Another would be that the case would go to the State court in which there was a division of the district court; or a third possibility would be that the case would go, if the defendant so desired, to a certain previously designated State court.

In an annual case, under this concept, the Federal court could maintain jurisdiction and try the case in the event that there was a showing of districtwide bias.

This is sort of an alternative to complete abolition as a concept. It could be done in most instances administratively by a magistrate or even possibly by a clerk, I do not know. The present removal statute does not require an order of a judge.

But the basic concept would be that if there is bias, the danger of that bias would be handled by leaving it to the nonresident, and maybe extending it to the plaintiff if he filed it, to either select or choose from an established list or some method by which there could be a change of venue in the State court.

I know I talked previously to Professor Meador about this, and he has given some thought to it. So, I would ask you if you would comment on this.

Mr. MEADOR. It is an interesting idea. Senator Heflin has mentioned it to me, and I have given it a little thought. I regret I do not have any magic solution, but I will make a few observations about it.

There is a dilemma in my mind in designing a statute to do this. Let me discuss how I think such a case might arise. A plaintiff files an action in a State court against a noncitizen of the State. The defendant, of course, has an option to stay in that State court if he wants to. On the other hand, he could remove the case, under the existing removal statute, to the Federal district court. Then, at that point, Senator Heflin's new idea would come into play, I suppose, and the Federal court might have a couple of options. One, it could retain jurisdiction over the case and proceed to try it as it does now; or, the Federal court could dispatch the case, so to speak, or remand it to some other State trial court—that is, a State trial court other than the one in which it was filed.

The theory, I suppose, is that the particular court where the case had been initiated might be one in which there was bias, whereas there was another State trial court, a few counties away or in another city, where the bias would be lessened or eliminated.

Now, there are two ways that kind of procedure could be handled. One would be to give the defendant what would be, in effect, an automatic right to elect another State forum. The other way of handling it would be to require a decision by the Federal court as to whether another State forum was justified.

I see problems with both routes. In the near-automatic kind of procedure, it seems to me a good deal of unfairness might be worked on some plaintiffs. I would have to think that through. It does bother me, though, to say that a defendant, whenever he has a residency that is diverse from that of the plaintiff, has in effect an absolute right to switch the case to another State court. On the other hand, if a showing is required by the defendant in the Federal district court, I am concerned about setting up a kind of law suit within a law suit, a litigation-promoting point whereby the parties would litigate whether any change in forum were really justified or whether bias really existed.

So, I have not come out, in my own mind, with the ideal procedure that would accomplish what Senator Heflin has in mind. There has been in past years a suggestion of a similar sort, which would provide that whenever there is a diverse defendant, he could remove the case to the Federal district court if he could show to the Federal district court that there was in fact bias in the State forum where the suit was brought. That proposal would require, in every case, case by case, a factual demonstration of bias. The problem with that in my mind is that the facts to be shown—namely the presence of bias against the out-of-stater—presents a very difficult evidentiary matter. It may exist, yet not be capable of proof; on the other hand, a lot of time and effort could be spent in trying to prove bias even where none existed. Thus, it would just inject another litigation point.

So, those are my observations. It is an interesting idea, worthy of thought and yet, at the moment, I am not satisfied that it can be worked out very well.

Judge HUNTER. Senator Heflin, I could also add a response. I think to do what you are suggesting would unduly complicate the State court's ability to control its own situation. You would be in the rather unusual position of bypassing the State court's ability and right to handle its own situation and be passing it along to some Federal district court judge, or some Federal magistrate to determine under what circumstances to what court this litigation should go.

To me it seems far better to address the question squarely and let the State court provide the needed change of venue, or the needed change of judge within the State court rules and State court practice. That is one thing.

The second objection that I see to it is that we now openly acknowledge that we are trying to apply a concept of federalism to the overall business of Federal and State courts, so as to put within each system that kind of litigation that properly belongs in that system. To put this, even temporarily, in the Federal system to decide whether there is bias or not, and what State court it ought to next go, really again involves an infringement on State sovereignty and certainly is a violation of the federalism that we are trying now to properly recognize. So, for those additional reasons I would not think that this is the way to do it. I would say the way to do it is to improve the State court system so it can handle its own problems.

Senator HEFLIN. Let me ask you this. You raised the issue of federalism. Is not this procedure much less than the removal of the case to the Federal court and allowing the Federal court to handle

the case entirely? You are in effect giving back jurisdiction to the States under federalism except one thing, and that is the direction of the venue.

There is the possibility of an argument in regard to the question of whether it is Federal intervention into State affairs. I see the abolition of diversity as a return of jurisdiction and power to the States, and it is a return of 99 percent with only maybe 1 percent of direction should a request for a change of venue be made.

Justice SHERAN. Senator Heflin, with your permission I would like to make these comments in response to your suggestion.

It seems to me that the suggestion is one that has considerable merit and that should be examined carefully. But there is one phase of it that might prove troublesome.

To begin with, I think every State now has statutory provisions for the transfer of venue. In our State, at least, the determination of the trial judge as to venue is immediately reviewable by the supreme court of the State, and we do this frequently.

We undertake to be generous in transferring venue where a showing of prejudice against one of the parties is made. But I do not recall a case where it was claimed that there was a local prejudice based upon the residency factor. It would well be based upon the fact that the party is a large corporation, but whether that corporation is organized within the laws of the State of Delaware or under the laws of the State of Minnesota does not seem to enter into the picture very much—conceivably in some cases it could.

Then, the next question would be whether the determination as to venue in this category of cases should be made by the State courts or the Federal courts. I assume that the way it would work out is that if it is done, the determination would be made by the Federal court, and the general mechanics of it would be that these cases go into the State court unless the party can demonstrate the existence of prejudice, based on residency, a fact to be established to the satisfaction of the Federal trial judge.

Now, in the State that I know the most about, Minnesota, that would not pose any problem because our chief judge in Minnesota has the same view on this matter as I do and unless there was a very clear showing of prejudice all of the cases would go to the State court. But that might not be true in other States with which I do not have similar experience. I will assume that in some States there are pockets of prejudice, based upon the factor of residency.

Now we have a Federal judge in the somewhat awkward position of making a judgment as to whether in this particular case the State court can afford a fair trial.

I expect that in most cases that would be done with the same objectivity and acceptability as is done when our State trial judges make such a determination on claims of prejudice.

But I still have some question as to whether or not the exercise of conflict between the Federal establishment and the State establishment so that the determination by a Federal trial court that a State court could not try a particular case fairly and impartially would not be very well received. So, it might put the Federal trial court in an uncomfortable position in undertaking to make such an assessment.

So, that would be a consideration that I think would need some thought. I would not purport to speak for anyone except myself on this subject. My own impression would be that as a trial lawyer I would be willing to accept the judgment of the Federal trial court in that regard, just the same as if it were a State court. It would not make any difference to me.

But I still have some question as to whether or not the exercise of such authority by the Federal courts might not exacerbate the tensions that we are trying to eliminate.

Judge HUNTER. I would only have one other thought to add to that, Senator Hefflin, and that is, when you put the matter over into the Federal district court to determine whether or not local prejudice existed on the basis of residence, I do not know what kind of a priority that would receive on the very busy Federal court docket. There might be a substantial delay before that matter was resolved, particularly if a hearing were required.

Now, assuming that the matter was then to be returned to the State court, you would have all of that delay. You would have the delay while you were waiting for the decision of the Federal court, and then I assume, when you get back over to the State court, you have to take your place in line at that point and have a delay in the State court system. So, it certainly would not expedite the trial of the case.

Senator HEFLIN. Judge Murphy, would you care to comment?

Judge MURPHY. I would support Chief Justice Sheran's comments. But in Maryland, unlike Minnesota, the refusal to change venue is not immediately appealable. I would prefer to see the removal machinery built into State law. Lawyers, of course, will quickly see to that through their impact on our rules committee and, I am sure, our counterparts within the State.

Senator HEFLIN. Well, the desirable situation would be to have the 50 States moving with some type of uniform procedure. More uniformity is certainly desirable in the court system. The difficulty is that States move very slowly. I am not advocating this as the only way in which you can resolve it, but you could give a "carrot". The carrot approach is, "If you adopt this 55-mile speed limit for your highways you receive Federal dollars." This is not the only concept that has done this sort of thing, when it is desirable to do it. However, I do feel that if diversity is abolished, that is a reason for Federal assistance to State courts because they will be taking a tremendous workload.

The other reasons I heard Chief Justice Sheran speak to. There are several alternatives to this concept. It could be done where Federal courts would automatically send the case to a State court with a non-resident having some choice, if he wanted to, and not having the hearing as an alternative—the hearing is another alternative.

There is some system where it is done in the Federal courts. That does not mean there would be a complete abolition of diversity. I have a serious question as to whether or not the complete abolition of diversity cases does not raise some constitutional impediments.

It could well be that a system of this sort can satisfy constitutional problems and still provide for an occasional change of venue when they are elected or there is a showing there are different alternatives.

I would appreciate if you would give some thought to this. I know it is an issue that could in a suitable situation be worked out, could

answer the political objections that are increasing more and more from lawyers across the country that are talking about it, and the main objection, of course, is the question of bias.

So, I think that has some possibility. I have not crystallized my thinking about it, but the desirable thing is, if you could have a corresponding uniform change of venue in each State simultaneously with the abolition of diversion cases, this would be a method by which a lot of objections would be met.

On the other hand, we know that from a practical viewpoint that is almost an impossibility, devising some method by which you can handle the issue of bias and it be handled under the aegis of the Federal courts in recognition of the fact that this is a return to the State courts, State matters, under the concept of federalism. It might work out. I would appreciate your continuing your thoughts on it.

That is all, Mr. Chairman.

Senator BAUCUS. Senator Simpson, any questions?

Senator SIMPSON. Thank you very much, Senator Baucus.

Let me say, it is a pleasure to see three of your four gentlemen again. I remember well our time in Williamsburg, and I think that was a very productive time for me in discussing the relationship between Congress, the Federal judiciary and the executive branch; I thought that was an excellent time. I am pleased that our chairman sought your testimony here again on this issue.

I have a concern which I try to expunge away from the arena of just provincialism as a Senator from a very small State of 400,000 people in 100,000 square miles—the land of high altitude and low multitude, as we refer to it because we only have one Federal district court, and that is the District of Wyoming, Cheyenne.

On that court serves a man who I think has quite a national reputation, Judge Ewing E. Cure, a very able jurist. People are very satisfied with his work, I practiced before him. I did not always like the results but always respected him; and Judge Clarence Bremer, who is now assisting with the district load.

It is something that I ponder in reviewing the testimony and try, as I say, to expunge away small State provincialism, but I do have a concern that these smaller Federal district courts serve a purpose. I am not out to make work projects. It is obviously the fact that most of them are totally overloaded with clogged caseloads.

I am of the opinion, however, that with the abolition, the outright abolition of diversity, that the workload in the district court in my district will be very much reduced—that sounds odd, that is what we are after, anyway, and I concur in that.

So, weighing that selfish preservation aspect, if we had 30,000 cases brought to the Federal system by diversity at the present time, and we are trying to develop the machinery to place those over into the State courts, I share that willingness to accelerate the reduction of that workload.

However, I guess I do come back to the issue, and I think the bias issue is there. How deep that is I do not know, I know that studies do not seem to indicate how deep that is.

I will present for the record a more detailed statement of some of my concerns about the issue, hopefully with allocation facts and doing

my homework I can try to present at least a "hearable" position of a smaller Federal district because obviously the metropolitan districts are the ones that push for this type of legislation, and I see why. I have no desire to be obstructive.

But I just want to share those observations and comments of mine about an issue which will very drastically affect the one Federal district court within my representative area.

So, thank you so much. I will read the testimony, and also noted the things you spoke of in Williamsburg, and that will help me in making my decision.

Thank you very much.

Senator BAUCUS. Thank you, Senator Simpson.

I have a question for Mr. Meador. It has been argued that the elimination of diversity jurisdiction will adversely affect the poor. I wonder if you could comment on that.

Mr. MEADOR. Well, I suppose I just do not appreciate the thrust of the argument. In order to get into Federal court, we already have a minimum amount of \$10,000, so there cannot be a small claims case, so to speak. Of course, a \$10,000 case has gotten to where it looks almost small these days.

I cannot answer your question without knowing a little bit more about the argument. I do not appreciate the thrust of it at all. Traditionally, Federal courts used to be looked at sort of as "rich men's courts," courts for big business, and so on. I do not perceive in my looking around at the business of Federal courts in diversity cases today that the poor, as distinguished from anybody else would be adversely affected by the elimination of that jurisdiction. Perhaps I do not understand the full argument.

Senator BAUCUS. I suppose part of the concern is related to the question of bias, of State courts and an institutional bias against poor people.

Mr. MEADOR. To the extent that that is the point, I suppose my response would be the same as it has been on other points—and this responds to part of Senator Simpson's point, too. I will ask the committee to think very carefully about the question of bias generally, and ask what kind of bias it is that people are talking about, or that you are concerned about. Is it bias because a person is poor? Is it bias because one party is a large corporation—and I mean bias either for or against, cutting either way? Is it bias that stems from the racial characteristic of some party, or the ethnic characteristic, or the place of residence, or what? There is whole panoply of biases that unfortunately abound here and there around our country. But the whole theory of diversity of citizenship is that there is only one kind of bias involved, as far as this jurisdiction goes, and that is a bias resting solely upon the fact of State citizenship, which is State residence for all practical purposes.

Now, the other point is that to the extent that diversity may happen to work, the benefit falls unevenly. Indeed, I submit it works a denial of equal protection under the law because the poor person in a case who happens to have an opponent from the same State does not have the option of the Federal court, whereas the poor person in a case that is identical except for the happenstance that the opponent comes from a different State does have that option.

I will submit that in modern circumstances that is not a rational basis for treating these cases differently, for giving one the option of the Federal forum and the other no option. If you want to address those problems, I submit you ought to address them more forthrightly in terms of what they are—as a denial of procedures, and remedies, and forums to fit today's problems—but not to try to do it indirectly in a very crude and poorly tailored way through the kind of diversity statute you presently have.

Senator BAUCUS. Would the elimination of diversity enable Federal courts to give more attention to civil rights cases and other cases that affect the poor?

Mr. MEADOR. To the extent that those cases arise under Federal law, the answer would certainly be yes, and of course a good many of them do, though by no means all.

Senator BAUCUS. I have no further questions. Perhaps Senator Heflin or Senator Simpson have additional questions.

Senator HEFLIN. Yes, I would like to follow that. Chief Justice Sheran has given a lot of thought to the increased workloads in the State courts as a result of a lot of things that are occurring. I know that he has been working with Professor Bringinton and the chief justices on Federal assistance to State courts.

Would you speak a little bit about the abolition of diversity, the increased workload on the courts, and that with some other justifications for assistance from the Federal Government to the State courts?

Chief Justice SHERAN. Since the decision of the U.S. Supreme Court in 1963—which in effect established national standards for the trial of criminal cases in State courts—there has been a nationwide movement on the part of State courts to measure up to these new responsibilities. We have in the country today such institutions as the National College for the Judiciary in Reno, Nev.; the school for appellate judges maintained at New York University; the Institute for Court Management where people engaged in court administration are trained; the establishment of national standards for the administration of criminal justice; the development of uniform rules of civil and criminal procedure of evidence. These are illustrative of the many improvements that have been made by State courts in response to the additional responsibilities which have been given to them by Federal action, including the decisions the U.S. Supreme Court.

Additional responsibilities that have resulted from congressional action. Patterns for State action in the field of environmental law is one instance. The necessity of establishing paternity as a condition to receive welfare payments is another. There are a great many. And policies which I think are sound have been enunciated by the Attorney General's Office and also lead in this direction. An example: the announced policy of the Attorney General of the United States to increase the responsibility for the prosecution of certain kinds of crimes in the State courts that have been tried in Federal courts.

It has been possible to bring about these improvements in the administration of justice in part because State court systems have had Federal assistance through the LEAA. About 5 percent of the total of the funds that were expended by the LEAA have found their way into the improvement of State court systems. State courts have been

able to use this Federal assistance, with great effectiveness and have been able to do so without feeling any intrusion on the part of the Federal Government in the management of State courts.

This is one of the most remarkable developments in recent governmental affairs. The possibilities of establishing justice, as the preamble of our U.S. Constitution directs us to do, are very great if we continue this harmony between the Federal and State governments in bringing effective administration to State court systems and developing the best possible methods of dealing with the great mass of litigation that comes to State courts.

Now, part of the concept which underlies all of this is that the State court, if it is to have a sense of pride in what it is assigned to do, must carry out effectively the responsibilities that are within its natural orbit. Surely diversity cases are. They involve not Federal law but State law. They are precisely the kinds of cases that the State courts are dealing with routinely. It is only a very narrow section of contract and personal injury cases that go to the Federal courts and that is because the jurisdictional amount has to be at least \$10,000, and diversity must be entire.

I am convinced and my fellow chief justices around the country are convinced that it would be a good step forward for the Congress to assign the responsibilities which are naturally ours to the States. It advances the health of the State court systems. It advances the principle of federalism. Better methods of delivering Federal help and resources will be a good thing for all concerned, because State courts will be able to deal more effectively with the work which must be done by them.

Judge HUNTER. I would like to add just one thought to that. As Mr. Meador has pointed out, it is very difficult to tell how much savings in money would result from taking the diversity cases out of the Federal system and putting them into the State system.

I believe if I recall correctly what he said in his statement which he has filed, that the best estimate that the Department of Justice can make, inclusive statistics, is \$8 million. It is nice to know it will not cost anything if they are transferred insofar as Federal expenses are concerned, and there will be some savings, hopefully at least the \$8 million mentioned.

That is money available for aid to States.

Chief Justice SHERAN. I would like to add, if I may, I neglected to do so previously, the sense of obligation which the State courts and the Conference of Chief Justices feel in all of this, the National Center of State Courts in Williamsburg—with which members of this committee are familiar. We looked upon it as the strong right arm of the State chief justices in working for the improvement of justice, and we are by reason of that fact grateful to this committee and the Congress.

Senator SIMPSON. Mr. Chairman, as a footnote, we were discussing in Williamsburg the issue of discovery. Lawyers are taking such severe advantage of interrogatories, and my suggestion was that all interrogatories will be handwritten by the lawyers. I would add, in this arena the simplest approach would be to have a law that before a judge receives his monthly check he would be required to sign an affidavit that he had no case assigned to him over 60 days. That might be a very workable little proposal.

Thank you for your testimony.

Senator BAUCUS. Thank you very much, gentlemen, on behalf of the chairman and Senator Metzenbaum; it was a pleasure having you here.

There will be additional hearings in the near future on S. 697 legislation to modify Federal diversity jurisdiction.

This hearing is adjourned.

[Whereupon, at 12:20 p.m. the committee adjourned, to reconvene subject to the call of the Chair.]

JURISDICTIONAL AMENDMENTS ACT OF 1979, S. 679

MONDAY, JUNE 4, 1979

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met at 9:38 a.m., in room 2228, Dirksen Senate Office Building, Senator Howard M. Metzenbaum presiding.

Present: Senators Metzenbaum, Thurmond, and Baucus.

Also present: Marge Baker, counsel, and Sally Rogers, minority counsel for Senator Thurmond.

OPENING STATEMENT OF SENATOR METZENBAUM

Senator METZENBAUM. The hearing will come to order.

Today we continue hearings on S. 679, legislation that would abolish most Federal diversity jurisdiction. This legislation is intended to remove the Federal courts from the business of deciding State law cases and return to the States responsibility that is rightfully theirs. It will permit Federal courts to concentrate on Federal laws and State courts on State laws, at the same time providing for more efficient, effective and expeditious resolution of disputes.

Approximately one quarter of the cases in Federal courts today are diversity cases. These are State law cases that happen to involve disputes between citizens of different States over sums in excess of \$10,000.

But for the accident of citizenship and amount in controversy, these cases would be heard in State courts. There simply is no longer any justification for keeping these cases in the Federal system.

Fears of bias against out-of-State litigants are outmoded in today's mobile society. The quality of State court justice can no longer be questioned and opportunities for the fertile exchange of ideas between the Federal and State court systems flourish. Perhaps most importantly, the State courts themselves have indicated their willingness and ability to accept these cases.

In sum, as Justice Burger stated recently, "Diversity of citizenship is an anachronism that should be eliminated. While there is no justification for keeping these cases in the Federal system there is every reason to provide relief to the Federal courts.

Crowded Federal dockets mean either that litigants face extraordinary delays in having their disputes resolved or worse, courts raise numerous technical barriers to suits in order to clear their dockets. In either case, the system frustrates thousands of Americans seeking to have their grievances redressed and important issues of Federal statutory and constitutional law resolved.

Abolition of diversity jurisdiction is strongly supported by President Carter, Attorney General Bell, the local justices of the 50 States, the Judicial Conference of the United States and the House of Representatives which passed a similar measure last session by a 2 to 1 margin, 266 to 133.

In addition, it has the support of an overwhelming majority of legal scholars who have addressed the issue. Simply stated, diversity jurisdiction is an idea whose time has passed.

The legislation before us today also provides for removal of the \$10,000 amount in controversy requirement in all Federal question cases. This will complete the action taken by Congress in 1976 which eliminated the amount in controversy as a necessity when the defendant is the United States, a Federal agency or Federal official.

There is no valid reason for retaining the amount in controversy requirement in any Federal question case. Elimination of this requirement will result in only a slight increase in the number of suits in Federal courts and will give every citizen the right to litigate his or her Federal claims before a Federal tribunal.

This bill recognizes that expanded access to Federal courts by citizens with Federal claims and to State courts by citizens with State claims is in the best interest of our judicial system.

In the final analysis, the elimination of Federal diversity jurisdiction will undoubtedly improve the quality of justice for all our citizens and all the courts of this country.

Before we begin hearing from our witnesses today, I would like to put a number of items into the record.

Judge Henry Friendly and Charles Alan Wright who could not be here today are strong supporters of the abolition of diversity jurisdiction and have asked that their testimony in support of S. 679 be placed in the record.

Without objection, it will be done.

[The prepared statements of Judge Friendly and Professor Wright can be found in the appendix.]

Senator METZENBAUM. Second, I have here a memorandum prepared by the Justice Department which documents an \$8.8 million annual saving to the Federal court system if diversity jurisdiction were abolished.

It also summarizes a national center for State courts' study concluding that State courts will not be adversely affected by the transfer of cases upon abolition of diversity jurisdiction.

That too will be included in the record.

[The memorandum referred to above can be found in the appendix.]

Senator METZENBAUM. Third, I have a letter from Daniel Meador, Assistant Attorney General in charge of the Department of Justice's Office for Improvements in the Administration of Justice to the chairman of this committee and the distinguished minority leader with recent statistics indicating that in certain jurisdictions which have been used for comparison purposes in the past, delays in Federal court are significantly greater than those in the State court system to which the diversity cases would be transferred.

In connection with that letter, I also have a chart prepared by the House and Senate Judiciary Committee staffs with the assistance of the administrative office of the courts and the national center for State

courts comparing delays in Federal and State courts in selected cities for 1976.

Contrary to some suggestions that delays in State courts are twice as long as delays in Federal courts, these statistics show that in fact in 1976 State court delays exceeded Federal court delays by that amount in only two cities surveyed while delays in Federal court exceeded State court delays in over one third of the cities surveyed.

That too will be included in the record.

[Chart pertaining to court delays follows:]

COMPARATIVE DELAYS IN STATE AND FEDERAL COURTS FOR SELECTED JURISDICTIONS

	State	Federal
Atlanta.....	317	270 (N.D. Ga.)
Boston.....	394	690 (D. Mass.)
Cleveland.....	378	210 (N.D. Ohio)
Dallas.....	210	300 (N.D. Tex.)
Detroit.....	735	270 (E.D. Mich.)
Ft. Lauderdale.....	189	120 (S.D. Fla.)
Houston.....	490	330 (S.D. Tex.)
Miami.....	236	120 (S.D. Fla.)
New Orleans.....	259	300 (E.D. La.)
Newark.....	608	360 (D. N.J.)
Oakland.....	295	270 (N.D. Calif.)
Phoenix.....	196	240 (D. Ariz.)
Pontiac.....	364	270 (E.D. Mich.)
Portland.....	275	270 (D. Oreg.)
San Diego.....	262	270 (S.D. Calif.)
Seattle.....	217	300 (W.D. Wash.)

Source: State Data: 1978 study by National Center for State Courts based on 1976 Data. Federal Data: 1976 annual report of the Administrative Office of the U.S. Courts.

Senator METZENBAUM. Next, I have three recently published law review articles in support of abolition of diversity which I will now put into the record.

The first is by Hon. Robert Sheran, chief justice of the Supreme Court of Minnesota and Chairman of the Federal State Relations Committee of the Conference of State Chief Justices entitled, "State Cases Belong in State Courts."

The second is by Judge Carl McGowan of the U.S. Court of Appeals for the District of Columbia entitled "Federal Jurisdiction: Legislative and Judicial Change."

The third is by Thomas D. Rowe, Jr., associate professor of law at Duke University, entitled: "Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms."

In his article, Professor Rowe highlights benefits that would flow from abolition of diversity jurisdiction. He points first to the number of vexing and time-consuming procedural and jurisdictional questions that will no longer be at issue if diversity is abolished.

Second, he points to the possibilities for rationalizing other rules of Federal Practice that have been distorted by attempts to apply procedures associated with diversity cases, to purely Federal question litigation.

[The above documents can be found in the appendix.]

Senator METZENBAUM. Finally, I have a letter from the American Council of Life Insurance in opposition to S. 679, which I have been asked to insert into the record. It will be inserted into the official record.

[The letter referred to can be found in the appendix.]

Senator METZENBAUM. Off the record.

[Discussion off the record.]

Senator METZENBAUM. On the record.

Our first witness today is the Honorable Charles Wiggins, former U.S. Representative in the Congress. He had a very distinguished record in the Congress. He has given great leadership on this particular legislation, as well as in so many other areas.

Congressman Wiggins, we are very happy to welcome you here with us today.

STATEMENT OF CHARLES WIGGINS, FORMER U.S. CONGRESSMAN

Mr. WIGGINS. Thank you, Senator.

I ask that my statement be made part of the record, in full.

Senator METZENBAUM. Without objection, so ordered. It will be inserted in the record at the conclusion of your oral testimony.

Mr. WIGGINS. I shall attempt to summarize what I have to say.

My name is Charles E. Wiggins. I am a partner in the law firm of Musick, Peeler & Garrett of Los Angeles, Calif. I am a member of the California and District of Columbia bars. Prior to joining my firm in January of this year, I served for 12 years in the House of Representatives and during my entire tenure, was a member of the Judiciary Committee of that body. Prior to that, I practiced law in California for 10 years.

I do not appear this morning, Mr. Chairman, in any representational capacity. I am here at the request of the chairman, speaking for myself alone.

I have to wonder why it is that I am here. I am familiar with the testimony which has been offered heretofore before Senator DeConcini's committee and before Congressman Kastenmeier in the House where witnesses of great prestige and learning have already testified on this subject.

It seems to me, Mr. Chairman, that the issue before this committee has been fully briefed and argued and it is about time to submit this case for a decision.

Given the fullness of the record and the skill with which witnesses far more impressive than myself have argued, I find myself taxed to find something new to offer the committee. But I shall try, nevertheless.

First, on the broad question of the abolition of diversity jurisdiction. On that question I come down on the side of its total abolition, Mr. Chairman. The arguments pro and con have been fully developed by others. Concerns of such respected scholars as Professor Moore, obviously not swayed by tactical reasons for preferring one forum over another, are entitled to great weight, of course. But so too are the contrary views of Professor Wright, for example.

As in the case of most legislative issues, it comes down to a question of balancing the conflicting views of earnest witnesses and deciding on balance where the public interest lies.

I should like to share with this committee the decisive factor which tilted that balance for me in the last Congress.

As a matter of first principle, I, of course, agree with Professor Moore who stated that the primary function of courts is to serve litigants and society.

It is equally fundamental, however, that all courts do not serve all litigants and all of society. There is a division of responsibility between state governmental functions and Federal governmental functions of which the administration of justice is a part, which is deeply rooted in our society.

This principle of shared governmental responsibility—Federalism it is called, has been battered and frequently ignored by the Congress, Mr. Chairman, but it lives as a governing principle, nevertheless. It should be honored, absent compelling reasons for the extension of Federal jurisdiction to its constitutional limits.

Respect for so basic a principle should require matters of Federal law to be litigated in Federal court and matters of State law in State court.

That should be the basic test of jurisdiction of the two-court system. Those urging a deviation from that constitutional norm carry a heavy burden of persuasion, in my mind.

It is evident that that burden was met in the first Congress since it conferred diversity jurisdiction on those new Federal courts in the original Judiciary Act.

For me, however, the original justification for diversity jurisdiction in the Federal court; that is, the fear of bias and prejudice by State courts and juries is no longer sufficiently demonstrable to continue this deviation from normal principles of federalism.

It is of course true that occasional examples of legal bias or prejudice will occur in both the Federal and State systems, but remedies exist within each system to correct such cases. Other extra-legal factors which do not taint the fairness of the trial itself, but which so greatly concern litigators who seek an edge for their client are not unique to either system, and in all events, are not of such fundamental importance as to justify a departure from so basic a principle as federalism.

A principled argument based upon State court prejudice would seek an extension of Federal diversity jurisdiction to the maximum so as to reduce or even eliminate every vestige of such prejudice. But opponents of this legislation do not consistently make such a principled stand. Some of them seek to retain diversity jurisdiction, but to reduce the number of litigants who will have access to the so-called unprejudiced Federal courts by raising the amount in controversy.

Several of the witnesses have reached that conclusion and their names and the citation of the source of that testimony is in my prepared statement.

Too many witnesses, Mr. Chairman, have made that argument and in doing so have undercut their own "prejudice" arguments to sway me on this legislation.

Proponents of diversity jurisdiction argue that it has made a significant contribution to American jurisprudence and indeed, it has. They argue that it has worked satisfactorily in the past, at least after the *Erie* decision, and I agree in general with that observation.

They argue that a shift of more than 30,000 cases to the State courts results in no diminution of judicial business, that is John Frank's

so-called manure pile argument, and indeed would produce a log jam in at least some State courts.

Well, Mr. Chairman, that the Federal Government can, in some instances at least, provide effective social services does not argue that it should or must do so unless principles of federalism are to be abandoned. There may come a time when the fears of some will be realized and the State courts will become hopelessly bogged down in handling their own business. But a proper Federal response to such an eventuality would be to help the States in the discharge of their governmental responsibilities by appropriate financial and other assistance, rather than a Federal assumption of governmental functions which properly belong elsewhere. Until pervasive State incompetence is demonstrated, however, they deserve a chance to prove the competence they claim for themselves.

My law professors at the University of Southern California used to exhort their students to think in the alternative, and I have tried to do so in looking at this issue.

Underlying Federal diversity jurisdiction is the premise that a certain class of litigants will receive better justice in the Federal courts than in the State courts. An alternative, which is consistent with this underlying premise, would be to expand Federal jurisdiction, not just in diversity cases, but across the board, because presumably better justice is dispensed in Federal courts.

And, I believe Congress is sufficiently ingenious, if it were so inclined, to find a constitutional basis for such an expansion. But any such dramatic expansion of Federal jurisdiction would surely be met by a chorus of opposition from both the State and the Federal judiciary. The focus of that opposition would, in my view, be the unacceptable degradation of the principle of federalism.

Let us take a look at another alternative. If the original premise of superior Federal adjudication is unprovable, let us assume that the State judges are fully as competent as Federal judges to dispense justice.

As an alternative to maximizing Federal jurisdiction, suppose the Congress were to minimize it and rely upon State courts to assume the resolution of all or most cases which are now filed in Federal court.

After all, there is no clear mandate in article III of the Constitution that we have a parallel Federal court system other than the Supreme Court, and until 1891 we managed fairly well with only a minimal Federal court structure.

But this alternative of minimizing Federal jurisdiction would also be met by a chorus opposition, in my opinion, and the focus of that opposition would as well be the unacceptable degradation of the principle of federalism.

Now the purpose and point of all of this fantasizing is that the underlying premise of Federal adjudication of State issues, or State adjudication of Federal issues, will simply not hold water, Mr. Chairman, if extended to the extreme because an aroused interest in federalism would not permit it to happen. If the Federal adjudication of State issues is not sound for all cases, it should not be applied to some absent compelling reasons for doing so. Of course, witnesses have advanced reasons, but I suggest, Mr. Chairman, that they fall far short of the compelling nature necessary for a deviation of the constitutional norm.

Now I would like to comment upon provisions of S. 679, first with respect to retaining alienage jurisdiction.

The legislation proposes to retain the so-called "alienage" jurisdiction of the district courts, and to increase the amount in controversy for that class of cases from \$10,000 to \$25,000.

I have no major difficulty with this provision, but I confess, Mr. Chairman, I have no great enthusiasm for it either. It has provoked no adverse comment in the record of which I am aware. Foreign states or citizens or subjects thereof are parties in which the Federal Government has a unique and continuing interest normally, wholly different from that of the U.S. citizens residing in different States. But when alienage jurisdiction is invoked under section 1332, of title 18, the District Court is still confronted with the unseemly responsibility of applying State law.

Accordingly, an increase in the jurisdictional minimum from \$10,000 to \$25,000 will shift the lesser cases to the State courts where they would normally belong, but retain Federal jurisdiction over the more important cases, in which that unique and continuing Federal interest is stronger.

Thus, at least it can be argued that the bill reaches a reasonable accommodation of both Federal and State interest.

Now Mr. Chairman, I have stated I have no great enthusiasm for the alienage sections, and I do not. I see no special reason, Mr. Chairman, why a resident alien in the United States who has been in this country for many years and intends to stay here and is entitled to citizenship should be granted access to the Federal courts whereas a U.S. citizen is not.

I would think that if we must retain alienage jurisdiction in the Federal court it perhaps ought to be limited to nonresident aliens, those temporary visitors who clearly have a citizenship which they intend to enjoy in a foreign country.

It would be my suggestion, Mr. Chairman, that you ask the Department of State to furnish this committee with a firm justification for retaining alienage jurisdiction based upon treaties or other interest with foreign nations; otherwise there seems to be little reason why a resident alien should have access to the Federal court, but a citizen presenting the same claim should not.

Retention of interpleader jurisdiction. Mr. Chairman, everyone seems to agree that interpleader is a useful application of Federal jurisdiction, especially where State process cannot reach all adverse claimants to the fund. I agree with this proposition as well.

The deletion of 1391(a) of the bill would be required, of course, if diversity jurisdiction is abolished since that subsection speaks to diversity.

The change in the "litigation breeding phrase" in which the claim arose to the more realistic language proposed is salutary for the reasons fully developed by the American Law Institute study to which reference has been made elsewhere in the record before this committee.

The proposed amendment is especially in order, I believe, in light of the 1976 amendments to subsection (f) of section 1391 of title 28.

It is true, as some maintain, that a repeal of subsection (b) will extend venue in Federal cases to the judicial district in which all plain-

tiffs reside. The only perceived argument against such as extension would be hardship to defendants; but in the past, in diversity cases, the burden to defendants has not been regarded as intolerable and I see no reason why it should be more so in Federal question cases.

Accordingly, I support the amendments to section 1391.

Section 8 of S. 679 has revised the earlier drafts to preclude removal by a citizen defendant in an action commenced by an alien plaintiff. The former language was subject to some criticism on this score by Professor Wright and by the Committee on Federal Legislation of the Association of the Bar of the city of New York. The amendments in the current bill represents an improvement over earlier drafts.

From all that I have said heretofore, Mr. Chairman, it follows that I endorse the elimination of the amount in controversy provision of 28 U.S.C. 1331, as the general rule of procedure in Federal question cases.

The deletion of the amount in controversy limitation on Federal jurisdiction in Federal question cases carries the trend established in 1976, which of course, eliminated the amount in controversy in actions against the United States, its agencies and so forth, to a proper conclusion.

But there is an exception. The exception is the Consumer Product Safety Act cases. That act confers certain Federal rights upon consumers and imposes substantial Federal duties upon those who deal in consumer products.

Upon principles of federalism which govern my decision with respect to the abolition of diversity, the Federal remedies provided in 15 U.S.C. 2072, should be heard before Federal rather than State courts.

But in its impact upon principles of federalism, Mr. Chairman, there is a gulf of difference between the Federal Government seizing jurisdiction which belongs to the State and voluntarily surrendering it to the State.

The bill proposes a voluntary surrender of jurisdiction in consumer product cases unless the amount in controversy exceeds \$10,000. This approach is somewhat analogous to the alienage cases. I do not find this minor deviation from the constitutional norm unduly offensive to principles of Federalism, and one which might make a great deal of common sense given the potential for a significant number of "small claims" consumer cases.

Finally, Mr. Chairman, it has been discussed that an amendment might be offered to this bill dealing with so called disaster cases. I have not seen the text of any such amendment which would permit diversity jurisdiction involving a common disaster where there may be a large number of parties from several States.

I have no conceptual objection to such a limited extension of Federal jurisdiction into areas normally reserved to State courts.

My basic thesis is, of course, that Federal courts should hear only Federal cases. But the essence of federalism is respect for the proper role of Federal and State governmental responsibilities. This principle does not suggest, and certainly does not require, hostility or isolation between independent governmental bodies.

Cooperation which recognizes the limitations of each body and seeks to augment the limited capacity of each is certainly in harmony with the Federal principle.

Thus, the limitations of the Federal system justify retaining the amount in controversy in consumer protection and alienage cases and shifting these lesser Federal cases to a State forum where they can be handled more efficiently and limitations upon the reach of State process justify Federal interpleader where the efficiencies of the Federal system could be realized.

So, too, in this case, would a limited application of Federal diversity in disaster cases with multiple and scattered parties complement State courts and promote judicial efficiencies.

Now, having said that I have no conceptual disagreement with such an amendment, I am not sure whether it is tactically wise to add such an amendment to this bill. I will, of course, leave that to the competence of the committee but if it appears that by enlarging the bill significant legislative hurdles are going to be created, then I would urge that the committee consider such an amendment by separate legislation rather than as amendment to this bill.

Let me conclude, Mr. Chairman, by returning to the question of why this invitation was extended to me. Ultimate legislative success requires the bringing together of a coalition of voting members representing more than half of the body. Sometimes the majority party can exercise such discipline so as to achieve a majority vote from within its own ranks. But sometime, and frequently, it cannot.

As we all know, it becomes necessary on occasion to assemble a coalition on a particular issue from both parties, from all regions of the country, and from all points on that imprecise scale which measures political philosophy.

Perhaps, Mr. Chairman, I can make a contribution to assembling this necessary coalition by appealing to Senators who characterize themselves as conservatives or who champion the cause of States rights. That is, I suspect, the reason I am invited to these hearings.

I hope in discharge of that mission I do not offend such proud liberals as yourself, Mr. Chairman, by characterizing S. 679 as a conservative bill. I intend rather to compliment you for your wisdom in rediscovering the principle of federalism.

Senator METZENBAUM. Could you emphasize that this is a conservative bill so the fellow on my left here could hear you?

Mr. WIGGINS. Yes, sir. Pointedly, to my friend from South Carolina.

Senator THURMOND. We are very glad to have you with us. I am in another committee this morning. The chairman will ask a few questions and the witness will respond or let Ms. Rogers, to my left here ask them.

I just want to say we are glad to have you. I was just wondering one thing though, since we have more judges and in view of the magistrates' bill that is coming up and so forth, if we need to abolish diversity altogether. You certainly might think over that.

Mr. WIGGINS. Yes, sir; I will respond to that at the end of my statement. I have only a few more lines here.

Senator THURMOND. Thank you.

Mr. WIGGINS. When was the last time, Senator, that this Federal octopus withdrew its tentacles and relaxed its grip on governmental responsibilities normally reserved to the States? I personally can recall no recent example of Federal power being withdrawn and responsi-

bilities returned to States. The bill represents a small step in the right direction, to be sure, but conservatives especially should savor the moment.

Support for this legislation is a clear opportunity for conservatives to stand up for their principles, and a rare opportunity to do so in a winning cause.

Naturally, I don't intend to frighten anyone from their support of this good idea, but it is not my responsibility to maintain that part of the coalition.

In short, Mr. Chairman, it is not why I have been invited this morning.

Now in a word or two I should like to respond to the question propounded by Senator Thurmond: Whether or not the elimination of diversity jurisdiction is wise in view of the fact that we have just authorized a major expansion in the Federal bench.

I have no doubt, Mr. Chairman, that the workload of the Federal court which has been growing will continue to grow in the Federal question area. If in fact, however, some of our Federal judges find themselves with no work to do as a result of removing diversity cases from them, there is no mandate that vacancies be filled. That is to say, this Congress and the President authorized strength in the Federal bench. It did not mandate that it be filled if the work is not there to do.

I suspect, however, that given the normal litigious nature of society, and the ingenuity of counsel, that Federal question cases will fully occupy the Federal bench. To the extent that it does not, then I would recommend that any vacancies occurring on the Federal bench in the future not be filled.

I will be pleased to respond to any questions.

Senator METZENBAUM. Thank you, Congressman Wiggins.

Congressman, what benefits flow from State courts deciding State law cases?

Mr. WIGGINS. Well, Mr. Chairman, the principal benefit, I suppose is that there is established a body of State law which has consistency and continuity since it is articulated by the highest court of that State. Consistency in the law is a virtue which permits planning. It permits prudent decisionmaking.

Apart from that, Mr. Chairman, it is unseemly that an independent governmental body should be intruding into the affairs of a sovereign State unless there are compelling reasons to do so. It is officious for the Federal Government to exercise jurisdiction over State law unless there is an overriding national interest requiring that it be done.

Senator METZENBAUM. Do you feel that the main benefit of this legislation comes from the saving in time of the Federal judiciary in deciding State court issues or do you feel that the main emphasis is the fact that Federal courts would be deciding cases that properly belong within the Federal courts and the State courts would be deciding cases that properly belong in the State courts?

Mr. WIGGINS. Yes, sir; it is the latter point, because it strengthens the State and therefore, strengthens the union of States. I look at it more as a political philosophical issue than one involving only the administration of justice. I recognize that some State courts are going

to be overburdened. Some are already overburdened. It is also possible that some Federal courts are going to lose a fair amount of the work that keeps them occupied. But those are secondary considerations which can be corrected in another way. More fundamental is that States do their own work.

Senator METZENBAUM. Do you think that benefits exist from the interchange of ideas and personnel between the State and Federal court systems?

Mr. WIGGINS. Oh, yes. That argument has been made by Mr. Frank and by others, and of course, it's a benefit. But I don't expect that benefit to dry up.

Active practitioners and I have become one, find ourselves in Federal or State courts with frequency and this interchange of ideas, this cross-fertilization is going to continue even after the passage of this bill.

Senator METZENBAUM. Do you believe State courts are capable of handling the extra caseloads that will result from abolition of diversity jurisdiction?

Mr. WIGGINS. Justice Sheran says they are. He represents the justices of all 50 States. I am prepared to take him at his word.

Senator METZENBAUM. Is the quality of State court justice inferior to that in the Federal courts?

Mr. WIGGINS. Well, I think the record of State justice is spotty, but it is also spotty in some Federal courts.

Senator METZENBAUM. The converse might equally be true that in—

Mr. WIGGINS. Yes, sir.

Senator METZENBAUM [continuing]. That in some instances Federal courts are not—do not render as good justice as State courts and vice versa?

Mr. WIGGINS. That cannot be a reason, even if true, for maintaining Federal jurisdiction of State cases. If the courts are better in the Federal system than in the State system, and you carry that argument to the extreme, a transfer of State cases to the Federal system would appear logical. But it is not.

Senator METZENBAUM. There would no longer be a State court system.

Mr. WIGGINS. That is right. It would no longer be "State."

Senator METZENBAUM. As a practicing lawyer, do you believe that you would be disadvantaged by having to litigate your diversity cases in the State courts?

Mr. WIGGINS. You can't make a general statement. It depends upon the case. Some cases are better filed in State court; others are better filed or removed to Federal court. It is a matter of what is in the best interest of your client.

We here should be concerned about governing principles, the administration of justice as a whole rather than tactical considerations in a given lawsuit.

Senator METZENBAUM. As a former practicing lawyer, at a plaintiff's bar and at a defendant's bar, would it be fair—I don't know what kind of a law practice you do. Is it plaintiffs' work, defendants or both?

Mr. WIGGINS. Well, both, civil, corporate mostly.

Senator METZENBAUM. One of my concerns is that we don't do an injustice to plaintiffs, not to the plaintiffs' bar, but to plaintiffs. I wonder if you would care to address yourself to that subject, because it seems to me that if that would be the only argument for maintaining the present system, then it would almost be an inequitable kind of reason. It would not be fair on its face to say, "Well, we are going to maintain this dual system because it provides a special kind of advantage, a choice of two courts."

Do you care to address yourself to that subject?

Mr. WIGGINS. Well, Mr. Chairman, I don't think we are talking about fairness here. The courts of the States, and the courts of the Federal system are fair. At least they are entitled to that presumption. If in fact there are not, there are remedies available to the litigants to correct that unfairness.

So, we are talking about optional choices that do not deal with fairness, but with respect to tactical advantage. I don't think the decisionmaking at this level should address itself to tactical considerations.

So much of the testimony that I have heard and my conversations with other lawyers deal with this tactical issue.

I was speaking recently with a prominent official of the American Bar Association discussing the diversity issue. He told me that he was against it. I asked him why. He said, "Well, I'll tell you, I built a building right opposite that Federal courthouse. I am not going to jeopardize my investment." It was a matter of personal interest to him, of convenience to him.

I won't characterize all of the witnesses in opposing to this legislation as being motivated by such a narrow interest, but there is very much of it.

Senator METZENBAUM. Why do you think as a group lawyers oppose S. 679, because almost with no other exception no one else is opposed to it. Why do you think there is this lawyer opposition?

Mr. WIGGINS. Speed is a very important consideration. It is generally easier, at least in the major litigation centers, to get to trial quicker in the Federal court. Delay is the bane of all of us. That is a very important consideration.

I would suggest that the proper response is to try to do something to speed up State justice rather than shift to the Federal forum.

The other is simply comfort—

Senator METZENBAUM. What?

Mr. WIGGINS. Comfort with the existing system. Once you are used to going into courthouses and handling certain cases under the Federal rules, it is awkward to have to relearn a whole new body of law and people tend to resist that.

Senator METZENBAUM. There is some argument made that bias exists against out-of-State litigants. I think that argument really has gone by the boards, but assuming that bias does exist, is there any reason to expect it to disappear in cases where complete diversity does not exist or where the amount in controversy is less than \$10,000?

Mr. WIGGINS. No, of course not, Your Honor—Senator, of course not. That argument—

Senator METZENBAUM. You have been practicing law too much, Congressman.

Mr. WIGGINS. Well, the first time that I made an appearance after leaving Congress, I asked the judge if he would yield. [Laughter.]

So, I have been trying to forget old habits, and now I am trying to relearn.

The strongest case that could be made for bias and prejudice would be in the criminal field, Mr. Chairman, and we certainly don't tolerate a removal of the Federal court by some out-of-State defendant, charged with a State crime, where there is the maximum opportunity for bias and prejudice. We disregard that. I don't think there is—

Senator METZENBAUM. I think that is a very valid point; a very interesting point that I don't know has been raised before.

Mr. WIGGINS. Well, it is certainly true. I would think that if we really felt strongly we would focus on the criminal side. But we do not and there is no empirical data to show bias and prejudice. There is anecdotal data, but nothing that could be used as a firm basis for retaining Federal diversity jurisdiction to avoid prejudice.

Senator METZENBAUM. Assuming bias exists, are there not already adequate remedies in the law to accommodate the concerns of both the plaintiffs and defendants?

Mr. WIGGINS. Yes, sir, but the point is that we are talking now about legal bias which conceivably can be shown and can exist, but that is not what concerns the American Bar Association: It is "edge." It is a tactical advantage or disadvantage which falls short of legal bias which would taint the trial and result in a denial of due process if in fact it occurred.

So, we are not talking about that kind of unfairness. Mr. Chairman. We are talking about a perceived or subjective feeling that the judge may tilt this way or that way or the jury may be hostile or not. This perception is present in both systems. You find that in the Federal court just as much as the State courts.

Senator METZENBAUM. As a matter of fact, although the chairman previously mentioned the concern of the plaintiffs' lawyers in having a choice of forum, the converse of that is also true and that if the plaintiff filed its suit in State court, then defendant's counsel has the choice of filing a motion for removal and of course, always getting it removed.

That is, if we enact this legislation, it would provide a forum for State cases and a forum for Federal court cases. I think that is the thrust of your remarks and concern.

Mr. WIGGINS. Yes, sir.

Senator METZENBAUM. I am very grateful to you. I don't know whether Senator Baucus has any questions.

Senator BAUCUS. Yes. Thank you, Mr. Chairman.

I want to thank you, Congressman. Other than the academic interest in eliminating diversity jurisdiction, what is the impetus behind the effort to eliminate diversity jurisdiction?

What is the central reason for the elimination of diversity jurisdiction?

Mr. WIGGINS. Well, Senator, this subject has been kicked around for years. I don't think that I could trace the historical antecedents to this

bill to some single idea that was spawned years ago to eliminate diversity jurisdiction.

I think probably it received its impetus from Federal judges facing crowded calendars who saw an opportunity to eliminate a large share of the reason for their court congestion if only diversity were removed.

I personally got involved in this issue about 4 years ago. What motivated me was as I recall, a statement or speech by the Chief Justice. It came at a time when we were considering the judges' bill. It looked to me like this was an option to an expansion of judicial manpower.

Well, I came to the conclusion that whether it was an option or not, it was still a good idea and continued to push it in the House even as we went forward with the judges' bill.

I think the crowded docket was the basic motivating cause.

Senator BAUCUS. If that is true, then why not deal with the crowded docket by more judges rather than eliminating diversity jurisdiction?

Mr. WIGGINS. Because you do not deal with the underlying philosophical problem of Federal adjudication of State issues. Now that would bother me if there were no trial congestion at all. If everybody was handling their business swimmingly. I still would be offended to have Federal judges deciding matters of State law.

Senator BAUCUS. Excuse me. Why, as a practical matter, should we concern ourselves with this philosophical problem if there is no significant opposition to retaining diversity jurisdiction?

Mr. WIGGINS. You say there is no significant opposition?

Senator BAUCUS. If there is not, yes.

Mr. WIGGINS. In diversity, I think to the contrary, there is—

Senator BAUCUS. My point is that there is significant opposition to—

Mr. WIGGINS. To diversity jurisdiction.

Senator BAUCUS. Well, at least among the Bar.

Mr. WIGGINS. Well, the question then is, because there is opposition to the bill, why not let things ride the way they are. Is that your question?

Senator BAUCUS. That is correct.

Mr. WIGGINS. Is that your question?

Senator BAUCUS. Yes, that's correct.

Mr. WIGGINS. I think this is an opportunity to do something right with respect to the proper relationship between Federal and State Government. This Senate should not pass the opportunity. There is no good reason at all for Federal judges adjudicating State issues. Now that is a basic point for me and it may not be shared by the Senator. But it is very basic with me.

There are a few cases now being decided which breathe a little life into principles of federalism. I am delighted to read them. I think there has been too much Federal preemption of State responsibilities and this is an opportunity to get back on the right track.

Senator BAUCUS. I agree with you philosophically, but I am curious as to why we should proceed in this direction. In the Western States, there is not a significant Federal case backlog and people aren't worried about this kind of Federal intervention. It isn't on their minds.

Mr. WIGGINS. Well, I realize that this is not a subject of general conversation on the street. I hope, however, a decision to enact a law

is not going to be wholly in response to public pressure to move. If the Congress has a good idea, if academics, after thinking through that idea tend to support it, if witnesses of learning, come to testify and support the idea, if it has merit, even if no one in the country has heard of it, then I see no reason why it shouldn't be passed.

Senator BAUCUS. Have you thought of any kind of a "phased-in" approach to the elimination of diversity? If we suddenly on a certain date abolish diversity jurisdiction in some parts of the country it could have quite an impact on State courts. I wonder if you ever thought of any kind of "phased-in" implementation?

Mr. WIGGINS. I guess the Justice Department's original bill would be a half-way measure, and if it gets down to that, I will support that over nothing. But on the other hand, why settle for half a loaf?

I look at that as kind of a holding action by those who really want to retain Federal diversity jurisdiction entirely. They are willing to surrender part because it looks like the best that they can get. I don't see any reason for accepting less than complete victory when it is attainable.

If there is going to be a problem to the Federal judiciary as a result of losing its Federal diversity jurisdiction, it will show up soon enough. This Congress can respond to that problem. I don't think you have to anticipate it by lightening the load 50 percent rather than going all the way.

Senator BAUCUS. What do you do in those States like my own, Montana, which has no backlog of Federal cases? In fact, our Federal judges try a lot of cases in different parts of the country. Very often they sit on the circuit court. They also serve as trial judges in different parts of the country.

Mr. WIGGINS. They come down to San Diego with great regularity.

Senator BAUCUS. Yes.

What do we do in the cases of Montana or other States like Montana?

Mr. WIGGINS. Well, if you are telling me you have too many judges in Montana—

Senator BAUCUS. We have two.

Mr. WIGGINS. You do?

Senator BAUCUS. Yes.

Mr. WIGGINS. Well, I would hope that as those judges retire and take senior status that the President would not be obliged to appoint a new one.

Senator BAUCUS. Well, I will tell you, we didn't get any additional ones.

Mr. WIGGINS. You apparently didn't deserve additional judges.

Senator BAUCUS. What about those States that have one Federal judge such as Alaska?

Mr. WIGGINS. There is enough environmental, Federal question, cases going to arise in Alaska to keep that judge busy.

You know, we have a great deal of jurisdiction that still is open for the Federal court. Federal question jurisdiction is significant and Federal criminal jurisdiction is inundating some courts which has nothing to do with the civil side.

San Diego, for example, with its immigration, its drug cases has become a criminal court. It is very tough to get to trial at all with a civil case.

There Federal courts are going to be busy because of the fact that Congress has been busy creating new Federal question causes of action.

I do not think that we are apt to find empty, decaying monuments to justice called "courthouses" with nothing for Federal judges to do in the future. That to me, is not in the cards.

Senator BAUCUS. Thank you very much.

Senator METZENBAUM. Thank you, Senator Baucus.

One last question—in your opinion, is it constitutional for Congress to remove this basis for jurisdiction from the Federal courts?

Mr. WIGGINS. Oh yes. Diversity is authorized, but I don't see any mandate in article III. I have not heard of a serious argument that Federal diversity is mandated by article III.

In fact, I am not at all sure that we even have to provide a court to hear these cases.

Senator METZENBAUM. Thank you very much, Congressman Wiggins. Your testimony has been extremely helpful. I particularly enjoyed that part where you emphasized the federalism aspect of this whole movement.

Mr. WIGGINS. Thank you Senator.

Senator METZENBAUM. I am glad you saw fit to be with us.

[Prepared statement of former Congressman Wiggins follows:]

PREPARED STATEMENT OF CHARLES E. WIGGINS

My name is Charles E. Wiggins. I am a partner in the law firm of Musick, Peeler & Garrett of Los Angeles, California. I am a member of the California and District of Columbia bars. Prior to joining my firm in January of this year, I served for twelve years in this House of Representatives, and during my entire tenure, as a member of the Judiciary Committee of that body. Prior to that, I practiced law in California for ten years.

In addition to my new—and totally satisfying—responsibilities as a practicing lawyer, I serve by appointment of the Chief Justice as a member of the Advisory Committee on Federal Rules of Civil Procedure.

I do not appear this morning in a representational capacity. Indeed, there appears to be no consensus even among the lawyers in the litigation department of my own firm on the legislation before this Committee.

I appear for myself, at the invitation of the Chairman.

At the outset, I wonder why.

I am of course familiar with the comprehensive nature of the testimony last year before Senator DeConcini's Subcommittee on Improvement in Judicial Machinery, and that before Congressman Kastenmeier's Subcommittee on Courts, Civil Liberties, and the Administration of Justice in the House. Witnesses of great prestige and learning, such as Professors Charles Alan Wright and James W. Moore; Dean Griswold and Assistant Attorney General Dan Meador; Chief Justice Sherran of Minnesota and U.S. District Judge Hunter of Missouri; respected practitioners such as John Frank of Arizona; and others of equal rank have already offered their views. In addition, scholarly comment from around the country has been received and is a part of the record before this Committee.

It seems to me that the issue has been fully briefed and argued and it is time to submit the case for decision.

Given the fullness of that record and the skill with which witnesses having far more impressive credentials than my own have argued, I am taxed to find something new to offer this Committee.

But I shall try.

I

A. ABOLITION OF DIVERSITY JURISDICTION: IN GENERAL

On the broad question of diversity jurisdiction in the Federal Courts, I come down on the side of its total abolition. The arguments, pro and con, have been fully developed by others. The concerns of such respected scholars as Professor

Moore, who is obviously not swayed by tactical reasons for preferring one forum over another, are entitled to great weight, but so, too, are the contra views of Professor Wright, for example.

As in the case of most legislative issues, it comes down to a question of balancing the conflicting views of earnest witnesses; and deciding, on balance, where the public interest lies.

I should like to share with the Committee the decisive factor which tilted the balance for me in the last Congress.

As a matter of first principle, I agree with Professor Moore that the "primary function of courts is to serve litigants and society." It is equally fundamental, however, that all courts do not serve all litigants and all of society. There is a division of responsibility between state governmental functions and federal governmental functions, of which the administration of justice is a part, which is deeply rooted in our society. This principle of shared governmental responsibilities—federalism—has been battered and frequently ignored by the Congress, but it lives as a governing principle nevertheless, and should be honored, absent compelling reasons for the extension of federal jurisdiction to its Constitutional limits.

Respect for so basic a principle should require matters of federal law to be litigated in federal courts and matters of state law in State courts. That should be the basic test of jurisdiction of the two court systems; and those urging a deviation from that Constitutional norm carry a heavy burden of persuasion.

Evidently that burden was met in the first Congress which conferred diversity jurisdiction on federal courts in the original Judiciary Act, for reasons which were then compelling.

For me, the original justification for diversity jurisdiction in the federal courts—the fear of bias and prejudice by State Courts and Juries—is no longer sufficiently demonstrable as to justify this continued deviation from normal principles of federalism.

It is of course true that occasional examples of legal bias or prejudice will occur in both the Federal and State systems. Remedies exist within each system to correct such cases. Other extra-legal factors which do not taint the fairness of the trial itself but which so greatly concern litigators seeking an "edge" for their clients, are not unique to either system and, in all events, are not of such jurisdiction, but to reduce the number of litigants who will have access to the federalism.

A principled argument based upon State Court prejudice would seek an extension of federal diversity jurisdiction to the maximum so as to reduce, or even eliminate, every vestige of such prejudice. But opponents of this legislation do not consistently make such a principled stand. Some seek to retain diversity jurisdiction, but to reduce the number of litigants who will have access to the "unprejudiced" federal courts by raising the amount in controversy. For example, see the statements of John R. Gibson, page 195, Edward W. Mullinix, page 203, David Berger, page 210, and the inconclusive comments of John Frank, pages 42-43 (all citations are to Hearings before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, United States Senate, 95th Congress, 2d Sess., on S. 2094 and other bills relating to diversity as citizenship jurisdiction). Too many witnesses have undercut their own "prejudice" arguments to sway me.

Proponents of diversity jurisdiction argue that it has made a significant contribution to American jurisprudence (Statement of Professor Moore, p. 127 at 129-30); that it has worked satisfactorily in the past (at least after Erie); and has provided a useful service to society in doing so (statement of John Frank, p. 28 at 34 and 38-39). They argue that a shift of more than 30,000 cases to the State Courts results in no diminution of total judicial business (the "manure pile" argument, Frank, p. 40) and indeed would produce a log jam in at least some State Courts.

That the federal government can (in some instances) provide effective social services does not argue that it should do so unless principles of federalism are to be abandoned. There may come a time when the worse fears of some will be realized and State Courts will become hopelessly bogged down in handling their own business. But a proper federal response to such an eventuality would be to help the States in the discharge of their governmental responsibilities by appropriate financial and other assistance, rather than a federal assumption of governmental functions which properly belong elsewhere. Until pervasive state incompetence is demonstrated, however, they deserve a chance to prove the competence they claim for themselves.

My law professors at the University of Southern California used to exhort their students to think in the alternative. I have tried to do so in analyzing this issue.

Underlying federal diversity jurisdiction is the premise that a certain class of litigants will receive better justice in the federal courts than in the State courts. An alternative, consistent with this premise, is to expand federal jurisdiction, not just in diversity cases, but across the board, because better justice is presumably dispensed in federal courts. Surely Congress is sufficiently ingenious to find a Constitutional basis, bottomed upon guarantees of a fair trial for example, to extend federal jurisdiction if it were inclined to do so. Any such dramatic expansion of federal jurisdiction would surely be met by a chorus of opposition from the State and the federal judiciary. The focus of the opposition would, in my view, be the unacceptable degradation of the principle of federalism.

Let's take a look at another alternative. If the original premise of superior federal adjudication is unprovable, let us assume that the State Judges are fully as competent as Federal Judges to dispense justice. As an alternative to maximizing federal jurisdiction, suppose the Congress were to minimize it and rely upon State Courts to assume the resolution of all or most cases now filed in Federal Courts. After all, there is no clear mandate in Article III of the Constitution that we have a parallel federal court system (except for the Supreme Court) and until 1891 we managed with only a skeletal federal court structure. This alternative, too, would be met by a chorus of opposition, and in this case as well, the focus of opposition would be the unacceptable degradation of the principle of federalism.

The point of all this fantasizing is that the underlying premise for federal adjudication of State issues, or state adjudication of federal issues, will simply not hold water, if extended to the extreme, because an aroused interest in federalism would not permit it to happen. If the federal adjudication of State issues is not sound for all cases, it should not be applied to some, absent compelling reasons for doing so. Some witnesses have advanced reasons to be sure, but I suggest that they fall far short of compelling a deviation from the Constitutional norm.

B. ALIENAGE JURISDICTION (SECTION 4, S. 679)

The legislation proposes to retain the so-called "alienage" jurisdiction of the district courts, 28 U.S.C. § 1332(a) (2) and (3), but to increase the amount in controversy requirement from \$10,000 to \$25,000.

I have no major difficulty with this provision, and it has provoked no adverse comment in the record of which I am aware. Foreign states or citizens or subjects thereof are parties in which the federal government has a unique and continuing interest wholly different from that of United States citizens residing in different states. But when alienage jurisdiction is invoked under § 1332, the District Court is still confronted with the unseemly responsibility of applying state law. Accordingly, an increase in the jurisdictional minimum will shift the lesser cases to the State Courts (where they would normally belong), but retain federal jurisdiction over more important cases, in which the unique and continuing federal interest is stronger. Thus, the bill reaches a reasonable accommodation of both federal and State interests.

C. RETENTION OF INTERPLEADER JURISDICTION

Everyone seems to agree that interpleader is a useful application of federal jurisdiction, especially where state process cannot reach all adverse claimants to the fund. See, eg., *Merrill, Lynch, etc. v. Cavietchia*, 311 F. Supp. 149 (1970). I agree, as well.

D. VENUE AMENDMENTS TO 28 U.S.C. § 1391 (a) AND (b)

The deletion in § 1391(a) would of course be required if diversity jurisdiction is abolished. The change in the "litigation breeding phrase 'in which the claim arose'" to the more realistic language proposed is salutary for the reasons fully developed by the American Law Institute study to which reference has been made elsewhere in the record. The proposed amendment is especially in order in light of the 1976 amendments to sub-division (f) of 28 U.S.C. § 1391.

It is true that a repeal of § 1391(b) will extend venue in federal question cases to the judicial district in which all plaintiffs reside. The only perceived argument

against such an extension would be hardship to defendants; but in the past, the burden to defendants in diversity cases has not been regarded as intolerable and I see no reason why it should be more so in federal question cases.

Accordingly, I support the Amendments to § 1391.

E. REMOVAL AMENDMENTS

Section 8 of S.679 has revised the earlier drafts to preclude removal by a citizen defendant in an action commenced by an alien plaintiff. The former language was subject to some criticism on this score (Statements of Wright, p. 52; and Committee on Federal Legislation of the Association of the Bar of the City of New York, p. 222) and the amendment represents an improvement over the earlier Bills.

FEDERAL QUESTION JURISDICTION

A. In general

From all that I have said heretofore, it follows that I endorse the elimination of the amount in controversy provision of 28 U.S.C. § 1331, as the general rule of procedure in federal question cases. The deletion of the amount in controversy limitation on federal jurisdiction in federal question cases carries the trend established in 1976 (eliminating the amount in controversy in actions against the United States, its agencies, etc.) to its proper conclusion.

B. The exception: Consumer Product Safety Act cases

The Consumer Product Safety Act (15 U.S.C. § 2051 et seq.) confers certain federal rights upon consumers and imposes substantial federal duties upon those who deal in consumer products.

Under the principles of federalism which govern my decision respecting the abolition of diversity, the federal remedies provided in 15 U.S.C. § 2072 should be heard before federal rather than State courts. But in its impact upon principles of federalism, a surrender of jurisdiction voluntarily is a far different proposition from seizing it. The bill proposes a voluntary surrender of jurisdiction in consumer product cases unless the amount in controversy exceeds \$10,000. This approach is analogous to alienage cases. I do not find this minor deviation from the Constitutional norm unduly offensive to principles of federalism, and one which makes much common sense given the potential for a significant number of "small claims" consumer cases.

III

PROPOSED AMENDMENTS: SO-CALLED "DISASTER CASES"

I have not seen the text of any amendment permitting diversity jurisdiction involving a common disaster where there may be a large number of parties from several states. I have no conceptual objection to such a limited extension of federal jurisdiction into areas normally reserved to State Courts. My basic thesis is, of course, that federal courts should hear federal cases. The essence of federalism is respect for the proper role of federal and state governmental responsibilities. The principle does not suggest, much less require, hostility or isolation between independent governmental bodies. Cooperation which recognizes the limitations of each body and seeks to augment the limited capacity of each, is in harmony with the federal principle. Thus, the limitations of the federal system justify retaining the amount in controversy in consumer protection and alienage cases and shifting these lesser federal cases to a state forum where they can be handled more efficiently; and the limitations upon the reach of state process justify federal interpleader where the efficiencies of the federal system can be realized. So, too, would a limited application of federal diversity jurisdiction in disaster cases with multiple and scattered parties complement State Courts and promote judicial efficiencies.

This, then, is an example of a "compelling" reason for extending federal jurisdiction into areas normally reserved to state jurisprudence, of which I earlier spoke, which justifies a deviation from the Constitutional norm.

However, because the House bill does not, to my knowledge, contain any such provision, it may be well to consider this, and similar proposals (such as class action jurisdiction based upon diversity) in separate legislation. At this juncture, the basic legislation should not be enlarged if difficult legislative hurdles are predictable as a result.

I return to the question "why am I here"?

Ultimate legislative success requires the bringing together of a coalition of voting members representing one more than half of the Body. Sometimes the majority party can exercise such discipline as to achieve a majority vote from within its own ranks. Sometimes not. As we all know, it frequently becomes necessary to assemble a coalition on a particular issue from both parties, from all regions of the country, and all points on the imprecise scale measuring political philosophy.

Perhaps I can make a contribution to assembling this necessary coalition by appealing to Senators who characterize themselves as conservative or who champion the cause of states rights. That is, I suspect, my mission in these hearings.

I hope in discharge of that mission I do not offend Senators Kennedy and Metzenbaum, two proud liberals, by characterizing S. 679 as a conservative bill. I intend rather to complement their wisdom in rediscovering the principle of federalism.

When was the last time this federal octopus withdrew its tentacles and relaxed its grip on governmental responsibilities normally reserved to states? I can recall no recent example of federal power being withdrawn and responsibilities returned to states. This bill represents a small step in the right direction, to be sure, but conservatives especially should savor the moment.

Support for this legislation is a clear opportunity for conservatives to stand up for their principles, and a rare opportunity to do so in a winning cause. Naturally, I do not intend to frighten liberals from their support of a good idea. To maintain that part of the coalition, however is not my responsibility: It is not, in my opinion, why I have been invited to testify this morning.

Thank you for this opportunity.

Senator METZENBAUM. Our next witness is John P. Frank, of Lewis & Roca, of Phoenix, Ariz.

Mr. Frank, the chairman has another hearing of the same committee that is taking place at this very moment. I would hope to be able to conclude the hearing this morning by 11:30, which is an hour from now, and we have you and two more witnesses.

So, I would be very grateful to you if you would be good enough to ad lib your remarks and put your entire statement in the record. I know that you are a very able exponent of the point of view that you are here to speak to.

I also note that on your committee you have my fellow distinguished Clevelander, Charlie Clark, who serves on your committee, with you. That is very interesting for me to note that.

STATEMENT OF JOHN P. FRANK

Mr. FRANK. Senator, may we do this: May I ask your aid? I have sent in a statement and an exhibit. I do not know whether they reached them in time to be distributed.

Senator METZENBAUM. They have.

Mr. FRANK. Could the statement and the exhibit be put in the record?

Senator METZENBAUM. Without objection, so ordered. They will be inserted into the official record.

Mr. FRANK. I will briefly extemporize. I appear first of all as Congressman Wiggins says he appears for part of a coalition. I appear for a total coalition, pretty much of the lawyers of America.

By specific designation I appear for the Bar of Arizona and Senator Baucus, by specific designation as a representative of your bar and

certain others. But I am also appearing generally in behalf of all 50 of the State bars and of the Committee to Maintain Diversity Jurisdiction.

That committee, in itself, is a cross section, representing, on the one hand, the largest corporate enterprises in America—the Association of American Railroads, the Ford Motor Co.—some of the greatest concerns in the United States. At the opposite end of the spectrum it represents the plaintiffs' bar of the United States, people who are representing the single practitioners, the little people with individual claimants. We represent people from large cities and small cities and big States and little States.

Senator METZENBAUM. While you are running through those that you represent, you heard the question that I asked before of Congressman Wiggins. I wish that you would comment specifically on the question that I have asked: "Why is it that it is only the lawyers who are opposed to this?" I am a lawyer. I am trying to understand why it is that lawyers would be so opposed, unless it is from a standpoint of a tactical aspect, and I understand that part full well, having practiced for a number of years.

How do you account for the fact that the lawyers are the only ones in opposition?

Mr. FRANK. Well, it is true, on March 23, I have given you a copy of a letter which you have anyway, but we have just put it into the record a letter from the director of government affairs of your State bar, the executive committee of the Ohio State bar adopted a resolution opposing the elimination of diversity.

Now why is this so? The short answer is that we are dealing fundamentally with the problems of access to justice in America. What this bill does is simply make it harder for the people of America to solve their problems. Nobody knows that better than the lawyers do who handle the cases.

The fact is, we are running something like 30,000 or so diversity cases a year. It was 32,000 last year. The fact is that in any of those cases there are something on the general order of—there is no fixed count, but at least five, eight, or more people involved as parties in addition to their counsel.

So, we are looking at over probably 200,000 to 300,000 people a year who come to the Federal courts of America asking for help in solving their problems.

Nobody knows better than the lawyers that the practical effect of this bill is to withdraw access to justice in America, to make it harder for people to solve their problems.

The fact is that in most of the areas where there would be this kind of a pull back the result is to make a bad situation much worse because generally speaking, pockets of heavy backlog on diversity are also the areas where there are heavy backlogs in the State courts. These are flip sides of the same coin.

Senator METZENBAUM. Can you document that for the committee?

Mr. FRANK. I used to be able to give exact documentation and because of the stopping of NYU of keeping statistics and because the State judicial center has just begun to accumulate statistics, I can now only approximate it. I have set forth the details in my statement.

I think that it is generally true that in an area such as the eastern district of New York, in the city of Chicago, in Philadelphia, and frankly, in Cleveland, sir, the practical effect, generally speaking on the average, is going to take human beings with human problems and say to them in a crowded State court:

You are going to have to wait 2 years, but don't bother us, we are too busy. We can't be troubled with humdrum people's problems, and we are going to give you a 5-year wait over on the State court docket.

Those 5- and 6-year waits exist. It is an incredibly cruel business to pull away from people access to justice in those circumstances.

Now the second point I want to meet square on is the argument that somehow this bill is a step in the interest of federalism.

One of the marvelous features of American political history is the capacity of the side to change lances and exchange positions, take opposite sides from what they may have had before.

We deal with legislation which got into this American law straight from George Washington, James Madison, and Oliver Ellsworth, the fourth Chief Justice of the United States. That's where the law comes from which you are asked to repeal.

Now I do not bespeak it simply because it is old. Clearly, if something is old and it has become obsolete, you throw it out the window.

But to say that a tradition in the practice of law and in the administration of justice in America which comes literally straight from the hands of Madison and Ellsworth is somehow non-Federal, to say that a bill which was adopted by the First Congress, to say that a plan for the settlement of disputes which was the only way private citizens could get into Federal courts at all, for the first 100 years of American history, to say that that is anti-Federal is an extraordinary use of those terms.

The fact is that Federal Diversity Jurisdiction and the Post Office are the two oldest Federal social services in the history of the United States.

Now we are talking about a social service. Dispute settling is exactly that. It is a system by which the society says to those who cannot agree on the resolution of some problem, "We will give you a place to get your disputes settled." That system was adopted long, long ago. It is true that the patterns of prejudice changed.

It is also true, I am sure, Senator Baucus, with a western feeling would know what I am talking about, and I don't know, I regret to say the State of Ohio, with the same geographic intimacy. I taught for years at Indiana, but I have been in your State from time-to-time on appearances or otherwise, but I don't know it in a fingertip way.

But, Senator Baucus, in my State, I suspect you know and I know that there are places in which an out-of-stater has litigation, he is going to be what we call "home towned" for sure.

So, it is therefore in the interest of just plain common fairness and the avoidance of prejudice, to have an alternative form which may be available to the disposition—

Senator METZENBAUM. On that basis, we don't have that kind of a bias that I know of in the State of Ohio. I would say to you that I think there is bias in Ohio, when Clevelanders go into some of the rural areas and bring their lawsuits. Should they then be able to trans-

fer their cases to the Federal courts because it would have that kind of bias?

I think there is bias when people from the lower economic areas are caught in some of the counties of Ohio and who, if they have a criminal case, I think they often times get the short end of the stick.

The question that I have to ask you is: Is this really the question of Federal jurisdiction? Can you really make a case out that bias exists in the 50 States to such an extent that we ought to maintain this duality of choice?

Mr. FRANK. In my judgment, the answer is "Yes." I find and as I say, I am in touch with the 50 States. They all report that there are pockets of outright bias in all of those States.

I would like to go farther and simply mention the headnotes of my argument and then welcome any questions because I realize that you have the task of moving along.

The first and fundamental reason which I have advanced in the argument made is that something on the order of 32,000 cases a year are being disposed of this way, and that in itself is a solution of a social problem, it goes to a matter of availability which in itself is highly desirable.

The historical considerations I think are legitimate. I am not prepared to say the Founding Fathers did not know what they were talking about, though I acknowledge that later wisdom may sometimes be better than earlier.

But here I think the experience has proved that there is an outright blessing. A point which I stressed over and over and which I mention it because Senator Biden's bar has especially pressed it to him, is the advantage of the true interchange of ideas which is very much a factor of having a highly overlapping jurisdiction. This is an area, if you will forgive me, in which I can claim some particular experience.

I served for 10 years on the U.S. Supreme Court Committee on the Making of Rules. I recently conducted the national conference on what the civil rules should be and I rather suspect that the recommendations of that conference are what were adopted by the Advisory Committee of the Supreme Court only a couple of days ago. So that I really have had some chance to see how ideas flow between the State and the Federal systems.

I really do conclude that we are getting much better idea exchange by virtue of having duplicating, overlapping bars in the two systems. I see it happening time after time that an idea starts in one place and goes to the other because these are all people who are commonly in the same courtrooms from time to time talking to each other regularly more than occasionally at bar associations, are in fact having common experiences which pool. It really does have an effect which I would detail and I have to a degree in my paper.

Let me say only two more things. First, the suggestion has been made from time to time that Federal cases should be in Federal courts and that somehow State cases should be in State courts and that somehow there is a difference. That, I submit is an artificial, verbal construct. There isn't such a thing, really, as Federal cases, State cases.

The legend that somehow it is proving terribly difficult for Federal courts to deal with State law problems is simply not true.

I am aware that the assertion has been made in some of these hearings that it is difficult to find persons to take Federal judicial positions because they don't want to be bothered by State law questions. All that I can say is that I have been involved in judicial selection intimately and in detail for many, many years, and I have never seen such a human being in my life.

Let me make one last point. I make, Senator, if you will forgive, ad hominem, but just as Representative Wiggins, whom I deeply respect, who has the distinction, true distinction of being the first practicing lawyer in the 10 years that this matter has been under debate that I know of, ever to appear before one of these committees to endorse any part of this legislation. He has been a practicing lawyer only lately.

Senator METZENBAUM. I want you to know I am a sponsor of this. I have practiced law since I was admitted to the bar.

Mr. FRANK. Senator Metzenbaum, you are the one that I want to talk to. I am really pushing my peanut up the mountain with my nose because I am not going to get anywhere persuading you. But Representative Wiggins spoke of representing a streak of coalition. I represent in my long life dealing with this, the opposite side. You and I, so far as the social outlook is concerned, do say our grace on the same side of the bench.

But I find really unfortunate, I say it with respect to a Senator who I accept as a leader for most purposes, is that this is simply part of the policy of legal elitism in America and it is very unfortunate.

Senator METZENBAUM. Legal what?

Mr. FRANK. Legal elitism in America. What we are getting right now—let me see, do I have 2 or 3 minutes left or would you rather I fold it up?

Senator METZENBAUM. Take it. I wouldn't cut you off.

Mr. FRANK. Well, I know that, but I also do not wish to trespass. I want to go to Senator Baucus' question: Where does all this come from? Let me address that. It will be my windup thought subject to any questions you have.

Senator, prior to *Erie Tomkins*, diversity jurisdiction really was an abuse and it was fairly criticized because prior to that decision we had a different body of law on the Federal court than on the State law and the wise guy jockeyed for the better body of law.

Erie Tomkins erased that. It really has done so quite successfully. When I was in law school in the thirties I was brought up to believe, and I did believe that diversity should be abolished because of the gross disparity of the two-law systems. It wasn't right. The big guys were getting advantages over little guys.

Once there was a great national movement to that effect. What you are getting in part is the vestige of a movement not whose time has come but whose time has gone, because *Erie Tomkins* did solve that problem. We are getting one system. I have not heard a complaint anywhere in America in years of divergent results between the two systems. That problem is really solved.

You get a vestige of that. The work on this subject, most of the impulse comes from people of my generation who adopted that point of view prior to *Erie Tomkins* and they are still floating on it.

But, what has happened since has been a new movement which I would call the legal elitist movement in the United States. We are

getting half of a pincer movement here and half somewhere else. So, we are getting a drive here to kick all of these cases out of the Federal courts where the people are and just leave in these the specialty subjects, the antitrust, the Internal Revenue cases, the matters, all of which involve purely the interpretations of Federal statutes or basically so, as patent cases.

We are going to have a group of super specialists in the Federal courts and we are going to run those courts for them.

On the other side we are getting the drive for an elite Federal bar and a push toward a barrister system of special examinations and you have to be somebody extra to get in.

The practical consequences of all of this is not merely to reduce the availability of justice, but it is greatly to increase the cost of justice. It will make it a lot tougher for the general run of the American people to get somebody to do their business for them because we are creating the super specialist in the Federal court, on the one hand, and then creating a set of specialized qualifications for a super bar on the other. We are in the midst of a deliberate drift toward a barrister system.

I am a senior partner of a large, and I regret to say inexpensive law firm. All I can say is the cost of legal services in this country are bad enough without creating this galaxy of superstars to handle this super business. I think it is a socially regrettable and backward step. It is a step which in those aspects of it, Senator Metzenbaum, you in particular don't really want to see happen.

SENATOR METZENBAUM. How would this create these superstars who get higher fees?

MR. FRANK. What we are doing, what happens now is that we have a large bar in the Federal courts of people who are handling both the specialty questions and they can handle diversity questions and there is some degree of overlap.

What we are going to do now under this bill is kick out all of that general run of people, the ones you know by name who are basically in there handling non-Federal specialties. What we are going to have left in there is a bar of specialists. People who are the patent specialists, the tax specialists, specialized labor law practitioners, and so on. That is all that is going to be left because that is what the Federal questions are.

SENATOR METZENBAUM. Look how much money we are going to save by no longer needing those lawyers to litigate the issue of diversity and to file the motions to remove the cases from the State courts to the Federal courts. We are going to save a lot of money.

MR. FRANK. Senator, you and I are old pros if I may speak in that over-familiar tone. I heard you make that comment to Representative Wiggins. I can say only that I have been in Federal practice actively for 35 years. I have taught the subject at various law schools. I have been in countless cases. I haven't seen three times in my whole life when any material time or cost was involved in the question of whether the diversity matter needed to be there or not or whether there were any problems.

You speak of the cost of the removal proceedings. The fact is, any paralegal can file a removal petition. There is nothing to it. It is just another piece of paper.

The number of times that there is a serious dispute over removal approaches zero. It isn't quite at zero. It is near there statistically.

Senator METZENBAUM. Wouldn't you say though, you say any paralegal could file it, but can you tell me of any instance in your recollection where an insurance company which had its lawyer file the motion was billed for the paralegal? Where it had anything other than full and handsome rates for the motion to remove?

You know, a lot of things could be done by paralegals. A lot of things could probably be done by nonlegals, but the legal profession, and I was part of it, and still am part of it, never that I know of, ever charged anything but full legal rates whether the secretary did it or the paralegal did it.

Mr. FRANK. I am keenly aware that you are part of it and I respect it very much. Indeed, the folks from Ohio tell me that your former partner is doing the best he can to persuade you of the error of your ways.

The fact is that you and I both know that the whole system is too costly. It is dreadful. But this is a long step toward upping those costs. I repeat. When you couple this with the other drive that comes from the same source to create a super specialist group of lawyers, you are just making a matter which is prohibitive now infinitely worse.

Senator METZENBAUM. Professor Wright, Judge Friendly and a whole host of people disagree with your conclusion on that.

Mr. FRANK. They do and they are good friends. We are colleagues in other work and I respect them all. It is true that Professor Moore, as Mr. Wiggins said, is a member of my committee. But I settle for the only jurisdiction I am claiming to represent and that is that every single working stiff in the bar of the United States thinks that diversity is serving a useful purpose. You haven't had such unanimity on any matter ever. Fifty States. Not merely the ABA and the ATLA, the big national groups, but the State bars.

Senator METZENBAUM. Let me ask you a question. You know—this story about 50 States and 50 bar associations—nobody ever polled me. I am still a member of the bar association.

If you tell me that my executive committee and every executive committee of every bar association in the country has a right to determine what all the lawyers of that State want, or believe in, then I have to say to you that it wouldn't be the first instance in which they have not reflected the point of view of the practicing lawyer.

Now what evidence do you have that the practicing bar really feels as you say they do and that you speak for them? Have there been any polls taken by—just general polls to the bar itself?

Mr. FRANK. The answer is yes. In most instances, you and I are aware that the State bars meet usually only annually. In State after State these resolutions have been adopted by the State bars in convention assembled.

In other States, the measure has been adopted by the executive committee, because it meets more often. For example, in your State it was first adopted by the executive committee and then I think the State bar, Senator Baucus. But I think you were there. You would know that better than I would.

May I regard that, Senator Metzenbaum, as an invitation that you would like to hear from more of the lawyers of your State?

Senator METZENBAUM. It would be fine with me. I am always delighted to hear from my constituents. I think I would be more interested though in a very fair poll of the bar of this country and that the questions would not be loaded because you and I both recognize that it is very simple to ask a question in a manner that almost assumes what the result will be.

But I think it would be helpful if 5,000 lawyers, randomly selected throughout the country were polled on this subject and that perhaps a paragraph or two would be submitted on each side of the issue and somebody like Justice Burger or Judge Friendly, or somebody of the kind, stated the issue on one side and somebody else stated the issue on the other side.

I think it would be very interesting. I am not at all certain that the next time you appeared at the next hearing in the House, after the Senate passes this, that the results might not be different. It might be worthwhile doing it. I would urge upon the bar to do just that and not do it in such a manner that we assume the results before they are done.

Let me ask you some questions.

Mr. FRANK. Please do.

Senator METZENBAUM. Your testimony attempts to leave the impression that transferring diversity cases to the State courts will cause undue delay because the State courts which will get most of the diversity cases, experience delays twice as long as the Federal courts which are their counterpart.

I would like to take a few minutes just to take a look at your statistics on that subject. You compare 1974 State statistics from the Institute of Judicial Administration to 1976 Federal statistics from the administrative office; isn't that correct?

Mr. FRANK. Whatever the figures were there. I don't have it open before me. That is essentially true. As I told you earlier there is a shortfall on figures due to the failure of NYU to keep up its statistical work.

Senator METZENBAUM. But you could use the figures from the same year. You could have done that?

Mr. FRANK. No. If I did it would work a distortion which would be unfair. The fact is that—let me answer that squarely please Senator. For years New York University kept these figures. They abandoned the enterprise with a change of staff. The State center is just starting statistical work now. At the moment, for the intervening period, there simply does not exist in America any good set of statistics for the State side, which is a profound loss.

So that is where we are, we have the Federal statistics kept current and the State statistics lag. If I were to take them for the same year it would be, I think, unfair to your side of the argument because the speedy trial act begins to have its impact and the Federal congestion is getting worse on the criminal side.

The consequence is that the Federal courts are more current in 1974 than they were in 1976.

Senator METZENBAUM. Well, the State statistics are for personal injury cases; correct?

Mr. FRANK. Yes. Typical jury-type cases.

Senator METZENBAUM. The Federal figures cover all jury civil trials; right?

Mr. FRANK. That is right.

Senator METZENBAUM. There really is a difference isn't there? Aren't you comparing apples and oranges?

Mr. FRANK. There is clearly a statistical deficiency. I am the first to acknowledge it and I proclaimed it in my statement. I can give you only approximations.

Senator METZENBAUM. There is typically no prejudgment interest in these personal injury cases; is there?

Mr. FRANK. No.

Senator METZENBAUM. There is no real incentive then on the part of defendants to hurry these cases to resolution; is there?

Mr. FRANK. The only incentive factor is the one you remember from your practice that the requirement of keeping the interest on reserves sometimes causes the defendants to push harder than the plaintiffs. That is a real factor.

Senator METZENBAUM. Unless the defendants' insurance companies are satisfied to have those reserves grow.

Mr. FRANK. Yes.

Senator METZENBAUM. Have certain amounts charged there, thereby permitting them to file for higher rates with the insurance commissioner?

Mr. FRANK. May I respond, please, Senator?

You began the hearing by reading a letter from the National Association of Insurance Attorneys asking that this bill be defeated. The plaintiffs' bar also asks that this bill be defeated. All are unanimous.

Aston Jennings, former president of the Insurance Council is on my committee; Robert Begam, the head of the policy section of the plaintiffs' bar is equally on the committee.

So we are at a matter in which both the plaintiffs' bar and the defense bar are at one that diversity is serving a useful purpose.

Senator METZENBAUM. I understand that. I am not sure that changes the factual situation. But I understand that at least the lawyer associations are against it. That I understand.

Mr. FRANK. Yes.

Senator METZENBAUM. Are you aware that the institute figures for the State cases cover the period from the time issue is joined until the time of disposition while the Federal figures cover the longer period from the time of filing to disposition?

Mr. FRANK. I am not able to make that particular comparison. I can't do it.

Senator METZENBAUM. Are you aware that the 1976 figures for the city of Boston, one of the five cities you cite in your testimony indicate that the average time from filing to disposition of all civil cases in the State court was 394 days, while in Federal court it was nearly twice as long, 690 days?

Mr. FRANK. I am not able to answer your question as to the Boston figures for that period and will ask leave to amplify my remarks in the record as soon as I can, in fact, check them. I will ask Ms. Baker to help me get it as part of the transcript, as quickly as possible.

Senator METZENBAUM. All right.

That would be exactly opposite from the results you reached, isn't it?

Mr. FRANK. If you are telling me that civil cases are going to trial

faster in the State courts than in the district courts in Boston, it would be the opposite of what I told you.

Senator METZENBAUM. Are you aware of the following disclaimer in the institute study, whose data you rely on, where they say that the study is not "intended to be a picture of general calendar congestion" and, "No generalization on the entire status of the courts' calendar can or should be drawn."

Mr. FRANK. I am not merely aware of it, I have proclaimed and stressed the fact that these are limited statistics. Until the State center gives us first class statistics, which it will, there will be no way of having hard information.

I may add, by the way, that one can also supplement, and I do, by direct conversations with the bar in the various places. I come to the conclusion on that basis also.

Senator METZENBAUM. Wouldn't you agree that really as you look at your statistics, which are much of the basis of your presentation as to the fact you can get speedier justice in the Federal courts than in the State courts, that really, in reality, your statistical presentation does have a number of weak spots in it?

Mr. FRANK. What I would like to say with care for this record, is that we are giving you the best statistical basis we presently have. I am keenly aware that in a State such as Montana, for example, the Federal docket is sufficiently light so that it is perfectly possible that you have a different situation than in my own State where the Criminal Justice Act has made it almost impossible for the Federal courts to move until we get our new three judges. We have imbalance among the States.

Senator METZENBAUM. But the point is, you present the statistics as a proof positive of a particular point of view, and yet, by reason of various factors, there are weaknesses in those statistics, aren't there?

Mr. FRANK. The maximum I claim for the statistics is that generally speaking in the crowded areas the matter will be worse for the people involved on the State side than on the Federal side.

That's the best I can tell you because there are no rigid statistics that permit a more exact answer.

Senator METZENBAUM. Isn't there inefficiency and waste associated with the Federal courts making nonauthoritative interpretation of State law?

Mr. FRANK. No. The fact is that in our part of the country, which I of course know best, the fact is that the circuit decisions on State law are substantially and invariably accepted. Senator, I can't remember an instance in which a ninth circuit decision wasn't helpful to the State courts rather than wasteful.

I have pressed Judge Friendly, who is a friend, and others of that point of view to give me as many as five examples in the United States in which in fact a Federal prediction of State law has later been reversed within, say, a 5-year span by a State court. I haven't found five cases.

Senator METZENBAUM. Then you are really saying that when the Federal judiciary speaks, it is recognized by the State courts as really being the law and having a kind of validity to it, even in interpreting State law that the State court decisions don't have?

Mr. FRANKS. Not at all. What I am saying is that when we are solving State law problems in the Federal courts, those panels commonly have judges who were drawn from the States themselves anyway. The problems are difficult. One fellow's solution is about as good as another.

As a result, the Federal courts are making, on the occasions when they have to be in advance of State law, interpretations which are likely to have respect on the State side because they are as good answers as can be had.

I repeat, this is the weakest single point of the critics. Since Judge Friendly is a good friend—has he been here yet, or is he coming tomorrow?

Senator METZENBAUM. We submitted a statement earlier today.

Mr. FRANK. All right. You might ask—I think Herbert Wechsler will be here tomorrow, and he shares Judge Friendly's views, and you might ask if they can give, within the last 5 years, five specific instances in which the State court has rejected a Federal decision as an inaccurate interpretation of State law. I don't think there are five.

Senator METZENBAUM. Well, I wonder whether the logic of that doesn't take you then to the point of saying that everything ought to be decided by the Federal judiciary and we ought to abolish the State courts?

Mr. FRANK. No, it does not. The fact is that the people of the United States have more problems than, in fact, they are able to solve by the combined court systems. Our goal is to try to have both systems working as well and as effectively and as hard as they can. We don't want to pull either one off the line.

Senator METZENBAUM. Of course, I don't suggest in any way that we ought to abolish the State courts, but it seems to me that is the logical conclusion of part of the thrust of your remarks.

Mr. FRANK. Then I can only say apologetically that I misled you because no thought is farther from my mind.

Senator METZENBAUM. You speak of this legislation as "closing the courthouse doors." You are not suggesting that parties to diversity suits will have no forum to litigate their disputes in if diversity is abolished, are you?

Mr. FRANK. I am saying that the object of this legislation is to move the 32,000 cases over to the State court system so obviously they can go to the State court systems. It closes the courthouse door very literally, yes. It slaps it right in the people's faces who want to be there.

Senator METZENBAUM. Are you suggesting that the State courts are not competent to handle these 32,000 cases?

Mr. FRANK. I am suggesting that there will, in fact, be a very serious added burden because the diversity cases frequently tend to be large and time-consuming cases. So the argument that all we are doing is dropping a few more grains of sand onto a beach which is already so large that it doesn't matter is itself seriously misleading. Some of these are going to be awfully big grains of sand.

Senator METZENBAUM. If I understand your point, it is that a litigant, or rather a litigant's lawyer, may conclude that a better result could be achieved in Federal court; is that correct?

Mr. FRANK. The conclusion may be that there is a better result. The conclusion may be that there is a fairer result. The conclusion may be

merely that it is a faster result or that it is a more convenient result. Many of those factors may bear.

One thing I would like to make very clear. This varies from time to time and from State to State. What we are asking in behalf of the people of the United States is an option as to a resource in which to solve our problems. This is not to say that the same solution will always be taken.

Senator METZENBAUM. Why are you entitled to an option? Why should any lawyer or litigant have an option to decide which court he or she is going to bring their case in? I don't understand that concept. What right is there to have an option?

Mr. FRANK. If the question is: What is the right? It is a right which is authorized by the Constitution of the United States by the most explicit language of article III. There are a whole variety of options which exist now. We can, if we wish, arbitrate our causes.

Senator METZENBAUM. Would you just spell out where it says in article III that the lawyer is supposed to have an option to choose which court he or she wants to bring their case in?

Mr. FRANK. What article III says is that the Congress of the United States may, if it desires, give to the people of the United States the option of having a Federal forum in which to dispose of their problems.

Senator METZENBAUM. It doesn't say anything about an option. It says, "May, if it desires, give the litigants the right to be in the Federal courts." First of all, it requires (a), Congress to make that decision, and (b), it says nothing about an option. It says it may go into Federal court.

Mr. FRANK. It says that Congress may give an option, and in the same fashion, there is also not a single thing in the Constitution which says that it is compulsory that there be a bankruptcy law. There is not a single thing that says it is compulsory that there be a post office. The Federal Government has chosen to provide those services.

Senator METZENBAUM. I am asking you to point out to me that part of the Constitution that provides for the option. You say it says an option. I don't remember that word being in the Constitution or in that section.

What I am trying to find out from you is, where did this right to have a choice of forum come from except as it has developed as a matter of custom over the years?

I know of no place that I have ever heard, nor do I remember that I was taught that in law school, that there was a constitutional right to have this choice. I don't think you told me where it provides that in the Constitution.

Mr. FRANK. What I have tried to say is precisely what Representative Wiggins told you, that the Constitution gave to this body power to give the people of the United States an option as to where their disputes could be settled.

Congress, so far, for 200 years, has seen fit to give that option. It is an option which we would like to keep. We find it useful. We think it contributes to justice. We think it helps to dispose of business.

Senator METZENBAUM. Explain to me briefly how you get this right to a choice. Where do you get this "option"? I think that we have an obligation to give the litigant a right to litigate his or her case, to do it fairly, to do it in a manner where the litigant won't be prejudiced.

Frankly, the litigant has no choice. The litigant's lawyer has a choice. I don't understand. I want to give that litigant every possible right, but if we give him two choices, why don't we give him three choices or four choices of courts that he or she can go into? That is the thing that gives me the greatest difficulty with the lawyers' position.

Mr. FRANK. You are about to do that, Senator. You may or may not pass an arbitration bill. You are beginning to set up magistrates.

Senator METZENBAUM. I want you to know that if I pass an arbitration bill with my vote, it will be only where the litigant has indicated he or she wants the matter to be arbitrated.

Mr. FRANK. May I conclude because I am worried about trespassing on your time with this thought, though I welcome every question you will ask. Senator, nothing in the Constitution says that there shall be Federal highways except as this body sees fit to authorize them. This body permits the people of America to have alternate roadways, State No. 1 and U.S. 95, to go from here to there. Nothing in the Federal Constitution says that the Federal Government shall have a school lunch program. Nonetheless, this body sees fit to see to it that the people of the United States, if they wish to exercise the option, may have their children have school lunches which you back up in various ways.

We are talking about a social service, a dispute settling service. I find it almost an astounding thing of the Federal Government maintaining its wide galaxy of social service, should now be seriously considering withdrawing from the oldest, most traditional social service of the law, virtually the only one that comes directly from the Founding Fathers of this country.

Senator METZENBAUM. Let me pose a hypothetical question.

Assume a New York driver going through a small town in Arizona gets involved in an auto accident and is sued. You are suggesting that that driver should be able to have the case removed to Federal court to avoid the local town's bias toward him as an out-of-Stater; is that correct?

Mr. FRANK. That is right. That is one of the reasons why he may wish to remove it.

Senator METZENBAUM. And a change of venue to a local court, in a more metropolitan setting would not suffice?

Mr. FRANK. Presumably he and his counsel think not. I think not frequently, and indeed, that very fellow, in certain areas of my State, he would get shafted if he doesn't remove it too.

Senator METZENBAUM. Now what if the New York driver actually kills someone in the accident, flees, is found and prosecuted in a locality where the accident took place. Local bias would still exist, wouldn't it?

Mr. FRANK. Yes, it would.

Senator METZENBAUM. But that case wouldn't be transferred to Federal court; would it?

Mr. FRANK. No.

Senator METZENBAUM. Would you explain for me why the alleged criminal being prosecuted should have any lesser right than the civil litigant?

Mr. FRANK. Mr. Chairman, I think the leading article on where the jurisdiction comes from historically is mine and it has been cited from time to time. It is in Professor Wright's book and in Professor Moore's. The only answer I can give you is that when James Madison was considering this problem along with Edward Randolph, the constitutional question, it seemed to him wise to make available this alternative in the civil cases, for whatever reason the criminal alternative didn't occur to him.

I think probably it was because they were thinking more of interstate business than they were criminal cases. But all I can tell you is that the Constitutional Convention—that subject didn't come up and the other subject, the instant subject did come up.

Senator METZENBAUM. That doesn't make it right, does it?

Mr. FRANK. It does give me something of a clue, Senator.

Senator METZENBAUM. That doesn't make it right, does it? I am not sure that there was a kind of omniscience that makes everything that was said 200 and some years ago right; nor do I know that they said at that time that there ought to be this choice of options for civil litigants and not for criminal litigants.

Mr. FRANK. They didn't put in as we know, a provision on the criminal side.

Senator METZENBAUM. No.

Mr. FRANK. They did put one in on the civil side.

Senator METZENBAUM. If I understand your testimony, on pages 4 and 5, you are not suggesting that the Constitution requires Congress to create Federal diversity jurisdiction; are you?

Mr. FRANK. Not at all. You have been given an option.

Senator METZENBAUM. Yes.

Mr. FRANK. An option which your predecessors have maintained for 200 years and if you wish to close it off, that is your privilege.

Senator METZENBAUM. Thank you very much.

Mr. FRANK. Thank you, Senator Metzenbaum.

I would like to say that we obviously see this across a great gap. I really appreciate the fairness and the thoroughness of your questions.

Senator METZENBAUM. Thank you. It is Sam Gaines with whom you have been speaking?

Mr. FRANK. My people in Ohio tell me that Sam is doing the best he can to persuade you to what we regard is the course of wisdom. Is that so?

Senator METZENBAUM. There is no greater trial lawyer, and there is no finer human being. He is trying to get in hisicks, but I am not sure he has been totally successful yet. But he has lost a few cases in his life and so, he may lose this one as well.

Mr. FRANK. I am aware that is his prospect in this instance.

Senator BAUCUS, is there anything that I can do to help you?

Senator BAUCUS. I hope. Thank you very much, Mr. Chairman. I have to leave in a few seconds, too. Mr. Frank, to the degree that prejudice is a problem and the reason, in your judgment, for retaining Federal diversity jurisdiction what would your reaction be to a modified approach where diversity jurisdiction is eliminated in the case of instate plaintiffs?

Mr. FRANK. Thank you very much for asking me that question. In all appearances here, because this legislation has been defeated here time after time for years and I have appeared at all the hearings, I have taken the position and I take it now that we would rather have total abolition than that. The choice that we have to make is either wipe it out all together or take the so-called instate plan of compromise, wipe it out all together. The vestige that is left we regard as not valuable enough.

Senator BAUCUS. I apologize. I haven't had the benefit of hearing your testimony before. Why would you prefer total elimination? A large portion of your comments this morning focused on the fact that local prejudice still exists across the country.

Mr. FRANK. Senator, may I stress what is to me the most important thing personally, because the prejudice subject comes in. All of these subjects come in. But if I may give you about a 90-second answer to that question, it goes to the heart of it for me.

Some people are coming at this as plaintiffs' lawyers. Some people are coming at it as defense lawyers. Some people are simply coming at it as people interested in law reform and an improvement in the administration of justice. My principal extracurricular activities are in that area. I have written in procedure. I have worked in procedure. I have been involved in procedure and so on.

To get the results we want of a unified system, there has to be a large enough body of diversity cases so that there really is a sizable group of lawyers who are in both systems. Let me be very specific and concrete about this. It really is true that ideas migrate, so that for example, the Arizona system of summary judgment has moved into the Federal system.

Our Western system of handling experts has moved into the Federal system, but it has been modified a little bit by the Eastern view and so you get detailed exchanges of that sort.

Fundamentally, law reform in America, in the detailed depth work that has to be done requires a large expenditure of money. Most of that, except in the case of very wealthy States like New York and California is coming out of Federal funds. That is where the rules of evidence work is done. That is where the work on civil procedure is done and so on. All of these things. That is where the centers are similarly functioning.

Now to make this work, to try to get what I am proud to say we have in my State, a unified system of identical procedures in the State and Federal courts in all civil matters. I think you probably come pretty close to it. We are number one. We have totally identical systems. We don't have a day when we don't have the same system in the two States. A key element of that very useful marriage is to have a large body of lawyers, a big bar that is in both systems, enough people to serve on our bar committees, to be on our executive committees. I do respect those committees.

The 32,000 cases that there are mean that we have at least that many lawyers commonly familiar with both systems. Now if you cut that in half we are going to lose the exchange value, the unified bar to such an extent that I at least would no longer think diversity worth keeping.

That isn't a mystical thing. Really and truly Senator, it is a hard thing and I have seen it worked out specifically.

Am I being responsive or am I just being misty in answer to your question?

Senator BAUCUS. Well, respectfully, more misty than responsive.

Mr. FRANK. Well, please push me because it is the last point I would like to leave.

Senator BAUCUS. Isn't it true that those cases where an out-of-State defendant wants to remove a case to Federal court are really the cases that involve the problem of prejudice?

Mr. FRANK. I—

Senator BAUCUS. I understand your point about cross-fertilization. You want to keep the Federal practice and State practice attorneys knowledgeable about the others' problems, but that doesn't seem to be the major thrust of your reason for opposing the bill.

Mr. FRANK. In my personal case, I mean it to be a major thrust. Prejudice is also there. Even there it is my feeling that we would do better to keep the system as it is. There is prejudice. You know perfectly well that an award is going to be different in Billings than from one of your small counties. That is a matter which may be of concern to somebody who is an in-State plaintiff as well as to somebody who is not.

Senator BAUCUS. What is the basic reason why an in-State plaintiff should be able to file in a Federal court?

Mr. FRANK. The largest single reason right now in 1979 why an in-State plaintiff should be able to file is that he may conclude that he can get faster or better justice in that system, in the Federal system than he would otherwise.

In other words, there are times in your own practice, and I am sure, when you have said, as a realistic matter I have a choice between Judge X here and Judge Y here and I know how those courts work. I think I can do my fellow better if I can use my option to go to Judge Y instead of Judge X.

Let me hasten to say, Senator, there have been times in my professional life when I don't go to the Federal court. I may think I can do better on the State side.

The argument has been made earlier that somehow there is something shabby about self-interest in these things. I utterly decry that. It isn't so at all. People wouldn't be having civil cases if there weren't quarrels over money and of course there is something economic about it.

Senator BAUCUS. Let me follow up a little bit on Senator Metzenbaum's point about options. Isn't it true though that if a plaintiff has an option, the plaintiff has an advantage?

Mr. FRANK. All I can say by way of answer to that, I can answer statistically. If that were really true, if the plaintiff had a significant edge, I wouldn't be here for the Association of American Railroads and the great motor car companies of the country and all of the insurance companies.

This really goes to the heart of it, Senator. You obviously have here through me an alliance, both the plaintiffs and the defense bars of the country. It is clear that they are in alliance because they think, with

all deference, that the sponsors of this bill are a menace to all of them. There is a common cause here.

Senator BAUCUS. It may be that the plaintiffs' bar and the defendants' bar agree, but I am asking as a hypothetical question. Isn't it true that the more options the plaintiffs have in choosing a forum the greater advantage they have?

Mr. FRANK. What I would say is that it is unquestionably an advantage to the plaintiffs' bar to be able to have this option to remove. Those are mutual advantages.

Senator BAUCUS. Thank you very much, Mr. Frank.

Thank you, Mr. Chairman.

Senator METZENBAUM. Thank you, Senator Baucus.

Mr. FRANK. Am I dismissed, sir?

Senator METZENBAUM. No. One question. The fact that the American Association of Railroads is so interested in this legislation suggests to me that they enjoyed Federal court congestion. I would guess, and I have no statistical data to support my guess, that if they pay out \$1 million in claims, and I know it is more than that a year, not less than 90 cents out of every dollar they pay out is paid out in FELA cases, almost all of which go into the Federal courts, not all, but almost all. They pay out very little in other kinds of personal injury litigation brought against the railroads.

So, it suggests to me that they enjoy Federal court congestion and cases moving at a very slow pace.

Mr. FRANK. May I answer that, sir?

Senator METZENBAUM. Please do.

Mr. FRANK. I would think that there was some maligned capitalist conspiracy of the wicked big corporations seeking to be malefactors at the expense of the worthy poor were it not for the fact that before these 2 days are done you are going to hear from the plaintiff's bar of America who are the very people suing the railroads and the big corporations and who are so hot on this subject that they put their entire staff to work full time to seek to persuade you all not to pass this legislation.

So, I somehow have the feeling that if the biggest defendants and the biggest plaintiffs all are on the same side, that probably there is no overwhelming weight of self-interest on either side.

Senator METZENBAUM. Then the people better beware.

Mr. FRANK. God save the United States.

Senator METZENBAUM. I appreciate your testimony, Mr. Frank. It is very helpful.

[The prepared statement of Mr. Frank follows:]

PREPARED STATEMENT OF JOHN P. FRANK

The bill which passed the House of Representatives in 1978 and which is pending again in that body as this article is written would abolish the diversity jurisdiction altogether. The bill has the support of the very able and conscientious Representative from Wisconsin, Robert Kastenmeier. It is also supported by the Chief Justice and the Attorney General and has White House backing.

That is a lot of support. There is also a lot of opposition. The ABA Board of Governors was just one vote short of unanimous in opposing this legislation. ATLA opposes it strenuously. Fifty state bars by their proper representatives or committees have adopted resolutions of opposition. There is no reason to suppose that any appreciable group of private practitioners in the United States

support the bill. The fifty state bars, in almost every case either by convention or by action of the Board of Governors, which we show opposed to this legislation are:

Alabama	Alaska	Arizona
Arkansas	California	Colorado
Connecticut	Delaware	Florida
Georgia	Hawaii	Idaho
Illinois	Indiana	Iowa
Kansas	Kentucky	Louisiana
Maryland	Maine	Massachusetts
Michigan	Minnesota (Crt.	Mississippi
Missouri	Rules Comm. only)	Montana
Nebraska	Nevada	New Hampshire
New Jersey	New Mexico	New York (Comm.
North Carolina	North Dakota	on Federal Courts)
Ohio	Oklahoma	Oregon
Pennsylvania	Rhode Island	South Carolina
South Dakota	Tennessee	Texas
Utah	Vermont	Virginia
Washington	West Virginia	Wisconsin
Wyoming		

It is of course possible that there may have been disagreement in some of these states; I have not been given the details of every session. However, the usual report is that the vote was unanimous. Indeed, it is doubtful if in the ten years this measure has been, one form or another, before the Congress, as many as two private practitioners have ever appeared in support of it.

The position of the private practitioners is solid regardless of the interests they represent. The Committee to Maintain Diversity Jurisdiction includes Mr. Albert Jenner of the ABA Board of Governors, a representative of some of the largest interests in the United States as well as many public causes; Mr. William Gossett of Detroit, former ABA President and General Counsel for the Ford Motor Company; Thomas L. Samuel of the Chesapeake and Ohio and Baltimore Railroad (Chessie System) and Mr. Charles Clarke of Cleveland for The National Association of Railroad Trial Counsel; Mr. Alston Jennings of Little Rock who has been the national leader of the insurance defense counsel, and Mr. Robert Begam, a former president of ATLA. It includes lawyers from small cities and semi-rural areas such as George and Georgina Guy of Cheyenne, Wyoming, Robert J. Fair of Princeton, Indiana, and Truman Hobbs of Montgomery, Alabama. It includes William Prickett, a representative of corporate litigation interests in Wilmington, Delaware and State Bar Secretary Edward Jones of Des Moines. It reaches from coast to coast; Richard Keatinge of the ABA Board of Governors who practices in Los Angeles is a member and so is Richard Donahue of Lowell, Massachusetts, a member of the Massachusetts Bar Board of Governors. So is Edward Mullinix of Philadelphia, particularly representative of the litigation section of the ABA, and John Davidson of Chicago, Professor J. W. Moore has sustained diversity through the debates of the past thirty years, and as member of the Committee he still does.

There have been so many proposals circling about the diversity topic since 1965 that there may be confusion as to what is under discussion. There are, of course, many private practitioners in the American Law Institute and there was approval by the ALI in 1965 and 1968 of proposals to reduce diversity jurisdiction. Those proposals differ in two radical respects from the present legislation. First, until 1977-78, no one in a responsible position has spoken of abolishing diversity jurisdiction. Second, the ALI proposal was to reduce diversity jurisdiction and to increase the federal question jurisdiction at the same time. The assumption was that the expansion of the federal jurisdiction on the one side would more or less balance the reduction on the other in quantitative case load. The ALI proposal was adopted as a package, reduce here and expand there. The expansion proposals of the ALI draft have long since been abandoned and are not touched in any way by any pending legislation.

Legislation, if it passes, is thus going to deprive the bar of the country which uses it of a resource which it values. There were 32,000 diversity cases in the federal courts last year, and this would put them all out.

I know of no substantial reason that is or can be advanced for this proposal except the commendable desire to lighten the load on the federal courts. The

difficulty with lightening that load is that necessarily the load must be increased on the state courts. We see no profit at all in transferring cases from one logjam to another. Diversity jurisdiction must be seen for what it is, a social service of the federal government provided for the people of the United States. A primary function of the legal profession is to settle disputes. The diversity jurisdiction provides an option as to how these disputes should be settled. In one sense, it can be compared to the school lunch program or the federal highway program or any other program by which the federal government serves the general public.

What is striking is that the proponents of this legislation as individuals are, for the most part, not advocating the abolition of other social services. This selective retrenchment is the more striking because diversity has been with us since 1789. It is the oldest single federal social service. It comes to us quite literally from the hands of George Washington, James Madison, and Oliver Ellsworth.

Certainly, I do not advocate the maintenance of any practice simply because it is old. If diversity has outlived its usefulness, away with it. But when a practice is so well established, and when it is so universally desired by those who utilize it, there ought to be a very strong reason for dropping it. The weight of the argument, I believe, runs the other way.

A. HISTORICAL CONSIDERATIONS

The original federal court jurisdiction was almost entirely permissive; the Congress was under no obligation to create federal trial courts at all, and could have left all original matters except those in the Supreme Court to the states. And yet the Constitution did permit the creation of federal diversity jurisdiction, and the first Congress did choose to take up the option. It granted jurisdiction for private, civil cases in diversity only.

Why? The need arose from a fear of prejudice against out-of-staters engaged in regional business. I have developed in some detail elsewhere, based on a study of all generally available pre-1787 reports, that this was largely a gloomy anticipation of things to come rather than an experienced evil; but nonetheless, there it was.¹

The diversity jurisdiction in the first 150 years of its life had its successes and its abuses. The successes were substantial—the disposition of a good amount of important commercial business; the furnishing of the Supreme Court with enough to do to keep it busy and finally more than busy, thus permitting it to develop as a national institution; the nationalizing effect of the entire judicial operation which, to a degree at least, helped unify the country.

But the abuses were serious. First, jurisdictional manipulations furnished an easy device for depriving states of initial opportunities to pass on matters of their own policy. Second, the class biases of federal judges led to gross abuses both to the growing labor movement as an institution and to the rights of injured workers in an expanding industrial economy. Third, the great error of *Swift v. Tyson*, 16 Pet. (41 U.S.) 1 (1842), and the federal choice of law permitted the abuse of jurisdiction shopping. It invited the manipulation of cases to put them where the results would be controlled by the choice of court.

If these abuses could not have been controlled, the abolition of the whole diversity jurisdiction should have followed. But creative leadership did devise controls, and the abuses were very largely eliminated. The legitimization of federal question litigation in 1875 eliminated much of the purpose of phony diversity intended to raise federal questions. Such decisions as *Harves v. Oakland*, 104 U.S. 450 (1882), helped check the gross abuse of the manipulated case. More fundamentally, the Johnson Act largely took the federal courts out of the utility regulation field, and the case developments following its policy have greatly minimized the conflict of jurisdictions. In the labor relations field, the Equity Rules of 1912 were some improvement, but not nearly enough; the Norris-LaGuardia Act in 1932 largely ended government by injunction. In the tort cases the rise of industrial compensation, the passage of the FELA and Jones Act, and the general revitalization of juries by the Supreme Court has almost totally eliminated the earlier abuses. Finally, *Eric R.R. v. Tompkins*, 304 U.S. 64 (1938), has largely ended the evil of jurisdiction shopping. There will never again, we trust, be

¹ J. Frank, *Historical Bases of the Federal Judicial System*, Winter, 1948, *Law & Contemporary Problems*, 3.

another case like *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928).

Nonetheless, these abuses leave a residue which contributes to the present push for great change. The past evils in diversity are not evils of an ancient yesterday. Most of the cures are the product not only of this century but of the years since 1930. These abuses were gross enough to warrant, if necessary, the total abolition of diversity. Able and impartial observers for the years 1890 to 1930 could very reasonably develop severe prejudices against this jurisdiction. They did and many of them have greatly influenced the thinking of the present advocates of change.

But the major premises of that prejudice deserve tight reexamination. It is possible—I think it is true—that the abuses of diversity have been pretty well filed away, and that what is left is a worthy and useful device of public administration. The anti-diversity attitude has become a habit. Those who wish to terminate, suspend, or cut down this valuable federal service would do well to reexamine and restate their major premises in depth. One hears the phrase, “an idea whose time has come.” This is an idea whose time has gone.

B. THE VALUES OF DIVERSITY

The first great value of diversity is its disposition of something on the order of over 30,000 disputes a year to the general satisfaction of those who need their disposition. In 1978, 12,200 diversity cases terminated without court action, and 18,250 with court action; See Annual Report of the Administrative Office, 1978. Of course not all litigants are content with results: doubtless human impulse leaves at least half of them unhappy. Nor are all federal judges wiser or abler or all federal procedures more satisfactory than state procedures. The federal bench has its share of incompetents, tyrants and fools; I can personally recall appearances before some of each. Occasionally a region or area, in which highly political appointments have been made in response to local and occasionally unworthy political impulses, found itself with a wholly inferior bench. Some federal procedures, such as the restriction of cross-examination to the scope of direct, may be inferior to state procedures.

Hence I recite here no cult of the superman. But, with a high degree of uniformity, the system has been generally satisfactory to those living under it. The litigant who loses rarely feels with much conviction that he would have been better off in a different system. Where political considerations make the federal judges poor, they are likely to make the local judges even worse. There is a general feeling that justice in federal courts is being well administered. There is no widespread obvious abuse to be corrected.

The second great plus is the educational value of having two systems in interaction. This value is felt at both national and local levels. The success of the federal rules has led to their widespread emulation in the states, and the federally sponsored process of continued revision is keeping the state procedure moving as well. This process is of tremendous importance because the necessary spade-work on procedural studies may require national attention and national subsidization. For illustration, a few years ago I spoke to the Wisconsin Judges Association on discovery, and the leadership of that group has been kind enough to connect this with recent procedural developments in Wisconsin. And interaction is by no means a one-way street. The present practice encourages the federal system to borrow state improvements and experiments. Many of the recent changes in federal procedure came from the states. A recent change in the federal rule on process stems from progress in Illinois: a change in parties from developments in Michigan; and a recent change in directed verdict procedure from a predecessor rule in Arizona. In Arizona again, pretrial procedures flow back and forth between the systems. The state practices on the time and manner of taking exceptions to jury instructions are working their way into the local federal practice, and certain federal devices of encouraging a business-like disposition of cases find their way back to the state court.

Those who would drastically cut the diversity jurisdiction do not doubt the validity of the point made here. They think merely that there will be enough federal business left to permit the same effect. The proposition is not demonstrable one way or the other, and I can only say that I do not myself think so. We need the substantial bulk, the regular exposure to concurrent jurisdiction, to get the best effect of the interaction. The federal question cases are more likely to be for specialists in antitrust or FELA or taxes. The inclusion of the full

gamut or commercial and tort cases puts the whole litigation bar into federal courts.

Finally, there are elements of prejudice and competence deserving to be taken into account. A native given the practical alternative of having his suit against an out-of-stater in a particular county of his state system may well conclude that speed, ability, impartiality or plain convenience will be best served in the federal court. The out-of-state defendant is normally not hurt by this judgment, and the whole cause may benefit from it. There are other prejudices than the merely regional, and a litigant may believe that he escapes some of them in federal court. The suggestion has been made that the litigant, if dissatisfied with his state justice, should improve it, not escape it; but this is visionary. The litigant has a problem which needs solving now, not in the time of the Messiah; and maintaining a concurrent system is one way of developing improvements in each of them.

Not merely did the founding fathers choose this as the one branch of federal jurisdiction in the beginning, but in this century Chief Justice Taft told the American Bar Association that "no single element in our governmental system has done so much to secure capital for the legitimate development of enterprise, throughout the West and South," as diversity jurisdiction. In 1928, Taft energetically reached out over all the country to oppose a proposal like this one. Professor Mason in his excellent work on Taft as Chief Justice tells, for illustration, that a newspaper such as the *Florida Times Union*, as a direct result of Taft's stand, noted editorially "emphatic protest against the bill."

Moreover, interstate prejudice is not dead now. The most recent comprehensive article on diversity, thoughtful and objective, is Professor David L. Shapiro, *Federal Diversity Jurisdiction*, 91 Harv. L. Rev. 317, 330 (Dec. 1977), who says on this point:

"But unlike such benefits as interstate discovery, why should these advantages be available to litigants simply because they are citizens of different states, especially since the federal courts are in such great demand from litigants who may be more deserving? If there is an answer, it may be that the litigant who is truly from out of state, and who thus can take no theoretical or actual responsibility for the shortcomings of state court justice, should not be saddled with these shortcomings if the Constitution authorizes an alternative. There may also be warrant for affording an out-of-state lawyer a procedure with which he is likely to be familiar because it is in force in the federal court in his own state."

C. THE CRITICISM OF DIVERSITY JURISDICTION

There are astonishingly few criticisms of diversity jurisdiction, and these are almost entirely unsupported by data or stated experience. First and most fundamental is an act of faith, an accepted and unexamined major premise that "state cases belong in state courts." This assumes a good deal. It assumes that there is such a phenomenon as a "state case," a kind of provincial fracas which would be kept happily local and free of federal contact. Why? The lawyer may file a brief with the NLRB on whether three butchers in a local meat market should be classed with the Retail Clerks or with the Meat Cutters Union; make a complaint that some individual suffered discrimination in employment; and try a million dollar diversity case. What is there in the genius of American government by which some of these dispute-settling functions may be absolutely required to be federal, while the million dollar law suit should not be federally settled even if one or both parties desire it?

Second is the ventriloquist's dummy criticism, the suggestion that requiring federal judges to be mouthpieces for state law will depreciate the quality both of justice and of those willing to participate in declaring it. When *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), was decided, many of us worried about it for a time, and will recall a general fear during the 40's that the decision might strangle creativity on the federal side of the bench. By now this is a problem which, if problem it be, is beyond mere nervous fussing. The evil, if any, should be demonstrable. How many federal decisions show an atrophy of creativity for this reason? What are they? What good men have refused the office for this reason? How many? I have been involved in discussions of recruitment for the federal bench in most parts of the United States and have certainly met with representatives directly involved from every region. I have known a number of persons who have declined the opportunity of federal judicial service bench. I have yet to meet or hear of any actual individual who even considered declining the post because of the burdens of determining state law and I frankly do not believe that such persons exist.

D. THE EFFECT ON THE STATES AND THE LITIGANTS

Viewing the matter overall, what is the virtue in taking cases off a crowded federal court docket and dumping them on a crowded state court docket? This proposal, I submit, is a kind of jurisdictional variation of the old three shell game. You will remember that at the carnivals the sleight-of-hand man stood behind three walnut shells, the pea went under one shell, and then it vanished—it was never under the shell you expected it to be under. This jurisdictional proposal has only half the magic of the three shell game—these 34,000 cases are going to disappear from under the shell of the federal walnut, but there is no doubt as to where they are going—they are simply moving over to a state court shell. Generally speaking, the areas which are behind in both their federal and state court dockets. I see no merit whatsoever in moving a case from a federal court docket where it may have to wait two years for disposition to a state court docket where it may have to wait four.

The practical result of the transfer in terms of what it will do to the litigants themselves is best demonstrated by comparison of the state and federal statistics. I take the state statistics used here from the publication of the Institute of Judicial Administration called *Calendar Status Study 1974*; the last year available, and the federal information from the 1976 Annual Report of the Director of the Administrative Office of the United States Courts. A comparison of the areas covered by both sources, state and federal follows. The comparison cannot be perfect because the Institute figures are restricted to personal injury cases and the federal figures cover all jury trials. Moreover, the geographic areas are not precisely identical in both instances. That is to say, the Institute figures are by counties and the federal figures are by judicial districts. Nonetheless, I have chosen illustrations which are essentially identical.

What these figures show is that in Chicago a jury case which would take 37 months to come to trial in the state court takes 11, on the median, to come to trial in the federal court. In Brooklyn the comparison is about 35 months on the state side to 18 months on the federal side. In Manhattan the time is 46 months on the state side as compared to 21 months on the federal side. In Philadelphia, it is 47 months on the state side to 27 months on the federal side. In Boston the state time is 42 months and the federal time 34. This means that in those crowded districts, diversity cases will be moving from an average wait of 22 months on the federal side to 41 months on the state side.

I fully appreciate that these figures are limited and approximate—they are the best that are available because of the limited statistical resources as to time on state cases. There were more state figures available in 1971 when I wrote on this subject, and I was able then to report as to 11 jurisdictions, adding Jersey City, Detroit, Los Angeles, Minneapolis, Cleveland and Memphis to those I have already mentioned. On the figures as they existed then, the litigant would be put approximately a year and a third farther behind by having his case forced over from the federal to the state court. In the existing situation, on the five jurisdictions for which there are fairly recent figures, the waiting time is doubled.

Let me put this as incisively as I know how. We are talking about 32,000 cases to be moved. To the extent that these cases do, as is inevitable, accumulate in the same jurisdictions in which the state dockets are heavy, the practical consequence is that this Congress is asked to tell thousands upon thousands of American citizens to wait twice as long as before to have their suits disposed of, when it was already taking far too long.

E. LEGAL ELITISM IS WRONG

The argument is made that keeping the diversity cases in federal court with their allegedly mundane and trivial content, has a two-aspect ill effect. First, it puts dull work into the federal system. Second, it forces the expansion of that system, creating too many judges and thus reducing the useful prestige which comes from having a small bench.

The quick rejoinder is that there is considerably more content to a rough product liabilities case than the general run of social security controversies. But the matter is more fundamental. Population expansion and legislation expansion result in judicial expansion, and we are simply going to have to live with it. The days of one federal judge per state are irretrievably simply gone.

There are other values involved. Litigation is too expensive right now for most people to endure the cost. The device of dumping thousands of cases into the state

courts is part of the contemplated package of an elite federal judiciary and an elite federal bar. It goes with the proposal to have an extra bar examination, creating a kind of superqualified federal barrister class to practice in the federal courts.

Nothing we can do, or for that matter should do, is going to make the federal courts into egalitarian, low-cost tribunals for the people. We need not push them, however, in the opposite direction, with a limited bar of anti-trust specialists, tax lawyers, patent lawyers, and so on. From the cost-of-service standpoint, the goal should be to have not as narrow but as broad a federal bar as possible. The barrister system apparently works well for England, but we do not live there.

This is not class legislation; I began by showing that the greatest corporations in America and the loneliest individuals, through their legal representatives, oppose this legislation. Closing the courthouse door is the worst of the solutions to the cost and jam-up problems of the day. The creation of a super-specialist bar may serve the court's interests, but it serves no other community interests.

This legislation conflicts with the most important single maxim which should cover a judicial system: courts are made for people and not people for courts.

[Exhibit consisting of letters from various State bar associations can be found in the appendix.]

Senator METZENBAUM. Prof. Burt Neuborne who will be testifying on behalf of the American Civil Liberties Union.

Since I had indicated that I would like to conclude by 11:30 and it is only 11:27 now, I obviously will have to change it some. I would be very grateful to you, Professor Neuborne, if you would summarize your position very briefly. Of course, all of your remarks will go into the record. If you could just take 2 or 3 minutes to state the reasons the ACLU supports this legislation and then I will have some questions for you.

STATEMENT OF PROF. BURT NEUBORNE, NEW YORK UNIVERSITY

Professor NEUBORNE. With your permission, I will submit my statement, in the record.

Senator METZENBAUM. Without objection it will be included in the record at the conclusion of your oral testimony.

Professor NEUBORNE. The American Civil Liberties Union, and I am testifying on behalf of the American Civil Liberties Union this morning, supports the abolition of diversity jurisdiction not because diversity jurisdiction is an evil. I think the question that has been asked this morning is perhaps the wrong question. A number of the witnesses talked about whether diversity jurisdiction is somehow an evil or whether there is anything wrong with it. I think that there is unanimity that it is a good thing. There is nothing wrong with diversity. It served a good purpose. It served a beneficial social purpose. It has simply become a luxury at a point at which the pressures on the Federal bench are so great that the bench itself finds itself in a position where it may not be able to deliver the same level of excellence in its adjudication that we have come to expect from the Federal judiciary.

The fact of the matter is we are in an era of scarcity in the Federal courts. The Federal courts are being asked to do more than 500 judges can possibly produce in a given year. When one deals with a situation where you view the Federal judiciary as a national resource, and I think we are all agreed that they are a substantial national resource, we begin to see that they are a finite national resource that can only

do so many things in a given year. We then have to ask the same kinds of questions that this Congress has been asking about other finite resources. That is, do we expand it? Do we conserve it? Do we substitute for it? Or do we ration it?

You have already expanded the Federal judiciary somewhat. I think there is a general consensus that there is a ceiling on the amount that you can expand the Federal judiciary without seriously impeding the quality of its bench and its output.

I think that we probably have gone as far in the expansion direction as we can go and are likely to go in the future.

We can conserve the time of the Federal judiciary by reforming certain aspects of the procedure in which judges perhaps waste time, the discovery process, the protracted litigation over whether or not a case is in the right court.

I was interested that Mr. Frank testified that in all of the time that he had been litigating diversity cases he couldn't remember an instance in which there was a serious dispute about diversity jurisdiction. Well, Senator Metzenbaum, I was taken with your daughter's remark about the complexity of diversity jurisdiction. I teach first year procedure. It is a staple of my first year course. In fact, if this bill passes—

Senator METZENBAUM. It will put you out of business. You will be unemployed.

Professor NEUBORNE. Right. I am the perfect disinterested witness. I will have to find a new job if this bill passes.

The fact of the matter is diversity jurisdiction is complex. It takes up an immense amount of time to litigate. It provides room for maneuver and even the amount of time spent out of court which ultimately, of course, gets billed to the client, adds to the expense of the administration of justice in the United States.

So that you really have a situation where by abolishing diversity you would not only be, I think, eliminating an unnecessary form of Federal jurisdiction, but you would be exercising conservation of judicial energy as well, because you would be allowing judges to concentrate on what we pay them for which is to resolve disputes and not on what lawyers seem to think they should do and that is to worry about jurisdictional complexity.

If you left it to the lawyers, I think judges would spend three quarters of their time worrying about jurisdiction and procedural complexity and one quarter of their time deciding the merits. If anything, the percentage should be reversed. It should be 90 percent of the time on substance and 10 percent of the time on procedure. Abolition of diversity would at least take us in that direction.

Even after you finish, Senator, worrying about expanding the judiciary and conserving judicial energy, I think at that point we then have to confront the notion of substitution and rationing which is the way one would deal with the oil crisis if one could.

We have a finite resource, the attention span of an article III judge—we know over the next decade article III judges can only do so much and we now have to ask ourselves what is it we want them to do over the next decade.

Well, the American Bar Association and the American Trial Lawyers Association and the railroads and the motor car manufacturers

want them to listen to them. They want to have the ear of the Federal judiciary over the next decade.

Seventy percent of litigants in diversity cases are corporations. That is a statistic that comes from the Justice Department. The debate over diversity is essentially a debate over who is to have access to this limited, excellent Federal judicial system over the next decade.

Is it to be corporations who are litigating important commercial cases and important tort cases or is it to be the run of other litigants worried about Federal question cases?

If we assume, as I think we must, that the courts can't do everything, we now have to ask what should they do.

So the question is not really whether diversity is a bad thing, it is whether diversity is a necessity when it is balanced against other forms of jurisdiction which diversity threatens to oust if not controlled.

When one looks at the Federal judiciary and asks why is this a unique bureaucracy? Why are these people so much in demand? Why is it that the railroads want to litigate before them and the civil rights lawyers want to litigate before them and the criminal defendants want to litigate before them? The answer is I think that, half out of wisdom and half out of luck, we have managed to combine a forum in which we have individuals of extremely high intellectual excellence in a nonmajoritarian setting. They are not subject to political pressures. Sometimes that may lead them to do things that many people don't like. But it does make them a forum of excellence in which decisions can be reached without regard to political pressures.

Unfortunately, that can't be said for the State trial courts. They tend to be elected. I don't suggest that for a moment they are any less devoted or any less excellent people, but they are a different bureaucracy. They are a bureaucracy that by and large is a politically chosen bureaucracy as opposed to a nonmajoritarian bureaucracy and as between the two it seems to me that you want to ask who needs the attention of that kind of insulated forum.

I think that diversity litigants, Senator Metzenbaum, come out on the bottom of the totem pole.

Senator METZENBAUM. Let me ask you, what happens to litigants with Federal claims who are thrown out of Federal court because of what we call rationing? What happens to them?

Professor NEUBORNE. Well, a Federal claim generally that is ousted from Federal court on a jurisdictional technicality must go over into State court, if it is possible.

There are some cases in which there are no forums at all available. For example, if what you want is an injunction, it may well be that you can't get one because federalism concerns may prevent the State court from enjoining a certain Federal official, for example. If you wanted to sue the U.S. Army, the chances are you couldn't do it in State court.

So, either you take it to State court or there is nowhere to go at all.

Senator METZENBAUM. With respect to litigants with Federal claims who end up having to go to State courts, do the State courts have any particular expertise in deciding these Federal question cases?

Professor NEUBORNE. Certainly not, sir. If anything, they have a decided lack of expertise.

Senator METZENBAUM. Do you believe the Federal courts are more capable of trying these Federal question cases?

Professor NEUBORNE. Yes, sir, I do.

Senator METZENBAUM. Why?

Professor NEUBORNE. Primarily because the Federal question cases tend to pit litigants of relatively weak political power against strong entrenched interests either because the claim is a suit directed against the Government or a claim against, for example, in a consumer case, a large corporation. There is often substantial imbalance between the power relationships of the plaintiffs and the defendants.

Federal courts, because they are insulated forums have traditionally in our history been the court in which justice can most easily be done between litigants of different power relationships. State courts have tended, unfortunately, to be more subject to local political pressure.

Senator METZENBAUM. With reference to the diversity cases that remain in Federal court, do the Federal courts have any particular expertise over that of the State courts in deciding these cases?

Professor NEUBORNE. No, sir. I think it is clear since the State law governs, the expertise is at least even. There is no edge in the Federal courts.

Senator METZENBAUM. In your opinion, is it constitutional for Congress to remove this basis of jurisdiction from the Federal courts?

Professor NEUBORNE. Yes, sir. I don't think there is a serious body of scholarly opinion that would argue that there is a constitutional obligation to retain diversity. In fact, my recollection is that as early as 1850 the Supreme Court ruled to the contrary. So, I think there is no question on that.

Senator METZENBAUM. Thank you very much. We appreciate your viewpoint, Professor Neuborne.

[The prepared statement of Professor Neuborne follows:]

PREPARED STATEMENT OF PROF. BURT NEUBORNE

Mr. Chairman and Members of the Committee, I am pleased to accept your invitation on behalf of the American Civil Liberties Union to discuss suggestions that Federal jurisdiction based solely upon diversity of citizenship be abolished.

Given the extraordinary achievements of Federal District judges operating at the trial level, we are prone to forget that the Federal trial bench consists, even with the addition of the new judgeships in the Omnibus Bill, of approximately 500 robed bureaucrats seeking to uphold and implement the Constitution and laws of the United States in a complex and contentious nation of almost 200 million people. When one considers the changes in American law and society over the last three decades and the extent to which Federal trial judges have guided, goaded, stabilized and overseen the process, the imbalance between the small size of the Federal judiciary and its social productivity is marked. Favored with a proud tradition; staffed by persons of substantial ability; and insulated from majoritarian pressures, the Federal trial bench continues to constitute a critically important national resource. As we have come to learn, however, national resources are rarely, if ever, infinite. Ironically, the Federal courts have become victims of their own excellence. Having performed so admirably in so many areas of the law, the Federal trial courts have stimulated demands for their attention which threaten to outstrip the ability of Federal trial judges to comply.

If, as I believe is true, current demands on the time and energy of Federal trial judges threaten to dilute the quality of the judicial product, the critical issue which confronts this Committee is how best to allocate a scarce resource, the attention-span of a Federal trial judge. Concern with the proper allocation of

scarce resources is, of course, far from a new issue for this Congress. However, in approaching the problem of access to the Federal courts, this Congress is rationing, not physical goods, but justice itself; for, to the powerless in our society, the Federal courts—and only the Federal courts—are institutionally capable of withstanding the pressures which always accompany decisions favoring minorities at the expense of majorities and the weak at the expense of the strong.

The Founding Fathers understood that all decisions, even in a democracy, may not be left to majoritarian control. They recognized that tyranny by a majority is scarcely less tolerable than tyranny by a few. In order to provide a counter-majoritarian check, they established a written Constitution and an independent Federal judiciary to enforce it. Virtually every decision by a judge on constitutional grounds overturns a decision of a popularly responsible official. Thus, constitutional decisions inevitably involve the judiciary in counter-majoritarian positions.

Moreover, in recent years, Congress has enacted statutes designed to enforce constitutional guarantees. In construing and implementing such statutes, courts are often called upon to render decisions which disfavor the majority in order to redress discrimination aimed at minorities. Finally, Congress has enacted legislation designed to curb abuses by powerful economic and social forces which, while non-majoritarian, are sufficiently powerful to exert pressure on the forums called upon to administer and implement the statutes.

It is a lesson of our history that the only institution capable of enunciating and implementing counter-majoritarian norms in a sustained manner are the Federal courts. To the extent, therefore, that litigation involving powerless plaintiffs (such as constitutional litigation, social security cases and consumer litigation) is shunted to non-Article III forums, the capacity of our society to enunciate and implement results which, although just, are distasteful to local majorities or power groups will have been seriously diminished.

At the present time, a rough laissez-faire form of allocation is taking place. As in any setting involving a scarce resource, in the absence of a structured allocation, market mechanisms operate which tend to allocate the scarce resource on the basis of wealth and power. Thus, we have witnessed in the past few years a disturbing trend in which cases brought by the weak and the powerless—those most in need of Article III protection—have tended to be bumped from the Federal courts to make way for cases brought by powerful commercial and corporate litigants under the heading of diversity jurisdiction. In a very real sense, therefore, the debate over diversity jurisdiction is a debate over who should have claims on the attention of Federal trial judges over the next decade. While one can hardly blame lawyers representing corporate clients in general commercial or tort litigation from seeking to assert a claim on the attention of the Federal courts, when one considers the attributes of Article III adjudication which render it unique, and the relative need for access to a Federal trial court, the corporate bar is unable to mount a convincing case for the retention of diversity jurisdiction.

As in any setting involving the allocation of a scarce resource, four general responses exist: (1) expansion; (2) conservation; (3) substitution and (4) rationing.

Congress has already explored expanding the Federal judiciary to meet the increased demand for its product. While a controlled expansion is appropriate, it is not the answer to the problem. Obviously, if it were possible to solve the oil crisis by expanding the supply of oil, that would be the preferable alternative. However, unlike oil, the unique attributes of Article III adjudication might be threatened by an uncontrolled expansion of the Federal trial bench.

Less attention has been paid to conservation. We know relatively little about the precise allocation of a Federal judge's time. Lacking such information, it is difficult to know whether a more efficient allocation of time is possible. Even without such a study, however, several obvious candidates for conservation exist. We have allowed procedural complexity in the jurisdictional area to reach, in Justice Steven's phrase, "Daedelian" proportions. We have failed to take full advantage of the potential for efficiency inherent in the class action. We expend needless energy in a seriously flawed discovery process. Finally, we expend valuable energy in minor criminal cases which do not warrant Federal attention. Were serious attention given to reforming one or more of such areas, conservation of judicial energy would amply repay the effort.

Even if one were to combine a modest expansion of the Federal judiciary with a serious program of conservation, the demand for Article III adjudication at the trial level will continue to exceed the capacity of the Federal trial courts to supply it. Thus, the Committee must consider the two more drastic expedients of substitution and rationing. Abolition of diversity jurisdiction constitutes precisely such an attempt to substitute state court adjudication for Federal consideration of claims sounding solely in state law.

In considering the propriety of substituting state courts for Federal in the diversity area, several preliminary observations are appropriate.

First, diversity jurisdiction is not an evil; it is a luxury. If it were possible to continue to operate the Federal trial courts without abolishing diversity, no reason of policy would exist to abolish it. As a mechanism for minimizing possible bias and permitting the most talented segment of the trial bench to contribute to the growth of general commercial and tort law, diversity jurisdiction has played a valuable role in the nation's jurisprudence.

Second, diversity jurisdiction is not a necessity; it is a luxury. Whatever necessity may once have existed to assure out-of-state litigants access to a neutral Federal forum, no current perception exists that state courts systematically discriminate against out-of-state litigants. Indeed, in the many cases in which diversity jurisdiction is unavailable because complete diversity does not exist, state courts routinely deal with out-of-state litigants in a fair and impartial manner. I am aware of no suggestion that out-of-state litigants in non-complete diversity cases are treated less fairly than natives of the forum state. Moreover, while it is true that during the reign of *Swift v. Tyson*, 16 Pet. 1 (1842), Federal trial courts played a valuable role in enunciating a uniform common law merchant facilitating rapid expansion of the nation's economy, the demise of *Swift v. Tyson*, requires Federal judges to apply state substantive law in diversity cases. *Erie v. Tompkins*, 304 U.S. 64 (1938). Thus, Federal judges may not play an innovative role in diversity cases, but must, instead, simply reflect the law of the states in which they sit. Stripped of the power to "make" commercial and tort law and freed from the obligation of providing a neutral forum, Federal diversity courts no longer serve a critical judicial function. Instead, they serve as a luxury—affording access to a forum of excellence and uniformity to litigants—primarily corporations—engaged in complex commercial litigation.

Third, while it is not unreasonable for lawyers engaged in complex commercial litigation governed by state law to seek access to Federal courts, a Federal forum is not crucial to the proper disposition of such cases. As a lawyer who for years has sought access on behalf of civil rights clients to Federal court in the belief that it was in the best interest of my clients, I am not unsympathetic to the efforts of corporate lawyers to achieve the same result. Lawyers opt for Federal court in diversity cases for two primary reasons. First, although it may be shrinking, many lawyers continue to believe that a competence gap exists between the Federal trial bench and the trial benches of many states. As I shall attempt to show, if such a gap exists, it is least pronounced in the areas covered by diversity jurisdiction. Second, and perhaps more importantly, lawyers opt for Federal courts in a diversity setting because uniform rules of procedure and evidence apply in Federal courts enabling a "national" bar to operate in major commercial litigation. Given the fact that 34 states have adopted variants of the Federal Rules of Civil Procedure and that the Federal Rules of Evidence appear to be gaining wide acceptance, the need for uniformity may no longer be acute. Moreover, it is, to say the least, debatable whether the bar's desire for uniform procedures justifies a continuing jurisdictional burden on an overworked Federal trial bench.

Fourth, diversity jurisdiction affords access to Federal court to a relatively narrow segment of the population, primarily corporations engaged in complex commercial and tort litigation. As the Department of Justice has noted, litigants in over 70 percent of diversity cases are corporations. Thus, diversity is a primary means of corporate access to the Federal courts in commercial and tort cases governed by state law.

Essentially, therefore, the debate over the retention of diversity jurisdiction pits lawyers representing corporations in commercial cases (governed by state law) against lawyers representing individuals in constitutional and Federal statutory cases (governed by Federal law) in competition for the finite attention span of an Article III judge. If, as I believe, the Federal judge cannot hope

to listen to both, an analysis of the factors which render Article III adjudication unique indicates that diversity jurisdiction is a luxury we can no longer afford.

Three factors have tended to make Article III courts unique forums for the resolution of critically important cases sounding in Federal law.

First, as I have suggested, the prestige, compensation, support services and selection mechanisms of Federal trial judges combine to assure a standard of intellectual excellence in the members of the Federal trial bench which, many lawyers believe, exceeds the ability levels of many state trial judges. As several witnesses have already suggested, the so-called "competence gap" between Federal and state trial benches may well be shrinking. Moreover, in the areas covered by diversity jurisdiction, it is doubtful whether any competence gap exists at all. The governing substantive law in a diversity case is state law.

Thus, a state judge, exposed to state law issues on a daily basis, is certainly as well equipped as a Federal court, called upon to delve into state law on a random and sporadic basis, to uncover governing substantive law. Indeed, whatever competence gap may exist at the trial level, it is nonexistent at the appellate levels. Surely, the Supreme Court of a given state is at least as competent to apply the law of that state as the Federal Circuit Court of Appeals. In addition, diversity cases generally turn, not upon precise and arcane analysis, but rather upon findings of fact. While reasonable arguments may be made concerning the existence of a (hopefully shrinking) trial-level competence gap in the area of technical ability, no basis exists for suggesting that state courts are less competent fact-finders than their Federal counterparts. Thus, from the standpoint of relative competence, no reasons exist to funnel diversity cases to Federal rather than state judges.

Second, Federal trial judges often display an enhanced bureaucratic receptivity to the wishes of the Supreme Court. Of course, where the law is clear both state and Federal judges do not hesitate to apply it. Most cases find themselves in litigation, however, because the law is debatable. While the phenomenon is admittedly difficult to demonstrate, many lawyers believe that in doubtful cases, Federal judges look to the probable wishes of the Supreme Court for guidance, while state judges feel bound only by more explicit rulings. Whatever the merits of such a debatable phenomenon, it has no application to diversity cases which look, not to the United States Supreme Court, but to State Supreme Courts for guidance. Indeed, should such a bureaucratic affinity exist, it cuts in favor of permitting state trial judges to anticipate the wishes of a State Supreme Court, rather than forcing a Federal judge to guess at the probable result.

Finally, and most importantly, Federal trial judges are appointed with lifetime tenure; while most state trial judges are elected for fixed terms. Thus, Federal courts provide a more insulated forum within which to consider issues likely to inflame local passions. As between corporations engaged in commercial jousting and individuals challenging the will of the majority through constitutional litigation, it seems clear that access to a politically insulated forum is far more important to constitutional than to commercial litigants. Thus, as between corporate diversity litigants and individual Federal question litigants, access to a Federal trial forum in Federal question cases is clearly more important. As the lowest priority, diversity jurisdiction is the leading candidate for the dubious honor of being first out of the lifeboat.

Not surprisingly, lawyers seeking to retain diversity as a "necessary" luxury have marshalled a number of arguments in favor of retention.

First, it is argued that bias against out-of-staters continues to exist in certain cases. Even if bias exists in isolated cases, its existence does not justify an across the board grant of diversity jurisdiction. It would be possible to insure against sporadic bias by permitting out-of-state litigants to remove cases to Federal court upon a showing of actual prejudice; a limited removal right already available to state criminal defendants. Thus, removal under extraordinary circumstances adequately protects against sporadic bias.

Second, it is argued that abolition of diversity will end valuable contributions by Federal diversity judges to the growth of general commercial law. Given a diversity judge's passive posture under *Erie*, it is questionable whether serious cross-fertilization takes place at all. However, even if it does, Federal trial judges will continue to be confronted with opportunities to participate in the growth of general commercial and tort law in several ways. First, Federalized torts, such as FELA and Jones Act cases would continue to be heard in Federal court. Second, pendent and ancillary jurisdiction over state law claims would continue to afford Federal judges substantial opportunity to dabble in state law. However, unlike diversity, such an opportunity would be discretionary, allowing a Federal

judge to enter the area only when he has something to say. Similarly, Federal Tort Claims actions compel resort to state tort law, enabling a Federal judge to comment upon and, perhaps, influence its growth.

Third, it is argued that a shift of diversity cases to state trial forums would unduly burden the state court system. The short answer to such a point is that 6,000 state trial judges are certainly better able to absorb the diversity cases than are 500 Federal judges. Moreover, the state courts have explicitly expressed willingness to absorb the diversity cases.

Fourth, it is argued that several Districts are able to handle diversity comfortably. Accordingly, it is suggested, no justification exists to free up additional trial time in such Districts. If, as I suspect, such fortunate Districts tend to exist in sparsely populated Western states, abolition of diversity would not result in underutilized Federal judges. Rather, to the extent it permitted District Judges to establish open time on their dockets, it would enable such judges to sit by designation on one of the Circuits experiencing serious appellate backlogs. Alternatively, it would permit a trial judge to accept assignments from over worked Districts with serious trial backlogs. Such an unexpected—and free-source of judicial reinforcements would prove an immediate dividend of abolition.

Fifth, it is argued that in complex litigation where it proves impossible or extremely difficult to obtain jurisdiction over all parties in a single forum, Federal diversity jurisdiction provides a helpful mechanism for orderly disposition. Of course, diversity jurisdiction does not solve a litigant's in personam jurisdiction problems, since diversity courts may exercise only the long-arm jurisdiction of the state in which they sit. Thus, if it is impossible to obtain jurisdiction in state court, it will probably be impossible to obtain jurisdiction in Federal court. However, the panel on Multi-District litigation has provided some practical assistance by providing for simultaneous administration of the pre-trial phase of complex cases. Even under the multi-District panel trial must be returned to the various Districts involved. Moreover, given the demise of mutuality, Balkanized litigation of a mass tort may take on less significance, since a defendant's loss in Case I will probably be preclusive in subsequent cases. In any event, the special problem of mass tort litigation would appear to call for a specialized procedure, rather than the chaotic and ad hoc procedures which now govern mass torts in diversity settings.

CONCLUSION

Diversity jurisdiction is a luxury that an overburdened Federal trial bench can no longer afford. That it has survived as long as it has is a tribute to the power and persuasiveness of lawyers for its primary beneficiaries—corporations engaged in commercial litigation. Abolition of diversity will not only relieve the Federal trial courts of a substantial burden, it will channel the considerable energy and talent of the commercial bar toward the upgrading of state trial forums. Until now, diversity jurisdiction has acted as a safety valve assuring lawyers a trial forum of excellence in most complex commercial cases without regard to the condition of state trial courts. With the abolition of diversity, the justifiable insistence of the commercial bar that complex commercial cases be tried in a forum of excellence will translate itself into action on a state level which can only accelerate the hopeful trend toward excellence at the state trial level.

In addition to abolishing diversity jurisdiction, the Committee is considering abolishing the remaining jurisdictional amount in Federal question cases. Under current law, no jurisdictional amount exists in most Federal question cases. One glaring category of case is, however, blocked by an unfortunate gap in the 1976 legislation. While, under the 1976 legislation, actions against Federal officials which arise under the Constitution or laws of the United States do not require a jurisdictional amount, it continues to be required in identical cases against state officials. Regardless of 28 U.S.C. § 1331(a), Constitutional cases against state officials may be found on 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3), without the necessity of a jurisdictional amount. Supremacy clause cases against state officials, however, fall outside the 1976 legislation and have been held by the Supreme Court to fall outside 28 U.S.C. § 1343(3) or (4) as well. Thus, cases challenging state action as violative of a Federal statute continue to require a \$10,000 jurisdictional amount. Since many such cases are brought on behalf of welfare recipients, individual claims rarely approach \$10,000. Moreover, the Supreme Court has construed Rule 23 and § 1331(a) to forbid class plaintiffs to aggregate individual claims to satisfy the jurisdictional amount. The net result

of the unfortunate statutory gap is to exclude a category of cases from Federal court which fall at the core of its jurisdictional mandate. When an impoverished plaintiff claims that state officials are disbursing Federal funds in violation of a Federal statute, his claim obviously belongs in a Federal court. Only by either (a) abolishing the \$10,000 jurisdictional amount; (b) permitting class aggregation; or (3) including Supremacy Clause claims under § 1343(3) can such cases be heard by a Federal judge.

Senator METZENBAUM. Michael Trister, of Sobol and Trister, of this community.

Mr. Trister, you heard the Chair indicate he is trying to get to another hearing at least to put in an appearance. Your entire statement will be inserted in the record at the conclusion of your oral testimony. I would appreciate it very much if you would briefly state your position and then I would like to ask a few questions.

STATEMENT OF MICHAEL TRISTER

Mr. TRISTER. Thank you very much, Senator. I will be very, very brief.

I am here today on behalf of the Center on Social Welfare Policy and Law which is a legal service backup center funded by the Legal Service Corp. The center specializes in the area of public assistance and medicaid and other statutory benefit programs and has been doing so for about 10 years, relying principally on the Federal courts to vindicate the rights of its clients.

We have testified before and would simply like to restate today our support for the abolition of diversity jurisdiction. Our reasons have been stated by many other witnesses. I will not go into them in great detail except to say that in addition to the expertise and the quality of justice that Professor Neuborne stressed, there is also the question of delay.

We regard the abolition of diversity as an opportunity to ease some of the burden on Federal courts and to allow more speedy justice to be attained on Federal question cases.

Poor people who come to Federal court are often seeking very basic necessities of life. They are seeking a welfare grant that they might be entitled to or public housing or enforcement of a housing code regulation or perhaps a job. These are the kinds of things that can't wait and yet, given the burden that we now have in Federal court, the delay is enormous and sometimes devastating for poor litigants.

My major purpose in being here today though is to make sure that section 2 of the bill is not ignored. That is the section that would repeal the amount in controversy requirement in Federal question cases. It has been a provision which at least to date has been noncontroversial. I heard Congressman Wiggins testify earlier in support of it and we are very gratified for that. Our concern is that people not forget that portion of the bill. What section 2 says is that there is no price tag of Federal rights. If a case involves a Federal question, a case arising out of the Federal Constitution or the laws enacted by this Congress, then the question deserves to be decided in Federal court regardless of the precise amount that any individual claimant may have at stake.

We support that proposition both philosophically and practically. It is vital that Federal question cases be decided in those courts where

there is necessary expertise and concern, and there is a desire to develop a body of law that is faithful to the Federal Constitution and to the Federal laws. For that reason we support very strongly, section 2.

Senator METZENBAUM. In other words, you are saying that because of the jurisdictional amount some litigants today are being denied a forum in which to litigate Federal issues.

Mr. TRISTER. That is precisely correct, Senator. Most recently, only 3 weeks ago the Supreme Court decided a case called *Chapman v. Houston Welfare Rights Organization*. What that case involved was whether or not the State of Texas must modify the standard that it uses for calculation of welfare grants to comply with the Federal statute that was enacted in 1969. This is a purely Federal matter. There is a Federal statute, the Social Security Act, Federal regulations, legislative history from this Congress. That is what was at stake in that case.

The Fifth Circuit Court of Appeals ruled that the plaintiffs were correct. The Supreme Court said no, you cannot come into this court. You have to show \$10,000 in amount in controversy. Because, as in many, many welfare cases, the individuals could not show that much at stake; they were out of court.

Senator METZENBAUM. What about the other side? Let me be the devil's advocate. Wouldn't this open the flood gates and wouldn't the impact on the caseload be tremendous if you eliminate the jurisdictional amount?

Mr. TRISTER. Senator, there is no evidence of that at all. I recall specifically testimony by Mr. Spaniol of the administrative office of the U.S. courts testified on the House side last year that the number of cases that would come in through this section is really quite small, so small they don't even try to figure out how many. It is a very small number.

Mr. Spaniol was testifying prior to some other Supreme Court cases that have in fact brought in some of these cases already, and so the number has got to be very, very small. I have not heard any testimony to the contrary on that point.

Senator METZENBAUM. All right.

Mr. TRISTER. Nobody has suggested that there are large numbers of cases at all.

Senator METZENBAUM. You point out there has not been any attack made upon that particular section. Let's you and I not discuss it ad infinitum to the point where somebody raises the point and starts to make an attack upon it. I think it will remain in the legislation.

One last question, in your opinion is it constitutional for Congress to remove diversity jurisdiction from the Federal court?

Mr. TRISTER. I would concur with Professor Neuborne on that. Nobody has raised any serious doubt about Congress' power in this area. I didn't understand Mr. Frank or others to suggest there is.

Senator METZENBAUM. Mr. Trister, we appreciate your testimony very much. It is helpful to us. Thank you. The staff will remain in touch with you.

Mr. TRISTER. Thank you.

[The prepared statement of Mr. Trister follows:]

PREPARED STATEMENT OF MICHAEL B. TRISTER

Mr. Chairman and Members of the Committee, my name is Michael B. Trister. I am appearing today on behalf of the Center on Social Welfare Policy and Law, Inc. (the Welfare Law Center), a legal services support center that specializes in the rights of needy persons under federal public assistance and related federal programs.

This is the second time that the Center has appeared before this Committee to support legislation to repeal federal diversity jurisdiction and the amount in controversy requirement in federal question cases. The Center supports such measures because it believes that the appropriate role of the federal courts is to provide a forum for the enforcement of federal rights—rights created by the United States Constitution and by the laws enacted by Congress. S. 679 advances this principle by eliminating from the federal docket cases which involve no special federal interest, while at the same time expanding federal jurisdiction to reach all cases in which the federal interest is the greatest.

1. ABOLITION OF DIVERSITY JURISDICTION

Assignment of ordinary accident and contract actions to the federal court system merely because the parties reside in different states makes little sense given the realities of our modern industrial state. In a world in which the principle parties in interest in many cases are large multi-state companies, and in which modern means of transportation and communication have reduced, if not eliminated, most pockets of local parochialism, it is no longer likely that non-residents will be treated with greater hostility if they sue or are sued in a state court rather than a federal court.

Federal courts have no special expertise in the kinds of issues that arise in diversity cases, and there is no unique federal interest to justify a federal judicial role. In fact, federal courts often do not have the necessary background to decide properly the state law issues that arise in diversity cases. In contrast, diversity cases present the same issues of law and fact that are the grist of state court practice. Thus, state courts offer, or with greater support from the trial bar can be made to offer, adequate forums for the fast, efficient and fair resolution of these disputes.

While serving no substantial federal purpose, the present diversity caseload does contribute significantly to the congested condition of many federal court dockets, thus adding to the delay and other administrative difficulties in the federal courts. For poor people in particular, many of whom come to federal court to enforce their rights to the minimal necessities of life such as adequate housing, financial assistance or medical care, such delays can be devastating. The Center therefore strongly supports the total abolition of diversity jurisdiction as called for in section 4 of S. 679.

2. REPEAL OF THE AMOUNT IN CONTROVERSY REQUIREMENT IN FEDERAL QUESTION CASES

While the abolition of diversity jurisdiction will ease the caseload burden on the federal courts, section 2 of S. 679 will help to rationalize federal jurisdiction by insuring that all federal law questions may be heard in federal court, regardless of the amount in controversy. During the 94th Congress, this Committee took the first step in this direction by adopting S. 800 which repealed the amount in controversy requirement in federal question cases brought against federal officers and departments. Section 2 of S. 679 would complete the job by allowing all other suits under the Constitution and federal laws to be brought in federal court.

The need for this amendment is highlighted by two decisions of the United States Supreme Court handed down only three weeks ago. In *Chapman v. Houston Welfare Rights Organization* (No. 77-719), and *Gonzales v. Young* (No. 77-5324), the Court held that cases brought against state officials to compel them to comply with the express requirements of the federal Social Security Act cannot be brought in federal court unless each of the plaintiffs satisfies the \$10,000 amount in controversy requirement or the plaintiffs also allege that their constitutional rights have been violated. Since the plaintiffs' claims in these cases were less than \$10,000, and no federal constitutional issues were involved,

the plaintiffs were barred from protecting their federal statutory rights in federal courts.

There are a number of reasons why poor persons should be able to bring *Chapman*-type cases in federal court:

First, the cases involve complex questions of federal law, such as whether a state has upgraded its welfare assistance standards to reflect cost of living increases, as required by section 402(a) (23) of the Social Security Act, or whether the Medicaid law requires states to provide transportation to medicaid recipients. State courts, to the extent that they are willing to hear such cases at all, often do not possess the necessary expertise or familiarity with these programs to properly decide these questions.

Second, while the damages suffered by individual plaintiffs are often small, the cases nevertheless often involve the proper expenditure of millions of dollars in federal assistance. Moreover, the basic issue presented in these cases is whether state agencies are in compliance with the federal law and regulations. In *Chapman*, for example, the Supreme Court had already ruled in an almost identical case involving New York State that the Texas procedure violated federal regulations. Thus, in both monetary and administrative terms, there are real federal interests to be protected in these cases.

Third, state courts often do not afford an efficient or adequate remedy to enforce federal statutory rights. In several states welfare recipients may not go into state court at all to enforce their federal statutory claims. In other states available remedies are so hampered by technical procedural requirements as to be virtually useless. Perhaps most importantly, state courts in some places remain so hostile to federally established rights that they are unwilling to enforce federal statutes such as the Social Security Act in the manner intended by Congress.

Fourth, as a result of legislation there are now very few actions involving federal rights that cannot be brought in federal court without regard to the amount in controversy. This trend reflects the judgment of Congress that the right to sue in federal court is too important to depend upon the monetary value of the injury suffered by the plaintiff. Yet, the result of *Chapman* is to deny access to federal court only for the poor. As the House Committee on the Judiciary put it last year, "Telling certain citizens, often the poor and oppressed, that although they have had their federal rights infringed, their resultant damages are too insignificant to merit the attention of a federal judge, causes visions of discrimination and unequal treatment."

Section 2 of S. 679 would enable cases such as *Chapman* and *Gonzales* to be brought in federal court by eliminating the requirement that each plaintiff allege a loss of \$10,000 or more. While we strongly support section 2, we urge the Committee to consider two changes in the bill as it has been proposed.

(a) *Separate enactment*

We understand the original reasons for joining section 2 to the provision for abolishing diversity jurisdiction. We hope, however, that any controversy that might arise over diversity will not delay passage of the federal question provision. The *Chapman* decision has created an immediate crisis for poor litigants which must be dealt with immediately. If it should appear that S. 679 will be delayed even for a few months as a result of the debate over diversity abolition, we hope that the Committee will consider reporting section 2 as a separate bill.

(b) *Effective Date*

Under section 9 of the bill as introduced, both the diversity and federal question amendments would not be effective until 60 days after the date of enactment. This delay makes good sense with respect to the abolition of diversity, since it would be both unfair and unwieldy to require the transfer of diversity cases that are pending in federal court on the date of enactment. However, repeal of the amount in controversy requirement in federal question cases should be made applicable to all cases pending on the date of enactment. This will avoid further unnecessary litigation of the jurisdictional issue, thus saving considerable judicial and legal resources, and in some instances avoid the necessity of refileing cases in order to take advantage of the new law. Only a small number of cases would be added to the federal docket by this amendment, but these cases

are of vital importance to the poor litigants who filed them. A copy of a letter I previously sent to Chairman Kennedy regarding this issue and a proposed amendment that would make section 2 of S. 679 applicable to pending cases are attached to this statement.

Thank you for your time and attention.

SOBOL & TRISTER,
Washington, D.C., February 7, 1979.

HON. EDWARD M. KENNEDY,
U.S. Senate, Washington, D.C.
(Attention: Mr. Ken Feinberg)

DEAR SENATOR KENNEDY: I am writing on behalf of the Center on Social Welfare Policy and Law, Inc., a legal services program that specializes in the rights of welfare recipients and other poor persons under federal benefit programs, to request a modification in section 901(h) of the proposed Civil Justice Improvements Act being prepared by your office. Under that section, the repeal of the \$10,000 amount in controversy requirement for federal question cases brought under 28 U.S.C. § 1331 would be effective only for new cases filed sixty or more days after the date of the bill's enactment. We would like to propose as an alternative that repeal of the jurisdictional amount be made effective with respect to all cases pending on the date of enactment or filed thereafter.

Although the total number of pending cases that would be covered by this change is not great, it would nevertheless be extremely important in a small number of cases involving the rights of poor persons to receive federal statutory benefits under the public assistance and medicaid titles of the Social Security Act. In addition to guaranteeing that such cases could remain in federal court, this proposal would avoid needless litigation over the amount in controversy in other pending cases in which jurisdiction is challenged in the trial court or on appeal.

When Congress repealed the jurisdictional amount in cases brought against federal officers and agencies as part of Public Law 94-574, it made that repeal applicable to all cases pending on the date of enactment. It would be extremely helpful if the same approach were taken here.

Sincerely,

MICHAEL M. TRISTER.

AMENDMENT TO S. 679 TO MAKE SECTION 2 OF THE ACT APPLY TO PENDING CASES

Amend Section 9 of the Bill to read as follows:

"The amendments made by this Act shall apply to any civil action commenced on or after sixty days from the date of enactment of this Act, *except that the amendments made by section 2 of this Act shall apply to any civil action pending on the date of enactment of this Act*" (italic portion is added).

Senator METZENBAUM. That concludes the hearing for this morning. We will reconvene tomorrow morning at 10 o'clock.

[Whereupon, at 11:45 a.m., the hearing was adjourned until 10 a.m. the next day.]

JURISDICTIONAL AMENDMENTS ACT OF 1979, S. 679

TUESDAY, JUNE 5, 1979

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met at 10:08 a.m., in room 2228, Dirksen Senate Office Building, Washington, D.C., Senator Howard M. Metzenbaum presiding.

Present: Senators Metzenbaum, DeConcini, Baucus, Leahy, and Hatch.

Staff present: Marge Baker, Katrina Lantos, and Arthur Briskman, counsel.

Senator METZENBAUM. Today we continue hearings on S. 679, legislation that would abolish most Federal diversity jurisdiction.

OPENING STATEMENT OF SENATOR METZENBAUM

As I noted yesterday, this legislation is intended to remove the Federal courts from the business of deciding State law cases and return to the States responsibility that is rightfully theirs. It will permit Federal courts to concentrate on Federal laws and State courts on State laws, at the same time providing for more efficient, effective, and expeditious resolution of disputes.

The legislation also provides for removal of the \$10,000 amount in controversy requirement in all Federal question cases. This will complete the action taken by Congress in 1976, which eliminated the amount in controversy as a necessity when the defendant is the United States, a Federal agency, or Federal official. It will result in only a slight increase in the number of suits in Federal courts, at the same time giving every citizen the right to litigate his or her Federal claims before a Federal tribunal.

This legislation commands broad support from all sides of the political spectrum. It has the support of an overwhelming majority of legal scholars: Professor Wright, Professor Bork, Judge Friendly, Professor Wechsler—who is here today—and many others.

It is strongly supported by President Carter, Attorney General Bell, the local justices of the 50 States, the Judicial Conference of the United States, and the House of Representatives, which passed a similar measure last session on 2 occasions, once by a 2 to 1 margin, and a second time by the even more overwhelming margin of 323 to 49.

The legislation recognizes that expanded access to Federal courts by citizens with Federal claims and to State courts by citizens with State claims is in the best interest of our judicial system.

In the final analysis, the elimination of Federal diversity jurisdiction will undoubtedly improve the quality of justice for all our citizens in all the courts of this country.

We have seven separate speakers today. I will ask each speaker to confine his remarks to an absolute maximum of 10 minutes so that there may be some time for questioning. Actually, that does not allow too much. I think maybe I will cut that back a little bit and make it 8 minutes for each speaker, if you please.

Our first witness is the Honorable M. Caldwell Butler, a Member of the Congress. We are happy to have you with us this morning, Congressman Butler.

STATEMENT OF CONGRESSMAN M. CALDWELL BUTLER

Mr. BUTLER. Thank you, Senator, members of the committee.

It is indeed an honor for me to have this opportunity to discuss with you a matter that is of the utmost importance to the operation of our Federal judiciary.

Legislation to abolish the use of diversity passed the House last Congress on two different occasions. The House Judiciary Subcommittee on Courts held 7 days of hearings last Congress and 3 days this year.

In spite of what you may have heard, there is still strong support for the abolition within the House Judiciary Committee and, I believe, in the House of Representatives.

However, since the measure passed the House twice last Congress, we are hopeful that the Senate will act first this year.

Abolition of the use of diversity as a means of entering the Federal court is only one of a number of legislative measures directed at bringing 18th century Federal judiciary into the 20th century.

Two Congresses ago we abolished the use of the three judge court; last Congress we increased the number of judges and reorganized the bankruptcy courts; 2 weeks ago the House passed H.R. 10, which in part would require State prisoners to use their State remedy prior to coming into Federal court. This alone would reduce the civil caseload by 6 percent.

Pending before this committee is legislation which would expand the use of magistrates, create a new court of appeals, and legislation to provide financial assistance for the development and maintenance of effective mechanisms for the resolution of minor disputes, among others.

Diversity jurisdiction finds its basis in article III, section 2, of the Constitution. It is intended to permit, but not require, Federal court jurisdiction involving controversies between citizens of different States and between a State, or the citizens thereof, and foreign states. This provision of the Constitution is not self-executing.

However, since the First Judiciary Act of 1789, the Federal courts have had jurisdiction in diversity cases. Legislative history as to why the First Congress exercised its prerogative to vest diversity jurisdiction in Federal courts is not very illuminating. Scholars who have researched the issue have concluded that the primary motivation for the enactment of diversity jurisdiction was to provide an objective

forum for the determination of controversies free from local prejudice or influence, or at least the fear of such.

Another view is that the Nation's early lawmakers shared misgivings as to whether at least some of the States' courts would be fair to the interest of out-of-State creditors.

In addition, at that time in our country's history, we had a Federal judiciary with a very light caseload. We also had, at that time, a weak Central Government and Federal court involvement in local matters, at the very least, enhanced local awareness of the existence of a Central Government.

All of this was thought to justify a Federal incursion on the States' authority to settle their own disputes. Justified or not, the conditions that existed in 1789 are vastly different than those that exist in 1979.

The decision as to what role diversity jurisdiction should play in modern American Federal jurisprudence, as well as what should be the proper balance between the State and Federal courts, must be made on present day facts. I contend that the facts are there and there is no existing information that would indicate justification for maintaining a system that has become burdensome to the operation of our Federal courts.

It is clear to me that the primary benefactor of permitting the luxury of a choice of courts is the trial attorneys whose practice consists primarily of representing corporations, insurance companies and personal injury type cases caused by motor vehicle accidents, and his decision is based on any number of factors such as backlog, procedure, courthouse location, court personnel, the type of jury and the potential size of the verdict.

If there is bias against out-of-Staters, then why are more than half of all diversity cases brought filed by plaintiffs in their home States?

If there is really bias against out-of-Staters, then it exists for all those cases with similar facts which happen to be under the \$10,000 minimum.

The local lawyer, handling a local case below \$10,000 with otherwise identical facts which will be decided by application of State, not Federal law, does not have any choice of a Federal court.

Why should a litigant by mere accident of geography and amount of money involved have an advantage, if there is one, over a neighbor with an otherwise identical case?

About 25 percent of the current civil caseload of Federal district courts consists of diversity cases. While only 8 percent of all Federal cases go to trial, 12 percent of diversity cases are tried. The more than 3,000 diversity trials held each year in Federal district courts constitute 25 percent of all civil and criminal jury trials, and about 68 percent of all civil jury trials.

By contrast, the elimination of Federal diversity jurisdiction will increase the civil caseload of State courts by an average of 1.03 percent. But yet the Association of State Chief Justices voted overwhelmingly to support the enactment of this legislation.

While the American Bar Association is on record in opposition to this legislation, its select committee, which it chose to study the issue, recommended to the House of Delegates to support curtailment of diversity. It failed by a vote of 164 to 127. The Federal Government

can no longer afford to give these special litigants the luxury of a choice of forum.

A recent study prepared by the Department of Justice concludes that the abolition of diversity is expected to result in a savings to the taxpayer of \$8.8 million each year, once the pending cases are terminated.

In addition to the abolition of diversity jurisdiction, except in alienage and statutory interpleader cases, S. 679 would abolish the \$10,000 amount requirement in Federal question cases. This would not create much of an additional burden on our Federal courts, but, more importantly, Federal courts should decide issues involving question of Federal law, be it treaty, statutory, or constitutional. I strongly support this provision.

With regard to the retention of alienage jurisdiction under diversity, I have serious questions about that. Last year our House subcommittee was advised by the State Department that the basis of such jurisdiction "was a conviction that since the Federal Government in any event would be answerable to foreign powers for the conduct of the various States of the Union, it would be best from the outset to grant Federal courts jurisdiction over cases in which foreign parties were involved."

An additional factor, according to the State Department, "was the desire to avoid offense to foreign countries because of apprehensions by them that their citizens would be subject to parochial justice in State courts."

I hope this committee will have the opportunity to probe this issue and make a recommendation to the House. Even if there is justification for the retention of this special jurisdiction, should alienage be so broad as to include permanent resident aliens, alien visitors or students, or refugees, or even illegal aliens?

In conclusion, Mr. Chairman, the time burden and expense diversity jurisdiction imposes on our Federal courts can no longer be justified. State courts, not Federal courts, should administer and interpret State law. Federal courts are at a disadvantage when a decision is required concerning a point of State law, especially when the highest State court may not have ever spoken on that particular point.

Mr. Chairman, I bring with me a letter from the chairman of our Subcommittee on Courts and Civil Liberties and Justice, Mr. Kastenmeier, in which I will file with you, if permitted.

Senator METZENBAUM. It will be included in the record.

[Document follows:]

NINETY-SIXTH CONGRESS

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Congress of the United States
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515
Telephone: 202-225-3951

June 1, 1979

The Honorable, Edward M. Kennedy
 Chairman
 Senate Committee on the Judiciary
 2226 Dirksen Senate Office Building
 Washington, D.C. 20510

Dear Mr. Chairman:

I am writing to thank you for scheduling hearings before the full Senate Judiciary Committee on S.679, a legislative proposal to eliminate the diversity of citizenship jurisdiction of the federal courts. I also would like to thank Senator Metzenbaum for agreeing to chair these important hearings. It is my hope that a diversity bill can be rapidly processed by the Senate and then sent to the House, where there is firm bipartisan support for such legislation.

I have hand delivered this letter to Congressman Caldwell Butler, a trusted friend and colleague, who will testify before your Committee on June 5, 1979. At my request, Congressman Butler will request to insert into the record both the letter and an attached copy of the statement on diversity I presented to Senator DeConcini's Subcommittee on March 17, 1978.

During the 95th Congress, Congressman Butler -- as a Member of my subcommittee -- was instrumental in the drafting and successful processing of the legislation through the House of Representatives. I would like to commend him for his efforts in this regard and for his continuing willingness to work on this legislation. In addition, I have read the statement he will present on June 5th and I wholeheartedly endorse the ideas stated therein.

The abolition of diversity of citizenship jurisdiction, and further, the elimination of the amount in controversy requirement in federal question cases, joined together in one bill, are among the most important court reform proposals that will be before you this Congress. The fundamental

Page Two

The Honorable Edward M. Kennedy

June 1, 1979

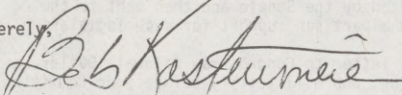
proposition that federal questions should be decided in the federal courts and state law issues in the state courts is an idea whose time has come. The resultant effects of this legislation are all positive and they apply throughout our entire judicial structure. The federal district courts, circuit courts of appeals, and Supreme Court benefit throughout. Similarly, the state courts benefit by being accorded a more respected and principled role in our justice system; so do litigants, both those with valid federal civil and constitutional claims who now must wait an intolerably long time for disposition of their suits in the congested federal courts and those with state law claims who are now encouraged to "shop" for the best forum. This legislative proposal, by promoting consistency and uniformity in the law, passes the ultimate test of good legislation. It ultimately will breed citizen confidence in our entire justice system.

A final argument in favor of this legislative proposal is that it is cost conscious. The federal taxpayer will save approximately 10 million dollars. The federal courts will save an incalculable amount of time to allocate to more pressing societal problems.

I look forward to working with you and your Committee on this important legislation, as well as other court reform and access to justice measures that are closely linked to it.

With warm personal regards, I am

Sincerely,



Robert W. Kastenmeier
Chairman, Subcommittee on Courts,
Civil Liberties and the
Administration of Justice

RWK:mra

TESTIMONY OF ROBERT KASTENMEIER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WISCONSIN

STATEMENT OF ROBERT KASTENMEIER

My name is Bob Kastenmeier. I am Chairman of the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice.

I am always pleased to speak before my subcommittee's sister Senate subcommittee on matters concerning the administration of justice in the American judicial system. The House Judiciary subcommittee which I chair and the Senate Judiciary Subcommittee on Improvements in Judicial Machinery share concurrent jurisdiction over most matters designed to improve the structure and machinery of our judicial system. Not surprisingly, both subcommittees are processing or have already processed significant legislation relating to magistrates reform, judicial tenure, attorneys' fees, arbitration, protection or jurors and jury fees, witness fees and judicial accommodations. Although all of these topics are of interest to us, today I shall direct my remarks primarily toward diversity of citizenship and federal question jurisdiction.

There are essentially two legislative proposals pending before the subcommittee. The first is the Department of Justice's bill to curtail diversity of citizenship jurisdiction by preventing the in-state plaintiff from filing in the federal court of his home state (cf. S. 2094; H.R. 9123). The second is my subcommittee's proposal to totally abolish diversity jurisdiction, to retain alienage jurisdiction and statutory interpleader, and further to abolish the amount in controversy requirement in federal question cases (cf. S. 2389; H.R. 9622). Since this legislation passed the House of Representatives on February 28, 1978, at this time I would like to submit the House Report on H.R. 9622 (No. 95-893) into the record.

I feel qualified to speak on each of the proposals because I was lead sponsor of both in the House of Representatives. My principle thesis is that diversity jurisdiction ought to be abolished because it is a luxury that our society can no longer afford.

II. BACKGROUND OF HOUSE ACTION

A little background is necessary to explain how I got interested in what Justice Frankfurter called the "mounting mischief" of diversity jurisdiction, why I introduced two pieces of legislation, and how I (and the Members of my subcommittee) progressed from being supporters of curtailment to advocates of abolition.

Several months after the start of the 95th Congress, the Subcommittee on Courts, Civil Liberties and the Administration of Justice decided to hold general oversight hearings on "The State of the Judiciary and Access to Justice". The two-prong title was not accidental. Generally, it was perceived that the inquiry should not be restricted to the problems of court reform but should be broadened to include the problems of the people who need judicial machinery to resolve their disputes. For the first time, we wanted to include in this debate ordinary people who seek access to the court system rather than simply federal judges or the Department of Justice. Moreover the inquiry was to cover threshold areas such as standing, class actions, federalism and comity, and other questions such as costs of litigation and attorneys fees.

Specifically, there were three reasons why my subcommittee commenced its legislative agenda with oversight hearings. First, we wanted to provide a legislative forum for several well-known commissions and conferences. Second, the Administration created with the Department of Justice a new "Office for Improvements in the Administration of Justice." This evidence of Administration

interest in court reform and President Carter's concern for threshold barriers such as standing and class actions, along with that of the American Bar Association, provided an impetus for a broad legislative inquiry. Third, and most important, Congress over the years has been somewhat negligent in not conducting an in-depth examination of the needs of the Federal courts and the people who use those courts. The result has been that few, if any, Members of Congress have ever set priorities for improving the administration of justice. Bills tend to move forward in a haphazard and often overlapping fashion. An example of this is the relationship between the abolition of diversity of citizenship jurisdiction and the increased use of arbitration. If one looks closely at the Department of Justice's proposal (S. 2253; H.R. 9778) to mandate arbitration in the federal courts, one perceives that it is directed in large part toward the resolution of diversity of citizenship cases. If all diversity cases are redirected to the state courts, the bite of the arbitration proposal is lessened.

In short, the Members of the House and Senate Judiciary Committees must strive for a rational, consistent, and comprehensible judicial system. To do this, we must be vigilant for contradictory and overlapping legislation. We must also set priorities and use different techniques to solve court related problems. During the State of the Judiciary hearings, Prof. Burt Neuborne suggested to my subcommittee that, as in situations involving the allocation of finite resources, four types of responses are available to us:

(1) Expansion of the commodity (but as in the energy area this is generally not a solution to the problem);

(2) Substitution for the scarce resource by redirecting litigation to alternative dispute resolution institutions, such as state courts, magistrates, arbitrators or neighborhood justice centers;

(3) Conservation of the resource by eliminating inefficiencies or by simplifying procedures and threshold barriers;

(4) and rationing the commodity by limiting availability to those litigants who have other institutional services available to resolve their disputes.

Judge Shirley Hufstедler later seconded this analysis by explaining that Congress "must match the demands against the resources, assign priorities based upon an evaluation of those needs, and ration access accordingly".

As an aside, in determining that diversity should be abolished, my subcommittee implicitly decided that this was a high priority in the area of court reform. This measure does not contradict but complements the expansion of the Article III judiciary and the increase in the jurisdiction of U.S. Magistrates.

The subcommittee held oversight hearings on the State of the Judiciary and Access to Justice on June 20, 22 and 29, 1977, and July 21, 22, 28 and 29, 1977. Keeping within the time frame allotted, we invited representatives of the three branches of government, the State courts, the practicing bar, the public interest law community and academia. Indisputably, the hearings produced excellent testimony from a variety of well known legal scholars.

One of our first surprises was the virtual unanimity with which the witnesses suggested that diversity jurisdiction be abolished or curtailed. The following witnesses supported total elimination: Thomas Ehrlich; Hon. Robert A. Ainsworth, Jr.; Prof. Burt Neuborne; Father William Cunningham; Prof. Robert Bork; Hon. Shirley M. Hufstедler; Dennis Sweeney, Esq.; Steven Steinglass, Esq.; Hon. Robert J. Sheran; and Hon. Warren E. Burger (by letter). Several other witnesses (Ralph Nader; Hon. Griffin B. Bell) proposed that diversity be curtailed by preventing in-state plaintiffs from suing in the federal court of their home state. There was not a single witness who argued that nothing should be done to diversity.

Shortly thereafter, upon request of the Attorney General I decided to introduce H.R. 9123, a bill to curtail diversity jurisdiction by barring the in-state plaintiff from suing in the federal court of his home state. In introducing the legislation, I quoted from the Attorney General's letter to the Speaker of the House of Representatives:

The major historical justification for diversity jurisdiction was the belief that persons who transacted business in states other than their own might not receive impartial justice in the courts of those States and that the free movement of commerce between the states might thereby be impaired. To obviate these possibilities, Congress gave federal court jurisdiction to decide legal con-

troversies between citizens of different states. It seems clear, however, that even if this historical justification has validity today, it would not apply where suit is brought in the state of which the plaintiff is a citizen. Moreover, it is plain that diversity actions brought by local plaintiffs contribute significantly to congestion in the district courts. Recent studies indicate that more than half of the diversity cases filed in the district courts are brought in the plaintiff's own state. Redirection of these cases by enacting this proposal could, therefore, result in reducing the caseload of those courts by as much as 10 percent. In sum, this proposal could have a significant impact on the civil docket of the district courts without conflicting with the historical justification for diversity jurisdiction.

I agreed at that time and I still agree with this excellent analysis. It does not conflict with my preference for complete abolition of diversity jurisdiction.

On the basis of solid evidence and with several bills on the table, the subcommittee decided that legislative hearings on diversity jurisdiction should be conducted. Four days of hearings were held (on September 22, 27, 28 and 29, 1977) during which such respected legal scholars as Prof. Charles Alan Wright; Hon. Henry J. Friendly; John P. Frank, Esq.; Robert G. Begam, Esq.; Thomas Ehrlich, Esq.; Hon. Edward T. Gignoux; Hon. Daniel Meador; and Pamela Horowitz, Esq. testified. In addition, written statements were submitted by Prof. Thomas D. Rowe, Jr.; the Deputy Comptroller General of the United States; William M. Shernoff, Esq.; the NAACP Legal Defense and Educational Fund; the National Senior Citizens Law Center; Public Citizen Litigation Group; and the American College of Trial Lawyers. Once again, the vast majority of participants supported abolition of diversity jurisdiction.

The exceptions were the Department of Justice, Public Citizen, and the American College of Trial Lawyers, which all continued to support partial elimination. John P. Frank, Esq., and Robert G. Begam, Esq., the latter on behalf of the Association of Trial Lawyers of America, were the only witnesses to publicly oppose any legislative changes. It is noteworthy that in their testimony both Mr. Frank and Mr. Begam stated however that they preferred total abolition to curtailment.

Several days later, the subcommittee voted at an informal briefing to draft a new bill (H.R. 9622) which would abolish diversity citizenship jurisdiction and further would abolish the amount in controversy requirement in federal question cases. It was also determined that an additional day of hearings would be held on the judicial impact of the abolition of the amount requirement in federal question cases. In addition, H.R. 9622 was distributed to over twenty-five well known professors of law, to all the witnesses who testified at the hearings, and to government agencies and private organizations such as the American Bar Association, the American Civil Liberties Union, the Legal Services Corporation, the Department of Justice, and the Judicial Conference of the United States.

Responses were received from a number of sources; again the reactions were positive. The only negative feedback came from practicing lawyers, several state bar associations, and the American Bar Association. While the position espoused by the practicing bar should be accorded considerable weight, two factors ought to be kept in mind. First, the bar and representatives thereof do not stand united in their opposition to abolition of diversity. Statements were received from several practicing attorneys who support abolition; the prestigious American College of Trial Lawyers advocates curtailment of diversity jurisdiction; and the ABA Special Committee on Coordination of Federal Judicial Improvements supported total abolition.

Second, the opposition of the practicing bar must be weighed against the overwhelming support of other organizations and individuals and it must be kept in the proper context—the practicing plaintiff's bar, rightly or wrongly, perceives of the federal forum as being the source of higher verdicts and the defendant's bar sometimes uses, by removal to federal court, the choice of forum to delay the outcome of litigation. At present, these are important determinations. As aptly observed by Professor Charles Alan Wright: "Any proposal to modify diversity meets immediate organized opposition from those who believe that they have a vested interest in preserving, for their own advantage, the widest possible choice of forum." Wright, Miller and Cooper,

13 Federal Practice and Procedure §3601, at 596 (1975). In short, the vested interests of the practicing bar in retaining jurisdiction must be considered in the same vein as the practicing bar's opposition to no-fault insurance or the medical profession's opposition to a national health plan.

III. ABOLITION OF DIVERSITY JURISDICTION

Since the House Report on H.R. 9622 contains a detailed discussion of several significant reasons for the proposed legislation, I rely on that analysis. I would nonetheless like to highlight a few important points. First, H.R. 9622 is clearly constitutional. The diversity of citizenship jurisdiction of the federal courts is made possible by Article III of the Constitution which is drafted to permit, but does not mandate, federal court jurisdiction based on "controversies between citizens of different States." This grant is not self-executing. Article III also provides Congress with authority to create inferior federal courts and delineate their jurisdiction.

H.R. 9622 is a two-pronged bill. It abolishes diversity of citizenship jurisdiction and it also abolishes the amount in controversy requirement in federal question cases. In my opinion, the bill achieves a proper jurisdictional balance between the federal and state court systems, in the light of the basic principles of federalism. Generally speaking, federal law questions are to adjudicated in the federal courts, regardless of the amount in controversy. Diversity cases, which involve questions of state law because the Supreme Court's decision in *Eric v. Tompkins*, are to be resolved in the state courts.

Thus, H.R. 9622 abolishes the analogous situation created for plaintiffs who, although deprived of a federal right, are stopped at the federal courthouse door because they were not injured enough. The bill also eliminates the costly mechanism of providing the choice between a federal and state forum due to the ostensible possibility of bias against the out-stater. In this regard, I would like to insert in the record a GAO study which concluded that the possibility of prejudice is no longer a significant factor in the choice of forum. Although this study only involved one geographical area (Minneapolis-St. Paul) and only eighteen attorneys were interviewed, I am confident that the subcommittee will be interested in its results.

The abolition of diversity jurisdiction is an important step in reducing federal court congestion and its deleterious effects on litigants. It will not place too great a burden on the state courts. In this regard, there are 6,000 state court judges who will assume the burden carried by 400 federal judges. The Conference of State Chief Justices voted that the state courts were willing and able to assume this burden. A study by the previous chairman of this subcommittee (Senator Quentin Burdick) of over half the states indicated that the increase of the civil business of state courts of general jurisdiction caused by the elimination of federal diversity jurisdiction would vary from 0.27 to 1.5 percent. See Burdick, *Diversity Jurisdiction Under American Law* Institute Proposals: Its Purpose and Effect on State and Federal Courts, 48 North Dakota L. Rev. 1, 14-15, (Table 4) (1971).

Several witnesses before this subcommittee may rely heavily on statistics to bolster their argument that a heavy burden will be placed on the state courts. Until several years ago the Institute of Judicial Administration kept statistics on personal injury cases in the state court systems. In 1974, however, the Institute determined that its statistics in this regard were totally inadequate and ceased this method of record keeping. Also, as pointed out by Judge Henry Friendly to my subcommittee, "personal injury cases are typically delayed not because the [state] courts are unable to handle them but because the lawyers don't want them to come to trial or are unable to bring them to trial because of the concentration of representation . . . in a relatively few lawyers who are hopelessly overcommitted". Thus, the Senate should be extremely careful in its reliance on these statistics.

The original reasons for diversity have long since disappeared, and even assuming *arguendo* that vestiges of bias against out-of-staters remain, the solution is not to leave 32,000 diversity cases in the federal courts, but to improve the state court systems. This will be an important side effect of the abolition of diversity.

Today, there is no reason for an amount-in-controversy requirement in federal question cases. Due to legislation in the 94th Congress, very few cases are now involved. Telling a citizen that although his federal rights have been abridged, his resultant damages are too low and therefore he cannot bring suit in federal court, causes visions of invidious discrimination and unequal application of the law. There is no room for this in our system.

IV. CONCLUSION

In conclusion, as observed in the title of a recent law review article, diversity jurisdiction is "an idea whose time has passed". cf. Bratton, *Diversity Jurisdiction—An Idea Whose Time Has Passed*, 51 Ind. L.J. 374 (1976). Judge Friendly wrote his seminal article in 1928. Justice Jackson observed shortly before his death in 1955: "In my judgment the greatest contribution that Congress could make to the orderly administration of justice in the United States would be to abolish the jurisdiction of the federal courts which is based solely on the ground that the litigants are citizens of different states."

With these words in mind, thank you, Mr. Chairman, and Members of the subcommittee, for the opportunity you have afforded me to testify on this important legislation. I am proud to have participated in the drafting of H.R. 9622 and its progression through the House of Representatives. I urge you to move forward on this legislation. In the alternative, I urge your support for S. 2094, the Department of Justice's proposal to curtail diversity of citizenship jurisdiction.

Senator METZENBAUM. Continue, Mr. Butler.

Mr. BUTLER. Thank you, sir. I will read this sentence. "I have read the statement of Mr. Butler and I wholeheartedly endorse the ideas stated therein."

So, I am not here unsupported by our subcommittee.

This legislation enjoys widespread support. Mr. Chairman, you have mentioned a few of them, and so I will not burden this committee with a further recital of them except to remind you that there are in fact a lot of folks around who think this is an awfully good idea.

I thank you for your patience and your kind attention.

Senator METZENBAUM. Mr. Butler, I appreciate very much your taking the time and trouble to be with us. The fact that you are here and made an excellent statement, is very much appreciated by this committee.

I must say the chairman is getting a little bit concerned. Yesterday, we had that prominent, former minority Member of Congress, Congressman Wiggins, speaking. Now we have a member of the minority, Congressman Butler. I have to try to get some Democrats to come over here and speak for this bill as well. We are particularly pleased to have you.

Let me ask you a few questions. Yesterday we heard testimony from John Frank suggesting that just about every lawyer in the country is adamantly opposed to diminishing diversity jurisdiction. You obviously are quite familiar with what the House of Delegates has done, what the Bar Association has done. Do you think that is true?

Mr. BUTLER. No, I don't think anybody can speak for lawyers as you well know. There are as many opinions as there are lawyers in the first place.

In the second place, I think the division of vote in the House of Delegates is an indication of a real disagreement among the bar.

Quite frankly, back in the days when I worked for a living, I didn't have much opportunity to be in the Federal court, but my observation is that outside of those people who are regularly in the Federal court, that is, the office lawyers and the people who are in the other areas, they view this pretty much with indifference. They certainly don't view it as a threat to the profession or anything of that nature.

I think the real disappointment to me, Mr. Chairman, is that the lawyers feel called upon to take such a strong position in this area when there is nobody else out there challenging this legislation.

The legal profession is a service profession. We have a noble profession. We have, over the years, developed a reputation which is in the eyes of the public, I hope, is very good. And yet, to feel that the lawyers feel compelled to get out there and defend a challenge to their options and nobody else is out there defending the lawyers, that concerns me.

I think we ought to get outside the profession and find out what is going on, and I don't find anybody that is supporting diversity outside the legal profession at this moment.

Senator METZENBAUM. Even within the profession, I must say, as one who goes back to Ohio very often, I think I can only remember

one lawyer who has spoken to me about this subject. I don't get that feeling of a great deal of interest on the part of the bar.

How about yourself? When you go back to Virginia, do you find many lawyers coming up to you to talk to you about it or calling you on the phone? Do you get much mail on it?

Mr. BUTLER. Our association, our State bar, the Virginia bar, and the Virginia State bar, I think they have resolutions which oppose this legislation. I have not been buttonholed on this issue by anyone except I recall three different people, all of whom were active in the Trial Lawyers Association, and obviously they were quite familiar with the whole thing. I felt a little bit like it was a generated sort of contact. That has been limited. I really don't think that the bar itself is that deeply involved in it.

Senator METZENBAUM. You are a member of the Virginia bar.

Mr. BUTLER. Yes, sir.

Senator METZENBAUM. Were you ever polled about your opinion on abolition or curtailment of diversity jurisdiction?

Mr. BUTLER. I could have been, but I have no recollection of it.

Senator METZENBAUM. Then who do you think is responsible for all these resolutions we keep hearing about, 50 States in opposition to this legislation, just the executive committees of the various bar associations? Would that be your assumption?

Mr. BUTLER. I would think that Mr. Frank and his associates have done their work well in this area. I suspect—of course, there is bound to be an overlap between membership in that group and membership in the bar association. In most States you need to be a member of the integrated bar in order to practice.

So, I would think that that is where it comes from. I don't quarrel with their right to say it. I am just a little bit disappointed they can't get somebody outside the profession to beat their drums.

Senator METZENBAUM. Do you think that fear of bias is any part of the basis for the lawyers opposing this legislation or do you think it relates more to the fact that they want to retain their choice of options?

Mr. BUTLER. Oh, I think it is choice of options, clearly. I see no bias in the State court system. In regard to this, those things still hang around that are based on other areas, but not from whence you come.

Indeed, in the State courts today, the juries are just as diverse in their backgrounds as the litigants. This is just out of date. That is all there is to that.

Senator METZENBAUM. Do you think the State courts are capable of handling the extra caseloads that would result from abolition of diversity jurisdiction?

Mr. BUTLER. I am assured that they are. I have been present on several occasions when the gentleman from Minnesota, Mr. Sharon, the chief justice there has made that statement.

There are letters in my file from the chief justice of the Virginia Supreme Court urging the adoption of this legislation. It is only a 1-percent overall caseload increase. Now there may be local problems, but there are always going to be local problems the local courts will have to adjust to.

Senator METZENBAUM. Are you satisfied that the State courts are competent to handle diversity cases?

Mr. BUTLER. I have greater confidence in the State courts than I do the Federal courts.

Senator METZENBAUM. In your opinion, is it constitutional for Congress to remove diversity jurisdiction from the Federal courts?

Mr. BUTLER. I have no quarrel with that at all.

Senator METZENBAUM. The answer is yes?

Mr. BUTLER. The answer is yes.

Senator METZENBAUM. Senator Hatch, do you have some questions?

Senator HATCH. Thank you, Mr. Chairman.

Mr. Butler, I have always been a fan of yours. I have enjoyed your very interesting testimony here today. My perspective may be a little bit different from yours as one who tried cases and holds certificates with the bar not only in the East, but also in the West.

I practiced law in Pennsylvania for 7 years prior to moving to Utah and was a partner in what I think was the oldest law firm in Pittsburgh, Pa., and tried cases on both sides of the fence, in both State and Federal courts.

In Utah, I tried on both sides of the fence and in both courts. My own personal opinion is that if you take diversity jurisdiction away that you are really going to lose some justice in the final legal analysis and the final legal outcomes in the lives of many litigants in this country. Also you are assigning the Federal court judges to primarily statutory litigation which does not involve nearly the human side of the equation as much as it should, which may be very detrimental to the Federal judges.

These are observations I have to make from my personal experience, which of course, probably has differed from yours.

I have also observed that in recent years the plaintiff lawyers in the country have been finding that the Federal courts in some areas of the country haven't been as receptive as the State courts, and have been filing in State courts instead. Proverbially they generally filed in Federal courts because they found the judges across the board to be more astute, as a general rule better informed, and greater legal scholars, and they felt they had a better result in the Federal court. I think that is a relative thing and I think that you pointed that out admirably here today.

I think essentially that it is not a simple problem, it is a constitutional one. It was provided in the Constitution and we have had diversity jurisdiction since that time. There was a reason for that in the minds of the Founding Fathers, and I suppose that it is difficult to pinpoint and analyze their specific reasons for doing so.

There is a lot of feeling in society today that perhaps we should not ignore their viewpoint regardless of what may have motivated them at that time. I have my viewpoints. Let me just add one or two other comments. My personal experience was that I was treated well in both courts. We had, in my opinion, very good results for clients in both courts, but in Pennsylvania I preferred to try in Federal courts because we had the old common law pleading system with all of its ramifications in the State courts. It was very complex and very difficult. The judges themselves did not understand it, and the attorneys who did had a field day in the State courts.

In Utah we adopted the basics of the Federal rules. There was not that much of a transition between the courts, although there were nuances and you had to know them between trying in the State court and in the Federal courts.

I might add that in Pennsylvania, as a defense lawyer there, I preferred defending cases in the State courts than in the Federal courts. We had much better results in the State courts as defense lawyers, while I preferred trying the plaintiff's cases in the Federal courts, because we had much better results for those clients there.

As an attorney who moved to Salt Lake City, Utah, I feel that the quality of the bench out there is high in both State and Federal courts. I might add, in Pennsylvania the quality of the bench was similar, although I felt that the quality was a little less in the State courts—

MR. BUTLER. We are familiar with the quality of the Federal bench in Utah.

Senator HATCH. Yes. Even with Judge Ritter, nobody could question his brilliances. He was a brilliant, brilliant man and I always got along very well with him. Judge Anderson is a perfect illustration of a very fine Federal judge, and the other judges in the State courts were good as well. I don't mean to imply that in Pennsylvania all the State court judges were not good, but they were not, in my opinion, across the board as high quality as the Federal court judges; and consequently, many plaintiffs and defendants did not receive as fair treatment as they may otherwise have received.

My question is this: Does it not concern you a little bit, and will you at least acknowledge that it is important for Federal judges to hear some of these personal injury cases, in order to not be involved exclusively in the statutory realm as far as listening to the ills and problems of society, while from a balanced standpoint it might not hurt the Federal judges at all. Even from a caseload standpoint it hasn't been notoriously significant for the last number of years.

Those are four or five questions rather than one.

MR. BUTLER. Well, I thank you very much. I appreciate your statement. I must yield to your experience in the Federal and State courts. I never classified myself as a trial lawyer.

Senator HATCH. I will say this, I have tried hundreds of cases and did hold the ABA rating for Martindale Hubbell as a trial lawyer. Whether that is right or wrong, it is still, as you know—

MR. BUTLER. I think your opinion of that is with reference to the relative merits of the cases and the facility with which you can move from one to the other. I can't make that same kind of statement. I just simply don't have that much experience to draw on.

Senator HATCH. Concerning your personal feelings with regard to it?

MR. BUTLER. With my personal feelings, yes. With reference to getting back to—I wanted to make the point that if the reform of the State court system is not keeping pace with the Federal system procedurally or questions of that nature, then I still don't think that represents a prejudice against the other State—

Senator HATCH. That may be an argument why we should bring these cases there to make them aware of it. That is one of the arguments.

Mr. BUTLER. Yes. I appreciate what you are saying there, but basically the reason which seems to underlie diversity is the local prejudice. If there are procedural differences that doesn't constitute a basis for local prejudice.

Senator HATCH. It can. It can be a very serious prejudicial effect for out-of-State people or even in-State people.

Mr. BUTLER. Well, I don't believe I am going to persuade you on that.

Senator HATCH. I don't think so.

Mr. BUTLER. But in our experience in Virginia we don't have that much difference between our procedures.

With reference to the importance of using the diversity jurisdiction as a means of educating the Federal judiciary to changes in the State law and maintaining a familiarity with—

Senator HATCH. That is not one of my points. I wasn't making that point.

Mr. BUTLER. Excuse me. I understood that was your point.

Senator HATCH. The point I was making was that for overall justice, is it good for the Federal court judges to be trying almost primarily statutory cases rather than to have some of these personal and human interest cases that involve, for example, the most commonly brought diversity case, the personal injury case. There are other cases, of course, that involve diversity jurisdiction.

Mr. BUTLER. Yes.

Senator HATCH. In other words, there is more to this than merely the fact that we have arrived at a modern time where people are sophisticated enough so that out-of-State people will receive fair treatment in State courts.

There is a big difference of opinion on that issue, but let's assume that that is true.

Mr. BUTLER. So putting aside the question of local prejudice, you are moving to the argument that—

Senator HATCH. Is it healthy for Federal judges to just try statutory cases, without having the human interest that you generally get in some of these personal injury and other type cases?

Mr. BUTLER. Well, I just think that that is an awfully poor basis on which to justify diversity jurisdiction.

Senator HATCH. Even for plaintiff or defendant who needs to have some justice with regard to your particular case?

Mr. BUTLER. Yes.

Senator HATCH. I think one reason why there isn't a hue and a cry against this proposal except from trial lawyers who want the options, is because the people who benefit are individuals who don't know and understand what diversity jurisdiction is.

I think you would find millions of plaintiffs in this country over the past 40 years who, if they knew that their right to bring their cases in Federal courts was going to be destroyed, would just be screaming at the top of their lungs against this bill. Now, maybe I am wrong on that.

Mr. BUTLER. Well, there certainly is no plaintiffs' association at this moment.

Senator HATCH. That's the point.

Mr. BUTLER. But, nor ex-plaintiffs' association, and certainly the hue and cry has not developed. I would like to respond to the suggestion that we need to continue to expose our Federal court judges to compassionate areas of jurisdiction in order to maintain their wisdom and sound approach to legal problems.

I simply think that to state that argument is to realize how unsound it is, because, in the first place, the Federal courts are not limited to statutory, they have constitutional cases, and, of course, they are moving into all sorts of tort areas. There are all sorts of civil rights cases before them every day.

Senator HATCH. For example, Equal Employment Opportunity cases and cases like that that are statutory in nature.

Mr. BUTLER. Well, just because they are statutory in nature does not mean that they don't involve the problems which you are talking about.

Senator HATCH. That is right.

Mr. BUTLER. I think that the contact that the Federal judiciary has with the world outside of diversity is enough for them to maintain the balance that they are expected to have on the court. If the only basis that we have for retaining diversity is the fact that it is going to educate our Federal judges as to compassion, then that is a pretty thin argument, sir. I really can't believe it is a serious argument.

Senator HATCH. I agree with you, but I don't agree with you that it isn't a serious argument. I think it is an essential argument. Some judges I have talked to are saying that they are trying almost all civil rights and equal opportunity cases that are driving them up the walls, many of which are not worth the time of the court.

Mr. BUTLER. Yes.

Senator HATCH. In some ways they are not growing from the process.

Mr. BUTLER. Do you realize, sir, that only 2 weeks ago we passed H.R. 10, in the House, which would require that 1983 cases, that they exhaust their State remedies before they go into the Federal court. So maybe we are going to get them away from that.

I do think that I would get a little tired of trying the same kind of case all the time in the Federal court. Of course, the Speedy Trial Act has put them off into mostly criminal jurisdiction, in most cases. If they have time for all those civil rights cases, I wonder how they are doing it, quite frankly.

Senator HATCH. I appreciate your testimony. Certainly you have made some very good points from your point of view, as usual. I will reiterate again, I have a lot of respect for you. So, I have to pay a lot of attention to what you said here today. Thank you.

Mr. BUTLER. Well thank you, Senator. I assure you that the respect is mutual. I appreciate the chance to appear today.

Senator METZENBAUM. Thank you very much, Congressman Butler. I am not sure whether Senator Baucus or Senator Leahy have any questions.

Senator BAUCUS. No questions, Mr. Chairman.

Senator LEAHY. No. Thank you.

Senator METZENBAUM. Thank you. We are very grateful to you for your participation this morning.

Mr. BUTLER. Thank you.

Senator METZENBAUM. It has been very helpful.

[The prepared statement of Congressman Butler follows:]

PREPARED STATEMENT OF CONGRESSMAN M. CALDWELL BUTLER

It is indeed an honor for me to have this opportunity to discuss with you a matter that is of the upmost importance to the operation of our Federal judiciary. Legislation to abolish the use of diversity in Federal courts passed the House last Congress on two different occasions (February 28, 1978, 266-133, and October 4, 1978, 323-49). The House Judiciary Committee Subcommittee on Courts held seven days of hearings last Congress on this issue and three days this year. In spite of what you may have heard, there is still strong support for the abolition within the House Judiciary Committee and, I believe, in the House of Representatives. However, since this measure passed the House twice last Congress, we are hopeful that the Senate will act first this year.

Abolition of the use of diversity jurisdiction as a means of entering Federal court is only one of a number of legislative measures directed at bringing our 18th Century Federal judiciary into the 20th Century. Two Congresses ago we abolished the use of the three judge court; last Congress we increased the number of judges and reorganized the bankruptcy courts; two weeks ago the House passed H.R. 10, which in part would require State prisoners to use their State remedy prior to coming into Federal court. This alone could reduce the civil caseload by 6 percent (over 9,000 cases). Pending before the Committee is legislation which would expand the use of magistrates, create a new Court of Appeals, and legislation to provide financial assistance for the development and maintenance of effective mechanisms for the resolution of minor disputes, among others.

Diversity jurisdiction finds its basis in Article III, Section 2, of the U.S. Constitution. It is intended to permit, but not require, Federal court jurisdiction involving controversies between citizens of different states and between a state, or the citizens thereof, and foreign states. This provision of the Constitution is not self-executing. However, since the First Judiciary Act of 1789 the Federal courts have had jurisdiction in diversity cases. Legislative history as to why the First Congress exercised its prerogative to vest diversity jurisdiction in Federal courts is not very illuminating. Scholars who have researched the issue have concluded that the primary motivation for the enactment of diversity jurisdiction was to provide an objective forum for the determination of controversies free from local prejudice or influence, or at least the fear of such. Another view is that the nation's early lawmakers shared misgivings as to whether at least some of the States courts would be fair to the interest of out-of-state creditors. In addition, at that time in our country's history we had a Federal judiciary with a very light caseload. We also had, at that time, a weak central government and Federal court involvement in local matters at the very least enhanced local awareness of the existence of central government.

All of this was thought to justify a federal incursion on the State's authority to settle their own disputes. Justified or not, the conditions that existed in 1789 are vastly different than those that exist in 1979. The decision as to what role diversity jurisdiction should play in modern American Federal jurisprudence, as well as what should be the proper balance between the State and Federal courts, must be made on present day facts. And I contend the facts are that there is no existing information that would indicate justification for maintaining a system that has become burdensome to the operation of our Federal courts. It is clear to me that the primary benefactor of permitting the luxury of a choice of courts is the trial attorneys whose practice consists primarily of representing corporations, insurance companies and personal injury type cases caused by motor vehicle accidents, and his decision is based on any number of factors such as backlog, procedure, courthouse location, court personnel, the type of jury and the potential size of the verdict. If there is bias against out-of-staters, then why are more than half of all diversity cases brought filed by plaintiffs in their home states? If there is really bias against out-of-staters, then it exists for all those cases with similar facts which happen to be under the \$10,000 minimum. The local lawyer, handling a local case below \$10,000 with otherwise

identical facts which will be decided by application of state, not federal, law does not have any choice of a Federal court. Why should a litigant by mere accident of geography and amount of money involved have an advantage, if there is one, over a neighbor with an otherwise identical case?

About 25 percent of the current civil caseload of federal district courts consists of diversity cases. While only 8 percent of all federal cases (civil and criminal) go to trial, 12 percent of diversity cases are tried. The more than 3,000 diversity trials held each year in federal district courts constitute 25 percent of all civil and criminal jury trials, and about 68 percent of all civil jury trials. By contrast, the elimination of Federal diversity jurisdiction will increase the civil caseload of state courts of general jurisdiction by an average of 1.03 percent. But yet the Association of State Chief Justices voted overwhelmingly to support the enactment of this legislation. While the American Bar Association is on record in opposition to this legislation, it's select committee, which it chose to study the issue, recommended to the House of Delegates to support curtailment of diversity. It failed by a vote of 164-127. The Federal government can no longer afford to give these special litigants the luxury of a choice of forum. A recent study prepared by the Department of Justice concludes that the abolition of diversity is expected to result in a savings to the taxpayer of \$8.8 million each year, once the pending cases are terminated.

In addition to the abolition of diversity jurisdiction, except in alienage and statutory interpleader cases, S. 679 would abolish the \$10,000 amount requirement in Federal Question cases. This would not create much of an additional burden on our Federal courts, but, more importantly, Federal courts should decide issues involving question of Federal law, be it treaty, statutory, or constitutional. If the Federal government believes it necessary to create rights, then the Federal government should bear the burden of providing a forum to parties who wish to be heard on those rights. The Congress could require the states to hear all Federal Question cases, but to exercise that power in such a fashion as to force small claims into state courts smacks too much, in my opinion, as regarding the state courts as secondary, or in some way lesser tribunals, and this is unacceptable in 1979.

With regard to the retention of alienage jurisdiction under diversity, I have some serious questions about that. Last year our House subcommittee was advised by the State Department that the basis of such jurisdiction "was a conviction that since the Federal government in any event would be answerable to foreign powers for the conduct of the various states of the Union (including their courts), it would be best from the outset to grant Federal courts jurisdiction over cases in which foreign parties were involved. An additional factor", according to the State Department, "was the desire to avoid offense to foreign countries because of apprehensions by them that their citizens would be subject to parochial justice in state courts." I hope this Committee will have the opportunity to probe this issue and make a recommendation to the House. Even if there is justification for the retention of this special jurisdiction, should alienage be so broad as to include permanent resident aliens, alien visitors or students, or refugees, or even illegal aliens?

In conclusion, Mr. Chairman, the time burden and expense diversity jurisdiction imposes on our Federal courts can no longer be justified. State courts, not Federal courts, should administer and interpret state law. Federal courts are at a disadvantage when a decision is required concerning a point of State law, especially when the highest state court may not have ever spoken on that particular point.

This legislation enjoys widespread support. The President, the Chief Justice, the Attorney General, Federal and state judges, many public interest groups, Charles Alan Wright, Robert Bork, and Paul Mishkin, among others, all support the abolition of the use of diversity jurisdiction. Other respected legal associations, for example the American College of Trial Lawyers, support some type of curtailment of such jurisdiction.

Thank you for your patience and your kind attention.

Senator METZENBAUM. Our next witnesses are Mr. Frederick A. O. Schwarz, Jr., of Cravath, Swain & Moore, and Mr. John H. Pickering of Wilmer, Cutler & Pickering.

**PANEL OF ATTORNEYS:
STATEMENTS OF FREDERICK A. O. SCHWARZ, JR., AND
JOHN H. PICKERING**

Mr. SCHWARZ. My name is Frederick A. O. Schwarz, Jr. A significant part of my practice involves the defense of defamation actions on behalf of Time, Inc. I have listed some media organizations, all of whom are listed on the first page of my statement. They include all the television networks, major newspapers, including both in this city, and all of the societies representing the media in this country. I add to the list that is already on the statement the National Association of Broadcasters.

We appear in support of the bill, but with a proposed amendment to it, which carries forward the logic of the proposal.

The logic of the proposal, Mr. Chairman, as expressed by yourself, is of course, that the Federal courts ought to handle and concentrate on Federal questions, and that the State courts ought to handle and concentrate on State questions.

Our proposal is to carry that logic forward so it is complete and to provide that where a claim is filed in the State court and the defendant has a substantial defense arising under the Constitution or the laws or treaties of the United States, a defense which if it were sustained would be dispositive of the action. Then the defendant should have the right to remove the case to the Federal court, or the plaintiff, once such a defense was asserted, should have the concomitant right to remove the case to the Federal court.

The consequence would be that this narrow class of cases, the best example of which I am going to come to in 1 minute, would be taken out of the State courts and moved, as a matter of removal, into the Federal courts.

Now, what are these cases, and why are all these media people interested in this proposal which would make them full supporters of your amendment?

Senator METZENBAUM. Does that also mean that as soon as we adopt the amendment that they will get off of the Bayh amendment? Is there no linkage?

Mr. SCHWARZ. I am not sure what the Bayh amendment is.

Senator METZENBAUM. The Bayh amendment has to do with contribution in antitrust cases.

Mr. SCHWARZ. There isn't a connection.

Senator METZENBAUM. There is not a connection?

Mr. SCHWARZ. Indeed, I am personally not working on that, although I happen now to know what you are talking about. I do the work on the first amendment questions, and some other people in my office do the work on the business questions, and the two don't quite come together, although we like each other.

Senator METZENBAUM. Since Time has become a conglomerate, it has become difficult to go around any corner here and not find that they don't have some position on a piece of legislation.

Mr. SCHWARZ. Yes, that's true.

Senator METZENBAUM. It is good for the legal profession. I am happy for them.

Mr. SCHWARZ. So, the theory of this would be that in cases where there is a substantial Federal defense asserted, you could have it removed by either the defendant or the plaintiff, to carry forward the logic of the bill.

Now what is the main situation where this arises?

It is in libel cases where a plaintiff sues a publisher for committing a libel and the defense is the Federal Constitution. Under the New York Times case, the defense, as you all know, is very often that there is a public figure involved, and there was no malice, and the Federal principles entirely control the disposition of the case.

Indeed, under the Supreme Court's decision in Gertz, a couple of years ago, the Federal Constitution is implicit in all libel cases. Now our theory here is that it would make sense to have such cases, following the logic of the bill, heard in the Federal courts.

The technicalities of our proposed amendment are all set forth in the statement. There are a number of exceptions set forth relating to certain kinds of actions where we follow the logic of the ALI which has been supporting for several years this proposal; indeed, Senator, they thought of this proposal of constitutional defense removal back before the whole diversity question arose, and made it a proposal on its own merits.

Senator METZENBAUM. Let me ask you a question. I have others as you conclude. Is there an element of unfairness in your suggesting that if there is a constitutional issue or a Federal question involved that there ought to be a distinction made between cases having a value of \$25,000 or more, and those having a lesser value?

Mr. SCHWARZ. Senator, that was the suggestion that I put in. I think the statement indicates, saying that we don't object to that. I am really, quite frankly—I think it would be unnecessary to have \$25,000.

I have talked with some people who said it might make things a little easier to put it in. I say we don't object to it. It happens that our sorts of cases, these first amendment cases, the people always are suing for millions of dollars. So in those cases, it wouldn't bite.

Senator METZENBAUM. What about injunctive cases, what would happen with or without the amendment?

Mr. SCHWARZ. It is a case where someone brings a complaint for an injunction?

Senator METZENBAUM. A case is pending right now up in Wisconsin or somewhere.

Mr. SCHWARZ. The *Progressive Magazine* case. Of course, that is in Federal court right now.

Senator METZENBAUM. Yes; but I mean if it had been filed in State court under your amendment, would that have been removable?

Mr. SCHWARZ. It seems to me that would be a classic case that ought to be removed, Senator. I think it is exactly the sort of—

Senator METZENBAUM. I am not arguing the point with you. I am just asking you.

Senator LEAHY. Mr. Chairman?

Senator METZENBAUM. Senator Leahy?

Senator LEAHY. Mr. Chairman, I am just wondering on this, and maybe I am missing the point here. I read Mr. Schwartz's testimony. Are you suggesting, Mr. Schwartz, that the State courts don't have the ability to consider the U.S. Constitution? Obviously, ultimately all the decisions, irrespective of even what their own State constitutions say, all the decisions have to be in conformance with the U.S. Constitution.

Mr. SCHWARZ. One could not responsibly take the position that any judge in the country is incapable of dealing with the Federal Constitution. As you say, they have a duty to. However, I think you can responsibly take the position that where a class of cases is going to predominantly turn on Federal issues, that the same logic that supports the amendment or the elimination of diversity supports hearing those cases.

Senator LEAHY. But aren't there a lot of other cases besides first amendment cases that have a predominant interest in the Federal Constitution, and, if so, certainly I could think of a number of cases within the criminal law field—search and seizure, so forth. Shouldn't those also then be removed automatically to the Federal courts?

The first amendment cases, are they the only ones that your clients are concerned with because they might affect them economically?

Mr. SCHWARZ. Well, my clients happen to be people in that field. They take this position because they think it is a good development of the law, and I suppose you could say people have an interest economically.

On the criminal point, this proposal does not apply in criminal cases, number one.

Number two,—

Senator LEAHY. I know. That is my point. If it is logical to have it apply in these first amendment cases, why wouldn't it apply in any kind of a constitutional issue? Criminal cases, certainly an awful lot of criminal cases, eventually are decided not on the facts, not on the fact pattern, i.e., either the person is guilty or not guilty of the particular act, are decided on the constitutional issues involved. Search and seizure is a fifth amendment right, et cetera.

Mr. SCHWARZ. I think, sir, I would have a couple of answers to that. First, those are situations where the Federal matter comes in in effect collaterally, someone is trying to exclude evidence in the search and seizure example. I don't think it would even fit the language of a defense which if sustained would be dispositive. Because while it can control the case, it is not a defense on the merits of the case. That would be a technical difference.

Another technical difference, Senator, would be that in these libel cases, really, the first amendment issue or the claim that the case is properly brought, despite the first amendment, could well be part of the plaintiff's complaint.

In fact, we now constantly get plaintiffs' complaints and they affirmatively allege in the complaint the fact that, or the claim, that the publisher was acting with Federal constitutional malice.

So, in this particular field at least, the law has so developed that the plaintiffs themselves, while they don't technically denominate their claim as one under Federal law, are making the Federal allegations in the complaints.

Senator LEAHY. Mr. Chairman, I am sort of moving out of turn here, but I want to follow that up.

Senator METZENBAUM. Please do.

Senator LEAHY. Do you feel that all libel laws should be done away with entirely? It has been suggested by heroes of mine such as Hugo Black—

Mr. SCHWARZ. Yes.

Senator LEAHY. Under the first amendment there is no place for them whatsoever.

Mr. SCHWARZ. Yes. You are asking what I feel as opposed to where we are with the Supreme Court decisions. I am very torn about that, Senator. I think a knowingly false statement is something which is reprehensible and for a publisher to publish a knowingly false statement, I don't have much sympathy at all with that.

On the other hand—

Senator LEAHY. Of course, it does happen fairly often.

Mr. SCHWARZ. It happens. I don't think that it happens fairly often, but it happens.

Senator LEAHY. It happens more often than it should.

Mr. SCHWARZ. It happens more often than it should.

So in that sense, I am afraid I can't take an absolutist position. On the other hand, one does find that—that it would create a certain narrow area where cases appropriately should be brought. One does find people abusing that right and bringing cases, I believe, for the purpose of harassing or for the purpose of ventilating a grievance and getting a little publicity themselves. So that coming along with what I think is a narrow, legitimate right, I think comes some abuse. But I don't take the absolutist position myself.

Senator LEAHY. You don't take the absolutist position and, if you will excuse just a personal observation, considering the almost paranoia that has been expressed by some on the Supreme Court, the Chief Justice, especially, who I am sure is a very learned man but at times appears to have skipped over the first amendment when he was reading the Constitution, might you want to consider that maybe you might want to be in some of the State courts rather than in Federal courts considering the fact some of those State courts might take a far more honest, responsible, good government, constitutionally appropriate view of the first amendment than the Supreme Court seems to have lately.

That is, I must admit, a bit of an editorializing in the question.

Mr. SCHWARZ. There is a lot of truth in that editorial too, Senator, I think. This proposal doesn't require the case get in the Federal court. The plaintiff could bring it in a certain State and you could decide not to remove.

Moreover, if I might step back from that and speak more generally, I think—I guess I don't think people ought to come in here, or lawyers should come in here and either support the basic diversity bill or not or support this proposal or not and make their decision dependent upon short-term advantage. I think we have some responsibility as lawyers to step back from the short-term advantage and think about what the long-term interest of the judicial process is.

Senator LEAHY. I agree with you completely. I share the frustration that I am sure you do and I am sure our chairman and others do that the proposals sitting here in the Congress will get distorted no matter what the Supreme Court case is—so-called liberal or conservative. Within a week there is a special interest group sending out mailings across the country, taking a “sky is falling” sort of an attitude, asking for large contributions to get either constitutional amendments or changes in the law to overturn the then Supreme Court decision. I agree, we should take a long term.

Thank you, Mr. Chairman.

Senator METZENBAUM. Thank you, Senator Leahy.

Mr. Schwarz, are you about concluded? May I ask you some questions?

Mr. SCHWARZ. I think I have given the thrust of my statement, Senator.

Senator METZENBAUM. Let me just ask you first, do I understand your position with respect to the overall legislation, knowing your position with respect to the amendment, do I understand you to be supportive of the legislation?

Mr. SCHWARZ. Well, now I have to distinguish my personal view. I think your proposal makes sense period. I think it makes sense because Federal cases, Federal courts really should concentrate on Federal matters.

As far as Senator Hatch's comment, there are plenty of human issues for Federal judges to deal with in the existing body of Federal law. They are not going to become somehow deprived of human emotion.

Now saying that as an individual, as opposed to representing all these people that I represent, in my capacity representing them, we believe that the statute with our amendment is something which should be strongly supported.

Senator METZENBAUM. Mr. Pickering, do you have a position on the legislation? Are you here in support of the amendment or the legislation?

Mr. PICKERING. I have been associated with Mr. Schwarz in a number of libel matters. We also represent Time, Inc., and occasionally other media clients.

I agree with Mr. Schwarz, as a personal matter, that the time has come to abolish diversity jurisdiction. You have had the testimony of the Judicial Conference of the United States. You have had the testimony of the Conference of State Chief Judges. You have had the testimony of scholars and you have had the testimony of Assistant Attorney General Meador. I agree completely individually with General Meador's statement on this point.

I should make clear, I am the president-elect of the District of Columbia Bar and will soon become the president of the bar.

The District of Columbia Bar, which will shortly become the second largest unified bar in the country, has not itself taken a position on this legislation, on the diversity matter.

Your hearings last year reflect the views of two divisions of the District of Columbia Bar, Division Four, “Courts,” initially raising the question and then finally coming out against abolition of diversity.

Division 11, I believe the other is—these appear at pages 401 and 402 of your hearings last year—the other division simply raised the question as to whether or not, if diversity jurisdiction were abolished, whether we needed another judge or two in the Superior Court for the District of Columbia.

We are fortunate in the District of Columbia with a two-court system where there really is not a great deal to choose between them. The superior court has been upgraded from what was originally a municipal court of limited jurisdiction, and I am sure this committee is familiar with the strides that have been made.

So, it is not, I think, a burning issue here in the District of Columbia on this matter. I simply cannot—the board of governors has taken no position on this—I can't speak for the bar. I don't want my appearance here to indicate I am speaking for it, but I am speaking personally in favor of abolishing diversity jurisdiction for the reasons you have said in your own opening statements, Senator.

Senator METZENBAUM. Thank you very much, Mr. Pickering.

Mr. Schwarz, with respect to your amendment, wouldn't it be fairly easy for a defendant to dream up a Federal defense if he wanted to move his case into Federal court?

Mr. SCHWARZ. No, I don't think so, Senator. First, the language says "a substantial defense which if sustained would be dispositive."

Second, that is a general kind of problem which can always arise with respect to jurisdiction in the Federal courts. I would suppose if you amended your bill and added the removal provision, it is possible that in the short term, for a year or so, some very few people would dream up a Federal defense. But the Federal courts are experienced people able to knock out things that don't belong there, and they would do that. Then, I think, what would even be a very few in the beginning would be eliminated.

Moreover, from the point of view of saving time for Federal courts, I think that our proposal would in the aggregate save time with respect to the kind of thing you mentioned.

Right now we have cases in which a plaintiff will sue, let's say, a television station or a publisher and will join as a defendant, for the purpose of defeating diversity under the current law, will join as a defendant, let's say, a person who just runs a newsstand on the corner. Now that person can't possibly be subject to liability for distributing the magazine or newspaper, but they join them for that.

Then the defendant—we are assuming a case where there is diversity—removes and there is this time wasting litigation in the Federal courts about whether or not there was what is technically called a fraudulent joinder of that newsstand operator.

I think if you do the two things, your amendment of eliminating diversity and this proposed amendment to the amendment, the aggregate is to save a lot of time for Federal courts.

Senator METZENBAUM. Have you considered an amendment that would only allow for removal of cases raising a substantial Federal constitutional defense?

Mr. SCHWARZ. Just the Constitution? Senator, from the point of view of the people I represent, I would support that, because that is the defense we raise.

Whether other persons believe that they have interests that arise under a statute and are raised by a defense, I am not sure.

Senator METZENBAUM. The cases that you have exempted from being subject to removal, you include FELA cases, I gather?

Mr. SCHWARZ. Yes, we do.

Senator METZENBAUM. Sections 51 to 60, of title 45.

Mr. SCHWARZ. The FELA cases are included in here.

Senator METZENBAUM. They are?

Mr. SCHWARZ. Yes.

Senator, I think I could give you a greater description if you wanted me to write you a letter about each of these nine categories.

Senator METZENBAUM. That might be helpful. We will include it in the record.

[Letter pertaining to above-mentioned material follows:]

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June 11, 1979

Dear Senator Metzenbaum:

At your suggestion during my testimony on June 5, I am writing to clarify several points concerning our proposed amendment to S. 679 (providing for the possibility of removal to Federal courts of cases involving substantial defenses arising under Federal law). In particular, you requested that I write to explain the exceptions incorporated into the proposal, which specify certain types of cases where removal would not be allowed.

The nine exceptions are part of the carefully drafted American Law Institute (ALI) proposed statute upon which our suggested amendment is modeled. While the ALI drafters wholeheartedly support the general principle that Federal issues, whether claims or defenses, should be capable of resolution in Federal courts if either party so desires, they recognize that in certain specified types of cases removal would be inappropriate. We agree with this position, hence we have included the same exceptions in our proposal.

A concise, cogent explanation of the exceptions and their justification can be found in the ALI "Study of Jurisdiction", cited in my statement, at pp. 200-03, a copy of which is enclosed with this letter. Briefly, the exceptions fall into three categories.

Numbers (2), (3) and (5) constitute recognition of explicit Congressional policy as enacted in existing legislation that certain classes of litigation should remain exclusively in state courts. In particular, I bring to your attention exception (2) which meets the concern suggested at the hearing that this statute not result in FEHA cases being brought into Federal court.

Numbers (1), (4), (8) and (9) involve either what are generally insubstantial Federal questions, or cases of relatively minor Federal importance. In either case, consistent with the general purpose of S. 679, the drafters' considered aim is to avoid the depletion of scarce Federal judicial resources in matters which do not involve important Federal issues. Specifically, these exceptions act as a clear statement as to the "insubstantiality" of the specified subjects.

Finally, exceptions (6) and (7) are included in light of the long-standing deference to state courts on essentially routine and local matters of law enforcement and eminent domain proceedings. (You will recall that in his testimony Professor Wechsler cited eminent domain as one of the kinds of cases that should not be removed.)

Before closing, I wish to highlight a point made by Professor Wechsler which illustrates the real and important concern to which our proposed amendment is addressed. Professor Wechsler pointed out that in defending the landmark New York Times case, his fear was that the New York Times would suffer injustice in a state court, not because it was an out-of-state defendant, but because it was asserting a Federal constitutional right in the form of a Federal defense. This fear is real--as evidenced by my appearance on behalf of the numerous media institutions which must assert Federal defenses to preserve their rights guaranteed by the First Amendment. As Professor Wechsler pointed out, this fear may be mitigated in the occasional egregious case by the possibility of Supreme Court discretionary review of state court decisions. However, not only is the occasion of Supreme Court review rare; it also presents an often prohibitively expensive and circuitous path to the Federal courts to vindicate Federal rights--particularly for the smaller members of the media. Moreover, as you well know, the fact finding which occurs at trial with regard to asserted Federal defenses is very often crucial to resolution of the Federal legal issues, and thus the principle that Federal courts should resolve Federal issues requires the availability of a Federal forum for trial as well as for appellate review.

The media's concern about local hostility to a Federal defense may be shared by others, such as a labor organization which claims that Federal labor law has pre-empted an action against it purportedly brought under state law. To the extent that prejudice exists today, we believe it is much more likely to exist against defendants who raise a Federal defense to local claims that it is to exist against defendants who are simply citizens of another state. The amendment we propose would satisfy those concerns--as well as put in the Federal courts the Federal questions which are the business of the Federal courts. Thus, our suggestion carries forward both the logic and the spirit of your proposal to eliminate diversity jurisdiction.

I appreciated the opportunity to testify before the Committee on the Judiciary on this important matter, and on behalf of Time Incorporated, and the many others who have authorized me to speak for them, I reiterate our support for S. 679 with the proposed amendment.

Very truly yours, .

Frederick A. O. Schwarz, Jr.

Frederick A. O. Schwarz, Jr.

The Honorable Howard M. Metzenbaum,
United States Senate,
- Washington, D. C. 20510

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Copy to Margery Baker,
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on Antitrust and Monopoly,
United States Senate,
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the premise to assert that because this could be done it would frequently be done. Experience suggests a contrary conclusion. Under present law cases in which the plaintiff relies on the Constitution may be commenced in federal court, yet many of these cases are brought in state courts every day. Under present law when such a case is brought in state court the defendant has the option to remove to federal court, but this is an option almost never exercised. It was pointed out earlier that in the combined years 1959 and 1960, the most recent years for which such figures are available, only 165 private federal question cases were removed from state to federal court.¹⁶ Of these at most 24 were cases in which plaintiff rested his claim on the Constitution. Many lawyers prefer a state court, either because they are unfamiliar with federal practice or because the state court is closer at hand or for other reasons. Where a case has been commenced in state court there is a natural tendency to leave it there. It is difficult to believe that many lawyers will devote their energies to conjuring up nonfrivolous constitutional defenses to take a case to federal court simply because it is possible to do so. State courts will continue to play a full role in the development of constitutional law in cases involving defenses just as they do today in cases involving constitutional claims. But the option of a federal forum should be available to the defendant relying on the Constitution just as it now is to the plaintiff relying on the Constitution. For these reasons, the Institute adopted the formulation permitting removal on the basis of constitutional as well as statutory defenses.

Subsection (b):

This subsection provides that certain specified kinds of cases that might otherwise be removable under subsection (a) cannot be removed. It does not limit removal of civil rights cases under subsection (c) nor does it limit removal of diversity cases or those to which the United States is a party. As pointed out in the Commentary to § 1301(a),¹⁷ it also must be read in the light of the case law excluding certain kinds of proceedings from federal jurisdiction altogether.

¹⁶ P. 192 *supra*.

¹⁷ P. 111 *supra*.

The case law is quite unsettled as to whether the language in the Fair Labor Standards Act, 29 U.S.C. § 216, that suits by employees "may be maintained in any court of competent jurisdiction" prohibits removal of such suits. *Compare, e.g., Asher v. William L. Crow Constr. Co.*, 118 F.Supp. 495 (S.D.N.Y. 1953) (removal permitted) *with Wilkins v. Renault Southwest, Inc.*, 227 F.Supp. 647 (N.D. Tex. 1964) (removal barred). Clause (1) resolves that controversy by prohibiting removal. These cases are typically for a very small sum and would invite the use of removal as a harassing tactic. The same thing is true of suits under the Carmack Amendment, 49 U.S.C. § 20. At present they are removable only if more than \$3,000 is in controversy. 28 U.S.C. § 1445(b). Clause (4) of this subsection prohibits their removal regardless of amount.

Clauses (2) and (3) continue existing law in prohibiting removal of actions under the Federal Employers' Liability Act, 28 U.S.C. § 1445(a), and under the Jones Act, *Civil v. Waterman S.S. Corp.*, 217 F.2d 94 (2d Cir. 1954). The bar on removal of such cases is not entirely logical, but it represents a deliberately considered choice of the Congress for this class of litigation, and it makes practical sense to continue the special treatment of these cases that has long been familiar.

Clause (5) prohibits the removal of workmen's compensation cases. The clause is similar to 28 U.S.C. § 1445(c) and reflects a congressional policy to keep these cases out of federal courts. They are already excluded from original jurisdiction in diversity cases. See § 1302(e).

Clause (6), barring removal of actions brought by a state or a subdivision thereof for enforcement of state law, was added in response to a number of suggestions at the 1965 Annual Meeting. There is no constitutional barrier to removal of a case brought by a state, even on the basis of a federal defense if the statute so permits. *Ames v. Kansas ex rel. Johnston*, 111 U.S. 449 (1884). As a matter of policy, however, proper respect for the states suggests that they should be allowed to use their own courts for routine matters of law enforcement. Where federal officers are defendants, or equal civil rights are involved, the general appropriateness of leaving state enforcement cases to state courts vanishes, but this subsection applies only to removal under § 1312(a) and does not bar removal under §

1312(c) or § 1323(c). The phrase "constitution, statutes, ordinances, or administrative regulations" is substituted for the word "laws," which appeared in Tentative Draft No. 4, so that the exception to removal does not apply where the state's claim is based on federal law or on state common law.

Clause (7) is added to prevent removal of private eminent domain cases under state law on the basis of a federal question. Removal of the bulk of eminent domain cases is barred by clause (6). If most condemnations under state law are to be heard in the state court, those proceedings brought by private corporations should not be removable simply because defendant alleges that the taking is unconstitutional.

Clause (8) is added to preclude removal based solely on the defense that the defendant could not constitutionally be subjected to process of the state court. Most challenges to state "long arm" statutes are today foreclosed by prior Supreme Court decisions, and would not raise a "substantial defense," required for removal by § 1312(a) (2). See the memorandum of Justice Goldberg, as Circuit Justice, in *Rosenblatt v. American Cyanamid Co.*, 86 S.Ct. 1 (1965). The views expressed in that memorandum were vindicated when the case, which came to the Supreme Court on appeal from a state court, was later dismissed "for want of a substantial federal question." *Rosenblatt v. American Cyanamid Co.*, 382 U.S. 110 (1965). Nevertheless, the law of amenability to process is not yet entirely settled, and there might be some cases in which the defense would not be foreclosed by prior decisions, and would, therefore, be "substantial." Removal should not be permitted in any such case. The objection to process, even if "dispositive of the action," is a dilatory one, which does not go to the merits. It raises in almost every case the related state law question whether the state has gone as far as the Fourteenth Amendment would permit.

This clause also reaches cases in which the only federal defense is that interstate commerce would be burdened if defendant were subjected to suit in the forum. Ordinarily such a defense would be insubstantial, and removal would be denied on that ground, because there has been a distinct trend away from recognizing such a defense. *Cincis v. Seaboard Air Line Ry.*, 201 Misc. 887, 889, 113 N.Y.S.2d 29, 31 (1952). To the

extent that there may still be a valid defense of this kind, it is clear from *Davis v. Farmer's Co-op. Equity Co.*, 262 U.S. 312 (1923), the leading case recognizing the defense, that the defendant in such a case would be saying that it could not constitutionally be subjected to process from the courts of the state.

Clause (9) bars removal where the defense is that the suit is barred by a judgment of a court of another state to which full faith and credit must be given, or by a judgment of a federal court granting a discharge in bankruptcy. It also precludes removal on the ground that the Constitution or laws of the United States require or forbid recourse to the laws of a particular state as a rule for decision in the case. Whether these are defenses that "arise under" federal law and whether they are "substantial" are questions that are not clear. It is clear that removal on this ground should not be allowed. Accordingly clause (9) is added to dispel any doubt on this point.

Subsection (c):

This subsection, permitting removal in certain civil rights cases, is taken verbatim, save for a minor rearrangement of form, from the present statute, 28 U.S.C. § 1443, but with the omission of part of clause (2) of that statute.

Insofar as clause (2) of the present statute permits removal of civil actions or criminal prosecutions "for any act under color of authority derived from any law providing for equal rights," it has now been authoritatively established that it confers a privilege of removal "only upon federal officers or agents and those authorized to act with or for them in affirmatively executing duties under any federal law providing for equal civil rights." *City of Greenwood v. Peacock*, 384 U.S. 808, 824 (1966). The cases within this branch of clause (2) are already covered by 28 U.S.C. § 1442a(1), as revised in 1948, *id.* at 820 n. 17, and are clearly covered by § 1323(c) in the present draft.

The second branch of clause (2) of § 1443 permits removal by state officers sued or prosecuted for having failed to do some act required by state law on the ground that the act was prohibited by federal law. *Id.* at 824 n. 22. The only reported

Senator METZENBAUM. Why wouldn't a provision permitting removal for a substantial Federal defense require courts to engage in a minitrial each time of whether the Federal defense raised would be dispositive of the litigation?

Mr. SCHWARZ. I don't think it would, Senator. I keep coming back to our situation because I think it is so clearly the strongest one. In our situation, people now know the law. The Federal judges know that these are Federal constitutional cases, really, the libel cases. There could be some. It is really like your first question, "Wouldn't it cause people to make frivolous removal claims." Some, but not many, Senator. The judges take care of their own jurisdiction pretty well.

One thing that has happened with one of the great reforms around the country, the single-calendar judge system, you know when you are going to stay before a judge that you better not be behaving in a way that is wasting time. You better not be doing frivolous things. That same kind of deterrent operates on people who know they are coming into the Federal system, which is now largely a single-judge. The same judge follows a case from its filing to disposition.

Senator METZENBAUM. Mr. Pickering, did you have anything further that you wanted to add to the presentation of Mr. Schwarz? I wasn't sure.

Mr. PICKERING. No, I think not, Senator. Thank you very much for your time and patience.

Senator METZENBAUM. Thank you. I am not sure whether Senator Baucus or Senator Leahy have questions.

Senator BAUCUS. Not at this time. Thank you, Mr. Chairman.

Senator METZENBAUM. Senator Leahy, do you have any further questions?

Senator LEAHY. One of the witnesses we were going to have—I understand it is changed somewhat—was Professor Wright of Texas. He argued that Federal diversity cases are more time consuming because of the complex jurisdictional rules that must be complied with before Federal jurisdiction will lie. Do you agree with that, Mr. Schwarz?

Mr. SCHWARZ. It wastes time?

Senator LEAHY. Yes.

Mr. SCHWARZ. I think there is some truth to that; yes.

Professor Wright, I believe, has testified in favor of our proposal at page 62 of last year's hearing before Senator DeConcini. He supported this particular proposal in referring to the ALI suggestion of several years ago.

You were making a different point. I think he is right; it does take a little extra time.

Senator LEAHY. You hire smart young law clerks who clerked for Federal judges before.

Mr. SCHWARZ. Oh, no. That makes it more difficult. They think of too many things to do.

Senator LEAHY. That's true. Thank you. Thank you, Mr. Chairman.

Senator METZENBAUM. Senator Baucus?

Senator BAUCUS. Thank you, Mr. Chairman.

Mr. Schwarz, other than libel cases, what kinds of constitutional defenses would you expect might be covered by your prepared amendment?

Mr. SCHWARZ. Well the only other one that I have heard anybody mention is the argument in labor cases that the Federal law preempts a particular kind of State law claims. In other words, that the Federal law has covered the field and that, therefore, the particular State law claim arising out of some old common law concept is no longer supported.

That is the only other one I have heard. I haven't heard a great deal about people saying that would happen.

Senator BAUCUS. Why would you expect only that one other area to be covered? There are lots of other constitutional questions. I am sorry, I haven't read the precise language of your proposed amendment. But, why is it limited to libel?

Mr. SCHWARZ. I share a bit of your puzzlement. This is not a new proposal. It has been on the table for some time. The ALI supported it 6 or 7 years ago.

I would have thought during that passage of time people would have brought up four or five examples of where there would be removal. That isn't what has happened. The one thing that people have constantly reiterated is this *New York Times* against *Sullivan* libel field. But I do share the same puzzlement that you have.

Senator BAUCUS. Thank you.

Mr. Pickering, we were yesterday told that all of the 50 State bars generally oppose this bill. You said that the D.C. bar has not taken a position, but that you personally favor the legislation. Since you are president-elect of the D.C. bar, I thought you might have some sense of the feelings of other State bars.

Mr. PICKERING. I know that—I think it may be summed up in Congressman Butler's testimony. The House of Delegates divided on the issue 164 to 127, I believe. That indicates that in the House at least there is a substantial body who would favor the abolition.

I think it is like everything else, Senator, people who are most concerned about it mobilize to try to do something about it.

I think for the bar at large this is basically a rather ho-hum sort of a thing. There are some lawyers, who in the interest of their clients and perhaps in their own interest, really want a wide choice of forum in which to go.

There are others to whom that doesn't make much difference. I think I have to be candid. Here in the District of Columbia it makes very little difference. I don't know what other voluntary bar associations in the District may have done. But the unified bar has not, as yet, taken a position on this. I refer to the positions taken last year by two divisions. Whether it would happen, I simply don't know.

But I think the vocal part of the bar has taken positions that it would be very difficult to know if you took a poll of all the lawyers what the outcome would be. I prefer to go with the scholars and the people who are very concerned about the fair administration of justice and here I refer to people like Judge Friendly and Professor Wright and Assistant Attorney General Meador, a former distinguished professor at the University of Virginia Law School.

Senator BAUCUS. Thank you very much. Thank you, Mr. Chairman.

Senator METZENBAUM. Thank you.

Senator METZENBAUM. One last question. In your opinion, is it constitutional for Congress to remove diversity jurisdiction from the Federal courts?

Mr. SCHWARZ. A, yes; and B, after we hear from the professor who wrote that great book, how can we say no.

Senator METZENBAUM. Mr. Pickering, would you care to address yourself to the constitutional question?

Mr. PICKERING. I agree completely with what Mr. Schwarz and Professor Wechsler have said.

Senator METZENBAUM. Thank you very much.

[The prepared statement of Mr. Schwarz follows:]

PREPARED STATEMENT OF FREDERICK A. O. SCHWARZ, JR.

My name is Frederick A. O. Schwarz, Jr., I have been a member of the law firm of Cravath, Swaine & Moore since 1969, except while I had the honor of serving during the 94th Congress as Chief Counsel to the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities. A significant part of my practice involves the defense of defamation actions on behalf of Time Incorporated. I am appearing on its behalf. Others who have authorized me to state that they join in this Statement are the Washington Evening Star; the Washington Post; Newsweek; U.S. News & World Report; Dow Jones & Company, Inc., publisher of the Wall Street Journal, Barron's and the Dow Jones News Service; The Reader's Digest Association, Inc.; CBS Inc.; National Broadcasting Company, Inc.; American Broadcasting Companies, Inc.; Magazine Publishers Association, Inc.; American Newspaper Publishers Association; American Society of Newspaper Editors; Association of American Publishers, Inc.; Associated Press Managing Editors; Radio Television News Directors Association; and Society of Professional Journalists, Sigma Delta Chi.

We do not oppose the provisions of S. 679 eliminating the diversity jurisdiction of the Federal courts. But we urge amendment of the bill to provide for removal to the Federal courts of cases involving substantial defenses arising under Federal law.¹ We are submitting to the Committee, along with this Statement, a draft of such an amendment.

Removal where a substantial Federal defense is asserted is consistent with and, in fact, furthers the stated purpose of the bill. The predecessor in the last Congress to S. 679 was S. 2389. The companion House bill to S. 2389 was H.R. 9622, which was accompanied by H.R. Report 95-893, *Abolition of Diversity of Citizenship Jurisdiction*, which sets forth this purpose (p. 1):

As a general proposition, it provides that Federal law questions are to be adjudicated in the Federal courts, regardless of the amount in controversy; and diversity cases, which involve questions of State law, are to be resolved in the State courts.

Since this is the purpose of the bill, it is an anomaly to keep the door to a Federal forum shut, as it has been under the present statute, merely because the dispositive Federal questions are raised by the defendant and not by the plaintiff. This anomaly—which was created by judicial construction or the removal statute and not by Congress²—was tolerable so long as removal could be had on diversity of citizenship grounds. But now that diversity jurisdiction is being abolished, the ban on removal based on a Federal defense should also be eliminated. The rationale of the bill requires that access to Federal courts be dependent on the nature of the issues rather than the alignment of the parties. Thus, it should make no difference which party asserts the Federal law issue.

In the defamation area, for instance, a plaintiff's claims arise under State law, but the power of the States to impose liability for defamation is substantially restricted by the First Amendment to the United States Constitution. Since *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), defamation actions have been litigated almost exclusively in terms of the First Amendment requirements. Is the plaintiff a public figure or official or is he a private individual? What is the required Constitutional standard of fault? Has plaintiff met that

¹ Indeed, the rationale of this proposed amendment supports Congressional enactment of separate legislation providing for removal based on the assertion of a substantial Federal defense even if diversity jurisdiction is not abolished.

² *Tennessee v. Union and Planter's Bank*, 152 U.S. 454 (1894); *American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts*, p. 188 (1969) [hereinafter "*Study of Jurisdiction*"].

Constitutional standard? These issues, which happen to be raised first by the defendant, are dispositive; and all of them depend upon the interpretation and application of Federal Constitutional principles. State law issues are rarely dispositive.³

The bill proceeds on the premise that cases involving Federal issues should be heard in Federal courts, but it fails to carry out the premise completely because the bill itself leaves in the State courts all cases involving Federal issues raised by defendants. The amendment being suggested eliminates this problem. By its adoption, the goal of the legislation—the determination of Federal questions by Federal courts and State law questions by State courts—will be completely achieved.

Removal of cases in which a Federal defense is asserted was recommended after extensive study and debate by the American Law Institute ("ALI") in its *Study of Jurisdiction* § 1321(a)(2) at p. 25 and Commentary at pp. 168 and 187–200. Our proposed amendment to S. 679 is modeled on the ALI's proposal, and much of this discussion is based on the fruits of their exhaustive analysis.

Others who have supported the elimination of diversity jurisdiction also support removal of cases involving a Federal defense. Charles Alan Wright, Charles T. McCormick Professor of Law at the University of Texas Law School, Reporter for the ALI *Study of Jurisdiction*, has spoken in favor of similar legislation before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary on at least two occasions—May 16, 1972,⁴ and March 17, 1978.⁵ Professor David P. Currie of the University of Chicago Law School has also supported Federal defense removal, although he was critical of certain aspects of the ALI proposal.⁶ Others who have indicated support for such an amendment include Alan Morrison, Director of the Public Citizen Litigation Group⁷ and Charles Stephen Ralston of the NAACP Legal Defense and Educational Fund, Inc.⁸

In addition to the primary justification for Federal defense removal—that Federal issues will be decided by Federal courts—there are additional reasons for permitting removal on this basis. Uniformity in the interpretation and application of Federal law is desirable. This need is particularly important to publishers of nationally circulated publications. In the defamation area, the absence of uniformity may tend to inhibit national publishers because they are forced to comply with the least protective State court interpretations of the Constitution. Although theoretically uniformity could be achieved by Supreme Court review of State court decisions, that is a practical impossibility. Greater uniformity is likely to be achieved within the Federal court system than within fifty separate State court systems.

The ALI study also concludes that Federal claims are more likely to be understood and to get a sympathetic hearing in the Federal courts than in the State courts. *Study of Jurisdiction*, pp. 166–68. The defamation area again is illustrative. Although the State courts have generally performed ably, there have been situations where, due to hostility, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), see 1972 Senate Subcommittee Hearings at p. 765, or simply a lack of understanding of the Federal issues involved, the State courts have performed less admirably. Moreover, with the adoption of the proposed amendment, the

³ In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347–48 (1974), the Supreme Court held that where "the substance of the defamatory statement 'makes substantial danger to reputation apparent' " and the plaintiff is a private individual rather than a public official or public figure, "the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood" so long as they do not impose liability without fault. But a court will reach this issue only if it first determines as a matter of Federal law that the plaintiff is a private individual and that the statement makes substantial danger to reputation apparent. If the court holds against the plaintiff on either of these issues, the State law question is never reached. Since the Federal defenses, if sustained are dispositive, these cases stand firmly within the Federal defense removal provision which we propose.

⁴ *Admiralty Jurisdiction, United States as a Party, General Federal Question Jurisdiction, Three Judge Courts, Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary on S. 1876, the Federal Court Jurisdiction Action of 1971*, Part 2, 92nd Cong., 2nd Sess. 763–65 [hereinafter "1972 Senate Subcommittee Hearings"].

⁵ *Federal Diversity of Citizenship Jurisdiction, Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary on S. 2094, S. 2388 and H.R. 9622, 95th Cong., 2nd Sess. 62–63* [hereinafter "1978 Senate Subcommittee Hearings"].

⁶ Currie, "The Federal Courts and the American Law Institute", Part II, 36 *U. Chi. L. Rev.* 268, 271–75 (1969).

⁷ 1978 Senate Subcommittee Hearings 184.

⁸ *Id.* at 197.

Federal courts will develop an even greater expertise than at present in handling Federal question litigation.

Another factor supporting removal is the limitation imposed by a State fact-finding process on any subsequent review by the Supreme Court. This factor is often crucial in defamation cases. See *Study of Jurisdiction*, p. 199:

"The [*New York Times Co. v.*] *Sullivan* defense is in very large measure dependent on the facts. The kinds of public issues involved in these cases are matters on which feelings run high, and on which the defendant is at the mercy of the jury in its decision as to actual malice. . . . [A] state court judge can charge the jury on the issue of actual malice in complete accord with the *Sullivan* test, and the jury can return a verdict for a locally popular public figure on an error-free record. Federal constitutional rights ought not to be subject to erosion by an unsympathetic jury's findings of fact. . . . It is of course true that federal juries are not immune from emotion and prejudice, but a principal justification for any federal jurisdiction of federal question cases. . . . is that when federal rights are involved there ought to be access to a federal forum for the determination of the facts."

Although this Statement has focused on illustrations from the defamation field, it may be that the need for removal based on a Federal defense is equally necessary in other fields.⁹ This Committee might wish to invite further comments from experts in those areas. But the primary reason for this proposed amendment is not its effect on any particular class of cases but its inherent logic.

We now turn to the specifics of the proposed amendment. The requirement of the ALI proposal that in order to remove, the Federal defense, if sustained, will be dispositive of the action is retained in the proposed amendment. This seems to be a fair restriction and is consistent with the purpose of the bill. It allows those cases in which Federal law predominates to be heard in Federal courts while leaving in the State courts those cases in which State law is determinative.

Like the ALI proposal, the suggested amendment permits either a defendant who asserts or a plaintiff against whom a substantial Federal defense is asserted to remove the case. We are now convinced that logic and fairness compel giving this right to the plaintiff as well as the defendant.¹⁰

The proposed amendment adopts the ALI position allowing any party to remove without his petition being joined in by all other plaintiffs or defendants, as the case may be. It also includes the exceptions from Federal defense removal contained in § 1312(b) of the ALI proposal, although we would not oppose any deletions from that section.

Although we think it is more logical for removal based on a Federal defense to be without regard to a jurisdictional amount and prefer that there be none, we would not object to such a requirement of, for example, \$25,000. Once substantial Federal question defenses are recognized as being on a par with Federal claims, logic and symmetry require that if there is to be no jurisdictional amount for original Federal question jurisdiction and removal in such cases, there should be none where removal is on the basis of a substantial Federal defense. But we recognize that logic and symmetry must at times give way to practicality. We know of the fear expressed by the ALI and others that lack of a jurisdictional amount would result in the removal of too many cases and might result in harassing tactics against plaintiffs with small claims. *Study of Jurisdiction*, pp. 195-96. These are debatable issues which none of us can answer in the abstract. If this Committee is persuaded by those who think a jurisdictional amount requirement is a necessary part of any legislation providing for Federal defense removal, we would have no objection to its inclusion. Even with such a requirement, at least substantial cases involving substantial Federal defenses will be heard where they belong—in the Federal courts.

PROPOSED AMENDMENT TO S. 679

(1) Subsection (a) of section 1441 of title 28, United States Code, is amended by striking out "of which the district courts have original jurisdiction may be

⁹ Professor Wright has indicated that "the preemption cases are an excellent example". 1978 Senate Subcommittee Hearings 62.

¹⁰ In testimony last year before the Subcommittee on Improvements in Judicial Machinery, we had originally proposed an amendment providing for removal only by a defendant, stating only that we did not oppose permitting a plaintiff to remove once a Federal defense was asserted. Prompted by the questions put by Senator DeConcini and speaking at that time only for myself, I agreed that a plaintiff should also have the right to remove. That position has been adopted in the amendment we now propose.

removed by the defendant or defendants" and by inserting in lieu thereof "may be removed

"(1) by the defendant or defendants if the action is one of which the district courts of the United States have original jurisdiction, or

"(2) if the matter in controversy exceeds the sum or value of \$25,000, exclusive of interest and costs, by any defendant, or any plaintiff, by or against whom, subsequent to the initial pleading, a substantial defense arising under the Constitution, laws or treaties of the United States is properly asserted, which, if sustained, would be dispositive of the action,".

Subsection (b) of section 1441 of title 28, United States Code, is repealed and there is inserted in lieu thereof:

"(b) The following civil actions shall not be removed under subsection (a) of this section from a State court to any district court of the United States:

"(1) Actions by an employee to recover wages under section 216 of Title 29;
 "(2) Actions against a railroad or its receivers or trustees under sections 51 to 60 of Title 45;

"(3) Actions for injury to or death of a seaman under section 688 of Title 46;
 "(4) Actions against a common carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, under section 20 of Title 49;

"(5) Actions arising under the workmen's compensation law of any State;

"(6) Actions brought by a State or a subdivision thereof, or an officer or agency of a State or subdivision thereof, to enforce the constitution, statutes, ordinances, or administrative regulations of such State or subdivision, or actions against a State, subdivision, or officer to require such enforcement;

"(7) Actions for the condemnation of private property under State law or for the award of compensation therefor;

"(8) Actions in which the only ground for removal is the defense that the defendant could not constitutionally be subject to process of the courts of the State;

"(9) Actions in which the only ground for removal is the claim that the suit or relitigation of an issue in the suit is barred by an adjudication from another court that the Constitution or laws of the United States require the State court to honor or that the Constitution or laws of the United States require or forbid recourse to the laws of a particular State."

TITLE 28, SEC. 1441, AS AMENDED

"(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State Court may be removed:

"(1) by any defendant if the action is one of which the district courts of the United States have original jurisdiction, or

"(2) if the matter in controversy exceeds the sum or value of \$25,000, exclusive of interest and costs, by any defendant, or any plaintiff, by or against whom, subsequent to an initial pleading, a substantial defense arising under the Constitution, laws or treaties of the United States is properly asserted, which, if sustained, would be dispositive of the action, to the district court of the United States for the district and division embracing the place where such action is pending.

"(b) The following civil actions shall not be removed under subsection (a) of this section from a State court to any district court of the United States:

"(1) Actions by an employee to recover wages under section 216 of Title 29;

"(2) Actions against a railroad or its receivers or trustees under sections 51 to 60 of Title 45;

"(3) Actions for injury to or death of a seaman under section 688 of Title 46;

"(4) Actions against a common carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, under section 20 of Title 49;

"(5) Actions arising under the workmen's compensation law of any State;

"(6) Actions brought by a State or a subdivision thereof, or an officer or agency of a State or subdivision thereof, to enforce the constitution, statutes, ordinances, or administrative regulations of such State or sub-

division or actions against a State, subdivision, or officer to require such enforcement;

"(7) Actions for the condemnation of private property under State law or for the award of compensation therefor;

"(8) Actions in which the only ground for removal is the defense that the defendant could not constitutionally be subject to process of the courts of the State;

"(9) Actions in which the only ground for removal is the claim that the suit or relitigation of an issue in the suit is barred by an adjudication from another court that the Constitution or laws of the United States require the State court to honor or that the Constitution or laws of the United States require a forbid recourse to the laws of a particular State.

"(c) [No change].

"(d) [No change]."

Senator METZENBAUM. Our next witness is Prof. Herbert Wechsler of Columbia University School of Law.

Professor Wechsler, we are very happy to have you with us. Your entire statement will be included in the record at the conclusion of your oral testimony.

If it is convenient for you, we would prefer that you not read the entire statement, only by reason of the limitations of time.

I note that you took a position on this subject when you were about 8 or 10 years old, 30 years ago. [Laughter.]

It is not a new subject for you. If you could, make an oral presentation of not more than 5 or 10 minutes, it would help the committee so we might hear some of the other witnesses before we conclude.

STATEMENT OF PROF. HERBERT WECHSLER, COLUMBIA UNIVERSITY SCHOOL OF LAW

Dr. WECHSLER. I did take a position on this, Mr. Chairman, at the request, incidentally, of Senator McGrath of Rhode Island, who had in charge in 1947 or so the bill that was part of a general revision of the United States Code that became title 28 of the United States Code. He was a friend of mine from days when I was an Assistant Attorney General and he was Solicitor General, Department of Justice. He asked me to take an objective look at it as he called it, and so I produced the article that is referred to in my statement in which I did attempt to be objective, but came to the conclusion that is in essence embodied in the bill before the committee now.

I call to your attention, as I think I should, as director of the American Law Institute that I take a position that goes further in support of abolition of diversity jurisdiction than the institute did in the 1969 study with which I am sure you are familiar, and was referred to by Mr. Schwarz in his testimony just a moment ago. I will come back to that in 1 minute.

I am not going to try to restate the general case against diversity jurisdiction. I should think that members of this committee have heard that case stated so often that any further restatement of the case could only produce hostility to a position that I considered to be sound.

I would say quite simply that I am in full agreement with what Prof. Charles Wright said at the hearings last year, with Judge Henry Friendly's statement in the House hearings, in 1977, which I think

he will be repeating in substance to you in a longer statement that I have seen that I understand will be presented at a later hearing.

But I do want to talk for 1 minute about the way in which I think this problem has to be approached. As I put it in my article 30 years ago, it seems to me it is a problem in the prudent uses of the Federal courts. It is not in any respect different from the kind of question that Congress faces when somebody comes down here and asks you to exercise the congressional power to regulate interstate commerce to prescribe a rule of decision in some commercial matter which is not now governed by Federal law. You don't say, because we have the power to do it, we must do it. You ask yourself whether there is a current Federal purpose to be subserved by national action, and you take advantage of the strength of the Federal system, that if there is no such Federal purpose to be subserved, you expect the residual authority of the States to do justice between man and man, and man and State. That is exactly the point of view that I take with respect to this problem, and have taken.

Now, if we ask ourselves are there current, valid Federal purposes, I think there is no question that the fear of prejudice against the out-of-stater was the historic reason that led the First Congress to take up the option that article III confers. I don't come before you and say that I don't think there is any such prejudice in the world today. I am sure there is. I have experienced it as a lawyer and as a litigator.

But what I do say is that it seems to me very strange that the least troublesome of all the prejudices that exists in this imperfect world should be the basis of a special Federal forum which none of the hostilities that flow from race or faction or interest or creed has been deemed sufficient to provide.

I say also that the scope of the diversity jurisdiction is such that it is a profligate remedy for the feared hostility. It is easily evaded as Mr. Schwarz pointed out in the case where it is most needed. I cite a case on page 3 of my statement in which I was counsel when I represented the New York Times Co. in southern libel cases where the fifth circuit held, Judge Griffin Bell writing, for a divided court, that the joinder of local codefendants defeated the removal by the non-resident New York Times at a time when every two-bit public official in Alabama had put in an action for \$1 million or one-half million dollars against the Times.

I represented the New York Times against Sullivan in the Supreme Court of the United States. We won that case. It cleaned up all the litigation that way which wasn't a bad way to clean it up by one fell swoop.

I do say that if you are concerned about this, then obviously the remedy is not to retain diversity in the form in which you have it, but to go back to the law as it was before 1948, and provide for a removal based on a showing of local prejudice.

I cite a case on page 3 in which William Howard Taft, when he was circuit judge, sustained a removal by a utility company in Detroit on the basis of local prejudice under that formulation.

I honestly don't argue for this. On balance I am content to see cases of true unfairness dealt with on direct review by the State appellate processes, in which I have continuously growing confidence, and, in exceptional cases, on certiorari in the Supreme Court.

But I say that if there is a case, and I don't know that John Frank still points to the prejudice problem as he maintains his peripatetic crusade on this issue, but if he does, I would be willing to give him that as a consolation prize if we could avoid giving him anything else.

Now I want to say also I support the bill in finding a valid Federal purpose in the interpleader situation and I call attention to the possibility that in multiparty cases where no State court can reach all the parties necessary to do effective justice, it may be feasible to expand the interpleader theory.

The American Law Institute did have such a formulation in its study predicated on exactly that theory. It is complicated and that is an objection to it legislatively, but it is a possibility that I should not dismiss.

Another possibility is to continue federalizing types of litigation on an ad hoc basis, as, for example, Senator Kennedy referred to the multiple aircraft, multiple-party aircraft disaster in his statement when the bill was introduced.

I can see a great deal of advantage in Congress providing a Federal forum with nationwide service of process in situations on a showing of that kind.

My best judgment is that the best result would be attained if these matters were studied closely on their merits in particular situations rather than dealt with across the board.

I also support the bill on the alienage point. So I call attention to a factor that I am not sure was considered. I think as the bill stands it would require complete diversity in the alienage situation. I don't see any reason why that should be the case.

Indeed, maybe something could be said even for limiting the alienage jurisdiction to removal by the alien and requiring only minimal diversity as in interpleader, but with the option vested in the alien, which is the interest in which there is a current special Federal concern based on the exclusive Federal interest in foreign relations.

Now the American Law Institute did not go as far as these provisions, as I said, but they did go very far. They would have eliminated the in-State plaintiff. They would have domesticated for diversity purposes, both corporations and unincorporated business entities having a local status; a local establishment for the conduct of business as to lawsuits arising out of the activities of that local establishment.

This radical proposal was put forward, incidentally, in 1932, by Attorney General Mitchell, with the approval of President Hoover and came very near to passing the Congress at that time. If it had not been for the enactment of the Norris-LaGuardia Act, I think it would have. But the act took the steam out of labor support for the more general provision and so it languished.

Anyhow, I think as I say here that the ALI proposals were a conservative set of remedies that one could support in 1968, without stultification, as a major step in the right direction, but I think to paraphrase Henry Friendly, the explosion both legislative and judicial in the last decade simply means that that conservative approach is a luxury that we can no longer afford if the Congress is to perform the

important function of assuring that the great national assets of the Federal courts are used in the ways that redound most to the advantage of the Nation.

Finally, I strongly favor the elimination of jurisdiction amount in Federal cases which was one of the things I argued for 30 years ago and the institute supported.

I would like in conclusion to express my appreciation as a citizen of the initiative represented by this bill and the action in the House of Representatives 1 year ago. The Federal courts to which most of my professional career has been devoted both as a teacher and as a practitioner have long needed the understanding oversight of the Judiciary Committees of the Congress.

May the enactment of this bill, following the constructive legislation of the last 5 years presage that such an era is at hand.

Thank you.

Senator METZENBAUM. Thank you, Professor Wechsler. Your testimony is extremely helpful to us. Let me ask you a few questions if I may.

John Frank suggested in his testimony yesterday that the current move to abolish diversity of jurisdiction is a throwback to the anti-diversity sentiment of pre-Erie days when diversity was abused.

When was Erie decided?

Dr. WECHSLER. In 1937, as I recollect.

Senator METZENBAUM. When did the American Law Institute make its recommendations to curtail diversity jurisdiction?

Dr. WECHSLER. That was 1968. It was approved in 1968, published in 1969.

Senator METZENBAUM. What do you think has caused the modern antidiversity wave?

Dr. WECHSLER. Well, there has been a stable sense in the professoriat and to a lesser extent the bar, that diversity jurisdiction is simply a wasteful exercise of Federal, scarce Federal energy. That goes back to the beginning of the Republic.

As a matter of fact, there were resolutions favoring the elimination by constitutional amendment of the basis for diversity jurisdiction that were put forward in some States as a condition of ratification of the Constitution. The history of the hostility to diversity jurisdiction is as old as the jurisdiction, but it is perfectly true that the free wheeling of Federal courts in pre-Erie days in dealing with questions of State law greatly exacerbated this feeling.

Post-Erie, I think it was thought that perhaps Erie had solved most of the problem. In the days when the number of diversity cases was 7,000 or 8,000 a year, as it was when I wrote my article in 1948, one could perhaps indulge that sentiment.

I think it is perfectly clear that what has happened to answer your question directly to stimulate interest in this matter now is the Federal legislative and litigation explosion of the last 20 years that has simply brought to Federal adjudication matters of such urgency and such importance that it is felt and widely felt, I believe, whatever John Frank says, that the most important thing that we can do is to equip the Federal courts with a calendar, and the energy and the personnel to discharge these national tasks in the best possible way.

That is certainly the thing that animated the institute in taking this partial step in 1969.

Senator METZENBAUM. John Frank testified yesterday that if diversity jurisdiction were abolished, any timesavings in not having to litigate questions associated with whether diversity jurisdiction exists would be minimal. Do you agree?

Dr. WECHSLER. No; I don't agree at all.

Senator METZENBAUM. Why not?

Dr. WECHSLER. Well, I should have to ask: Why so? [Laughter.]

Senator METZENBAUM. All right.

Dr. WECHSLER. John Frank, who is an old friend of mine, indeed, I gave him his first Federal job, incidentally, in 1941, is given, as you know, to somewhat pontifical statements which are not always supportable on analysis. But I can't imagine what basis there is for that statement. It sounds to me not only ludicrous but—

Senator METZENBAUM. I gather you to disagree.

Dr. WECHSLER. Yes. [Laughter.]

Senator METZENBAUM. Mr. Frank also suggests that there are no real inefficiencies associated with the Federal courts making non-authoritative interpretations of State law. Do you agree with that?

Dr. WECHSLER. No; I do not. Once more, I think efficiency is the wrong word to use. What we are dealing with here is a matter of the principles of federalism. When a Federal court makes a nonreviewable determination on an issue of State law, which is wrong, in the sense that it is not what the highest court in the State would hold, I think that the principles of federalism are offended. I should think that John Frank ought to think that. I knew him when he did think that, by the way. [Laughter.]

Senator METZENBAUM. Do you believe fear of bias is the reason lawyers choose to litigate their cases in Federal court?

Dr. WECHSLER. Well, I think there are instances of that kind. For example, that is the reason why we tried to remove to Federal court, the *Parks and Patterson* case referred to on page 3 of my statement, in 1962. This is an action by former Governor Patterson of Alabama and Mayor Parks of Montgomery, against the New York Times, based on the publication that was the subject matter of the *New York Times* against *Sullivan*.

It was perfectly clear. We tried three cases in the State courts and the jury took about 3 minutes to come in with the ad damnum demanded in the complaint. If the ad damnum was \$1 million, they came in with \$1 million. If it was one-half million dollars, they came in with one-half million dollars.

We wanted to get that case in the Federal court where we thought before Judge Johnson we would have a decent chance. It wasn't because the New York Times is a New York corporation, though, that we were in trouble.

Senator METZENBAUM. Would fear of bias explain why more than half of all diversity cases brought are filed by plaintiffs in their home States?

Dr. WECHSLER. Obviously not. Yet the proposition is correct, according to all the figures I have seen.

Senator METZENBAUM. Several witnesses have suggested that alienage jurisdiction under diversity be eliminated or curtailed as well. Do you agree?

Dr. WECHSLER. No; as I said earlier, when I think you were out of the room, I support the bill in retaining the alienage basis, not as a matter of prejudice or fear of prejudice, but as a matter of foreign policy. I understand that to be the view of the State Department. If the Department of State abandoned that view, I would think their judgment better than mine on the point.

Senator METZENBAUM. In your opinion, is it constitutional for Congress to remove diversity jurisdiction from the Federal courts?

Dr. WECHSLER. There is no question about that. It is constitutional for Congress to remove any jurisdiction from the Federal courts except the original jurisdiction of the Supreme Court. The Supreme Court has said that since 1791.

Senator METZENBAUM. Senator Baucus?

Senator BAUCUS. Thank you, Mr. Chairman.

Professor Wechsler, it is an honor for me to meet you. Fourteen years ago, I took a law course which used your book as the major textbook. At that time, I had no way of knowing that we would be here today discussing some of the basic issues in your book.

Dr. WECHSLER. Thank you, Senator Baucus.

Senator BAUCUS. What, if I may ask, is your reaction to Mr. Schwarz's suggestion that there be an amendment to this bill which would permit removal to Federal court when a defendant was going to raise a "constitutional" defense?

Dr. WECHSLER. I am glad you asked me that because, as you said, this is a point on which Law Institute recommendations, as he also said, favored making provision for Federal defense removal.

I think in principle that there is a great deal to be said for that removal. I think the best case for it is the one that he put second; namely, the case where under Federal law, State jurisdiction has been preempted, has been excluded, as in some of the labor situations under the National Labor Management Relations Act because here we have State courts proceeding to adjudicate in an area where Congress in the exercise of the commerce power and unquestioned congressional authority, has declared that State courts shall not adjudicate.

There is no prompt remedy in that situation for the litigant who is thus drawn into the State court. Removal would be appropriate.

In the libel situation, which to be sure, is the one that was referred to most by the institute, partly because of the timing involved, 1967, 1968, 1966, when the institute was working on this, was not long after *New York Times v. Sullivan*; people were very much interested in it, quite apart from my involvement in the case.

I wonder what Mr. Schwarz would think, though, if I said to him that my own observation as a teacher of constitutional law is that direct review by the Supreme Court has functioned pretty darn well to protect publishers of all kinds, in the very libel situation with which he is concerned.

Now, I know of some cases where I think that didn't work, one in West Virginia, I may say, where I was counsel for the publisher. We failed to obtain a review of the highest court of the State in affirming

one-quarter of a million dollars verdict for a justice of the supreme court of the State, who incidentally, had been a student of mine many years ago.

But generally speaking, these libel cases have been taken on direct review. They are certiorari cases so that the court has done this as matter of discretion.

I think, therefore, what you have here and ought to conceive that you have is a pragmatic problem how best to use these Federal resources.

I am a little fearful of an across-the-board removal for Federal defenses. We tried, in the institute study to articulate exceptions to it.

For example, I own some property of which I am very fond, in Massachusetts which is in the national seashore. Suppose the national seashore gets an appropriation to acquire land and condemns my property. I put in a defense that I am entitled to just compensation. Is that a Federal defense case that I would be entitled to take to Federal court in Boston or do I have to try it locally. That is the kind of drafting problem that I see.

I do not mean to overstate it, because I say again, in principle it seems to me the present situation is really quite mixed up. When do we have Federal defense removal? When the case arises under the Constitution, laws or treaties of the United States, on a well pleaded complaint, the plaintiff who put in that complaint elected to sue in the State court and it is the defendant who wants to remove, but it is the plaintiff who is relying on Federal law, not the defendant, and yet, the defendant in that case can have it removed.

But in the case that Mr. Schwarz put where the plaintiff is counting on State law for libel, defamation, and it is the defendant who is defending on the basis of Federal law, he can't remove.

There is an anomaly there. I would be hopeful that that anomaly might receive congressional attention. I am frank to say that I hate to see this committee, at this stage, get into what I know is a very complicated problem because I hate to see this excellent bill held up. This is not in any way inconsistent with this bill. It is a further development of the law of Federal jurisdiction. I hope there will be many such developments through the years.

Senator BAUCUS. One problem I wanted to raise with you relates to the caseload situation in my own State of Montana. One of the threads of your position is that the bill will cause a more prudent use of the Federal courts.

Dr. WECHSLER. Yes, one thread of my position.

Senator BAUCUS. One thread, that's correct. In my State of Montana there is a backlog of State court cases, but there is virtually no backlog of Federal court cases. Obviously this bill would decrease some of the backlog of the Montana State courts. I wonder if this isn't a prudent use of the resources of the Federal courts.

Dr. WECHSLER. Well, certainly the point you make, the point implicit in your question is a highly relevant point. The answer to it, in my view, is that it is simply impossible to formulate a position on this matter which will work with the same efficacy and justice in every part of the country.

You have had excellent Federal judges in Montana. I don't know if Judge Jameson is still sitting, but I am sure that if he is, I know what

kind of a docket he runs. Yet, I would suggest to you sir that perhaps if those cases could not be moved over into the Federal courts, there might be more pressure to devise similar procedures within the State courts or to enlarge judicial personnel or to do whatever may be needed to be done so that State dockets in Montana will be in as good shape as Federal dockets.

Senator BAUCUS. That is precisely the position of the chief justice of the Montana State Supreme Court. He maintains that this bill will have the effect on the State court system that you have outlined.

Thank you very much.

Senator METZENBAUM. Thank you very much, Professor Wechsler. We may have some inquiries of you by mail.

Dr. WECHSLER. I will be glad to answer any that I can, sir.

Senator METZENBAUM. Thank you.

[The prepared statement of Dr. Wechsler follows:]

PREPARED STATEMENT OF HERBERT WECHSLER

My name is Herbert Wechsler. I am a member of the New York bar and an Emeritus professor at Columbia University Law School. For almost half a century I have been teaching a course in federal jurisdiction, based since 1953 on a widely used teaching book of which I am a co-author, Hart and Wechsler's, *The Federal Courts and the Federal System*. Moreover, as Director of the American Law Institute since 1963, I played a part in the Institute's Study of the Division of Jurisdiction Between State and Federal Courts, undertaken at the request of Chief Justice Warren and published in 1969.

I appear at the request of the Chairman to discuss the changes in the jurisdiction of the District Courts proposed by S. 679. I am heartily in favor of those changes. Since they go further toward elimination of the general jurisdiction based upon diversity of state citizenship than the Law Institute recommended in its Study of a decade ago, I should make clear that I do not purport to represent or to speak for the Institute, though I shall gladly answer any questions you may have about the Study.

First: The case against the general diversity jurisdiction has been articulated so fully and persuasively in the hearings before the Subcommittee of the House of Representatives two years ago, in the Senate Subcommittee hearings last year, in the report of the Judiciary Committee of the House (No. 95-893, 95th Cong., 2d Sess.), in Congressman Kastenmeier's testimony before the Senate Subcommittee (pp. 15-28), and in Senator Kennedy's statement of March 15, upon the introduction of the present bill, that the Committee should be spared a fresh reiteration of the arguments for abolition. No one can improve upon the statements by Judge Henry J. Friendly in the House Hearings (pp. 199-218) or Professor Charles Alan Wright in both Subcommittees (House, pp. 218-230; Senate, pp. 44-63), with which I am in full agreement.

My point of view upon these issues was set forth some thirty years ago in a paper prepared at the suggestion of Senator McGrath of Rhode Island, who was Chairman of the Subcommittee having in charge the then pending recodification and revision of the Judicial Code as Title 28 of the U.S. Code. See *Federal Jurisdiction and the Revision of the Judicial Code*, 13 *Law & Contemp. Prob.* 216 (1948). Observing that "the sum of federal adjudication should represent as prudent use as we can make of the important national resources represented by the federal courts" (p. 218), I suggested that "the deepest issue of the uses of the federal courts was posed by the diversity jurisdiction—a jurisdiction "employed not to vindicate rights grounded in the national authority but solely to administer state law." I argued that withdrawal of these cases from the state judicial processes involves "a patent violation of the principle so strongly urged originally to justify the federal judicial power: that judicial authority must be coextensive with the legislative. The state judicial power is less extensive than its legislative when a portion of the task of state administration is assumed by federal courts whose judgments are not subject to a state review." Unless "this exceptional judicial undertaking rests on some present, valid, federal purpose,"

it was a function, I submitted, that should plainly be surrendered to the states (*Id.* p. 235).

That was my conception of the problem then and it is my conception still. I think it fair to say that it was also the conception that prevailed in the House of Representatives in passing H.R. 9662 in the last Congress and that animates the bill you have before you.

Second: I perceived no present valid federal purpose for general diversity jurisdiction thirty years ago, when the annual total of such cases had not yet reached 9,000. Now that the total is approximately 30,000 and undoubtedly will grow, my conviction on the point is more intense. This is not to say, of course, that I am unaware that hostility to strangers may exist and even may affect the fairness of jury verdicts or judicial action in the contracts, torts and property litigation primarily involved. It is to say that it is strange, indeed, that this least troublesome of all the prejudices should be the basis of a special federal forum which none of the hostilities that flow from faction, interest, race, or creed is deemed sufficient to provide. It is to say also that the general diversity jurisdiction is a profligate remedy, easily evaded in some of the most urgent situations (see, e.g., *Parks and Patterson v. The New York Times Company*, 308 F. 2d 474 [1962] [joinder of resident codefendants by in-state plaintiff to defeat removal by non-resident defendant]), of uncertain efficacy when hostility is strong, and fantastic in the extent to which it brings to federal adjudication cases where there is no risk of prejudice at all. The notion that the risk of prejudice in state tribunals can sustain the jurisdiction as presently defined is quite plainly totally untenable.

The most that might be argued, in my view, is that the statute should restore the pre-1948 provision for removal by a non-resident party in a state court action on a showing that he is a target of local prejudice likely to impede a fair determination. See, e.g., *City of Detroit v. Detroit City Ry.*, 54 Fed. 1 (E.D. Mich. 1893, W. H. Taft, C.J.). Though Judge Denman, speaking in 1945 for the twenty-four circuit and district judges of the Ninth Circuit, supported such a qualification to the abolition of diversity jurisdiction (S. 466, 79th Cong., 1st Sess.), the authorization of a diversionary motion calling for the litigation of an issue of this kind involves many disadvantages. On balance, I should myself prefer to rely for protection on state appellate processes, including when due process or equal protection may be denied, the possibility of correction on direct review by the Supreme Court. But the issue is a close one, I concede.

Third: I support the bill in finding a valid federal purpose in the statutory interpleader under present law, where minimal diversity suffices for jurisdiction and nationwide service of process is available. This is, perhaps, the most obvious case where federal intervention is based on a current finding of state inadequacy, the prototype of a present, valid, federal purpose to which I previously have referred.

The question here, in my opinion, is whether there may not be other situations where the ineffectiveness of state judicial processes is equally clear and federal jurisdiction, with the opportunity of authorizing nationwide service of process, would similarly rectify a present state inadequacy. Such a formulation was developed in the American Law Institute Study (§ 2371 *et seq.*) proposing to confer jurisdiction on the district courts of "any civil action in which several defendants who are necessary for a just adjudication of the plaintiff's claim are not all amenable to process of any one state or other territorial jurisdiction," if minimal diversity obtains. This was an extension of the interpleader theory and it has substantial merit.

It might, however, simplify the drafting problem if a provision of this kind were formulated only as a basis for removal by a state court party suffering from inability to reach defendants necessary for a just adjudication of the claim, since the history of the effort in the state court would presumably assist in appraising the deficiency in state court process. An alternative approach that I believe I favor is to seek to identify specific kinds of multi-party claims, where parties are dispersed throughout the country, such, for example, as aircraft disasters, and to deal with them by special legislation, federalizing all or part of the rules of decision that may be involved and not merely offering a forum.

I should hope, I must say, that an effort of this kind would be placed on the agenda for future legislative action rather than delaying action on the pending bill. The problems of lawyers' law involved, including, for example, determining the scope of federal preemption and the issue of the choice of law, insofar

as state law is to govern, will not be easy to resolve. Meanwhile, the relief to the District Courts that will be afforded by the elimination of general diversity jurisdiction ought not to be postponed.

Fourth: I also support the bill in finding a valid federal purpose in the jurisdiction in controversies between citizens of a state and citizens or subjects of a foreign state, not I must say because of apprehension of state prejudice but rather because cases of this kind have implications with respect to the foreign relations of the Nation, a pervasive federal concern.

Whether the jurisdictional amount required should be raised, as the bill provides, from \$10,000 to \$25,000 seems to me to be a minor problem. I do question, however, whether it is consistent with the theory for retaining the jurisdiction based on alienage to adhere to a formulation that apparently requires under new § 1332(1) that all the parties on one side be citizens of a state and all those on the other side citizens or subjects of a foreign state—the analogue of the requirement of complete diversity. The problem has been well presented by Professor Thomas D. Rowe, Jr., in a study supported by a Department of Justice grant and recently published in the *Harvard Law Review*. *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 *Harv. L. Rev.* 963, 966-968 (1979). I agree with Professor Rowe that as in statutory interpleader minimal diversity should here suffice.

Fifth: The American Law Institute Study did not, as you know, recommend the abrogation of general diversity jurisdiction but rather its reformulation in accordance with the presumed purpose of protecting out-of-state persons and interests from the presumed danger of local prejudice. This led to the proposed exclusion from the jurisdiction of actions by citizens of the state in which the District Court sits, including corporations chartered by or having the principal place of business in the state. It led to barring invocation of the jurisdiction either originally or on removal by corporations or unincorporated business entities maintaining a local establishment in the state for a designated period in any action arising out of the activities of that establishment—essentially the proposal of Attorney General Mitchell in 1932, supported by President Hoover. See Sen. Doc. No. 65, 72d Cong., 1st Sess. (1932). It led finally to barring invocation of the jurisdiction by individuals in any state in which for more than two years the individual has had his principal place of business or employment.

In 1968, when these proposals were approved, they represented a conservative program for addressing an unprincipled extrapolation of national judicial jurisdiction. One like myself, who favored more extensive change, could support this more modest program as a major step in the right direction. But in the decade since 1968 federal rights both statutory and constitutional have been enormously expanded and the litigation seeking their enforcement has concomitantly grown, qualitatively in its demands upon the bench and quantitatively as well. To paraphrase Judge Henry Friendly in his testimony of two years ago, the conservative approach of 1968 has "become a luxury we can no longer afford."

Sixth: Finally, I strongly favor the elimination of the jurisdictional amount requirement in the relatively few federal question cases in which it still obtains. If there is reason for relegating any cases arising under federal law to initial state determination, and I do not exclude the possibility that such a reason may arise, it will not be because of the amount in controversy. This is a change that I have long supported. It was included in the recommendations of the Institute and brought forth no dissent that I recall.

In conclusion, may I express my appreciation as a citizen of the initiative represented by this bill and the action of the House of Representatives a year ago. The federal courts, to which most of my professional career has been devoted, have long needed the understanding oversight of the Judiciary Committees of the Congress. May the enactment of this bill, following the constructive legislation of the last five years, presage that such an era is at hand.

Senator METZENBAUM. I am going to call two witnesses together at the moment, Prof. John Reed, professor at the University of Michigan Law School, appearing on behalf of the American Bar Association and Robert G. Begam, past president of the Association of Trial Lawyers of America, both to testify at the same time.

STATEMENTS OF JOHN REED, ACCOMPANIED BY JOHN SHEPHERD AND HERBERT HOFFMAN, REPRESENTING AMERICAN BAR ASSOCIATION, AND ROBERT G. BEGAM, PAST PRESIDENT, ACCOMPANIED BY HOWARD SPECTER, REPRESENTING ASSOCIATION OF TRIAL LAWYERS OF AMERICA

Senator METZENBAUM. Would you gentlemen be good enough to identify yourselves.

Mr. REED. Mr. Chairman, I am John Reed, from Michigan, and with me is Mr. John Shepherd of St. Louis, a practicing lawyer there and a member of the American College of Trial Lawyers and chairman of the House of Delegates of the American Bar Association. We represent the American Bar Association.

Mr. BEGAM. Mr. Chairman, my name is Robert G. Begam. I am here representing the Association of Trial Lawyers of America. I am from Phoenix, Ariz. With me is Mr. Howard Specter, of Pittsburgh, Pa., a trial attorney, who is chairman of the national affairs department of the Association of Trial Lawyers of America.

Mr. REED. And this is Mr. Herbert Hoffman who is director of the American Bar Association's governmental relations office.

Senator METZENBAUM. I am happy to have you with us this morning, gentlemen. I don't think the Chair has any conflict of interest. I think I am or at least was a member of both of your organizations. But I will assume for the moment that you speak for your organization, which I am sure you do, absent the fact that you may not be speaking for the chairman, even if he still is a member at the present moment.

Mr. REED. Mr. Chairman, may I ask whether there is any prejudice in the fact that you are from Ohio State and I am from the University of Michigan?

Senator METZENBAUM. Yes. [Laughter.] Yes. Strong.

Mr. REED. I will keep that in mind.

Senator METZENBAUM. Gentlemen, unfortunately, and I am embarrassed about this fact, I have permitted the earlier witnesses to go on longer than I had thought they would. I would like to include all of your statements, I guess there are two, in the record in full at the conclusion of your oral testimony.

I would say to you that the chairman, who is also the prime sponsor of this legislation would be very grateful to you if you would address yourselves to that part of the issue that is concerning me and that is whether or not the abolition of diversity jurisdiction will in any way affect litigants negatively.

I am a little less worried about affecting lawyers negatively than I am in affecting your clients. If you would be inclined to speak to that, as well as such other remarks as you care to make, I say to you for one that I am particularly interested in whether plaintiffs and defendants are being adversely affected.

Mr. Reed, we are happy to have you start speaking, if you like and then we will go to Mr. Begam.

Mr. REED. Mr. Chairman, the point has been made repeatedly in these hearings and in hearings on earlier versions of the bill under discussion that it is impossible, or nearly impossible, to prove statistically that

litigants will be disadvantaged by the abolition of diversity jurisdiction—to prove statistically the existence of prejudice because of regional bias, or bias in a local court as distinguished from districtwide or statewide Federal court.

I think we would all have to concede that it is a kind of thing that is not easily quantifiable. It is, however, the opinion of the overwhelming majority of trial lawyers in the States unequivocally that there is prejudice against which the existence of diversity jurisdiction is a defense.

Accordingly, we say that we appear not as lawyers speaking in self-interest, but as lawyers speaking as attorneys, if you please, for their clients, because it is their interest that we represent, not only in court, but here today. That is the position of the American Bar Association and of the 50 State bar associations that have taken remarkably consistent—indeed unanimous—view with respect to the undesirability of depriving litigants of this option that they now have.

Senator METZENBAUM. Do you feel it is a matter of right, forget about this particular legislation, but is it a matter of right that a lawyer have a choice of two courts in which to go?

Should I have a choice back in Ohio of going into the State courts or the justice of peace courts or whatever the case may be or the municipal court.

The question is: Should there be this kind of choice? Is that good for the law?

Mr. REED. Indeed, it seems to me it is not only good for the law, it is almost an indispensable condition of high quality in the law.

Certainly the history is a long history and we may not have time for legal history here today; but the English Common Law profited from competition between the King's Bench and Common Pleas and Exchequer and Chancery. In the development of our American legal system, there has been a similarly rich interchange of ideas and experiences and experimentation between the systems. I see it not as a luxury, as Professor Wechsler sees it; I see it not as—I think he used the word profligate—defense against prejudice against litigants. It is the only measure that article III affords. Article III says that you may have diversity jurisdiction. Diversity jurisdiction is then used to protect against not only regional prejudice but other kinds of prejudices that can be avoided by getting into a broader based court and sometimes a court of higher quality.

So, it is not a luxury. It is not a negative thing. It is, as we called it in our statement, a condition of justice.

Senator METZENBAUM. Professor Reed, why is the litigant who has a case that involves in excess of \$10,000 have a choice of forum, whereas the criminal defendant does not have a choice of court?

Mr. REED. Or some other civil defendants or plaintiffs have no choice of forum? It seems to me that you are talking about an ideal against a practical situation. That the diversity remedy is not available in every case is not a good argument for doing away with it in the cases in which it can be used. It is a bulwark against prejudice that is used by something like 30,000 litigants a year.

Should we now say that because not everybody can have this protection—under \$10,000 or \$25,000 or whatever, or incomplete diver-

sity—therefore we shouldn't give it to anybody with more at issue, and with total diversity? By the way, I would prefer to abolish Strawbridge and Curtiss and the rule of complete diversity. That would even increase the load on the Federal court.

Senator METZENBAUM. Mr. Begam, do you care to address yourself to some of these questions I raised and any other items that you care to address yourself to?

Mr. BEGAM. Thank you, Mr. Chairman. I would like to come to grips immediately with your first question and that is, is this something that lawyers are interested in rather than people or rather than their clients?

Senator METZENBAUM. No, that is not quite what I am saying, although that is certainly part of what I am saying. What I am asking is, is it unfair to the litigants to require you to bring these cases in a single forum—the State courts.

Mr. BEGAM. I think we can speak to that appropriately, because our bar association, as the Chair knows, is a plaintiffs' bar association in a sense, and it is our members who initiate litigation. If the option is preserved, as I hope it will be, it will be the lawyers in our bar association and their clients who will continue to benefit from an option that we have enjoyed for 200 years now.

It goes without saying, it seems to me, that of all segments of the bar and of all groups of litigants, our members and the injured accident victims they represent would be the last segments that would be indifferent to delay or indifferent to court congestion.

We are vitally concerned with matters involving court congestion. If that was the only issue before us in the diversity conflict, we would be out front doing anything reasonably available to the bar and the bench and the Congress to reduce the court congestion.

But we don't think, on balance—now I am talking not only for 34,000 members of the Association of Trial Lawyers of America, but I think I am talking for their clients, injured accident victims—we don't think there is enough to be gained. We do think there is a great deal to be lost.

Now let me be quite specific on one aspect of that loss. I wasn't here yesterday, but I understand that John Frank spoke to this. I don't want to track what he said.

Senator Baucus mentioned, in discussing with Professor Wechsler who is very seductive and who seduced me 30 years ago when I took a procedure course with him at Columbia Law School on this subject, that in Montana the situation is that there is no problem in getting to the Federal court quite quickly, whereas there is tremendous congestion on the State side.

Judget Jameson keeps the calendar on the Federal side down low and still has time to visit in Arizona, which he does quite frequently, and help us with our caseload.

The problem is not just the Montana problem. I think, as Mr. Frank pointed out yesterday, in cities like Boston and Philadelphia and Brooklyn and Chicago and the Borough of Manhattan, the problem is even greater; it is more distinct, more dramatic than in Montana.

In Boston, according to the statistics that Mr. Frank presented, for example, it takes 42 months in terms of a median analysis of the caseload, 42 months to get to trial in Federal court.

In Philadelphia it is 47 months.

Senator METZENBAUM. Mr. Begam, I should point out to you that I inquired of Mr. Frank concerning his figures, particularly with reference to Boston, because I had totally different figures indicating that it took about half as long to move forward in the State courts as it did in the Federal courts.

We also discussed with Mr. Frank the fact that he was comparing personal injury cases in one court with all jury cases in another court and using different time periods to the point that I am sure, if you will read the record, you will find that Mr. Frank pretty much agreed that these were not reliable statistics.

So, I would have to say to you that although I have not studied your particular statistics, I am wondering whether or not you are using the same statistics that Mr. Frank used and which, frankly, do not prove Mr. Frank's point.

Mr. BEGAM. Well, I am using those statistics. I am deriving my statistics from Mr. Frank's statement; but when I first saw those statistics back in, I think it was February or March, Mr. Chairman, when Congressman Kastenmeier was conducting hearings on the House side on this subject, I was surprised by that.

I guess we all bring our own experience to these matters, and in Arizona, unlike Montana, and unlike the statistics that Mr. Frank presented, we have the opposite situation. In Arizona, we simply cannot get any civil case to trial in Federal court. That is a very dramatic way of putting it, but it happens to be accurate.

On the State side we have a very manageable calendar. In the big cities, it takes us 1 year, 1½ years, to get to trial, and in the rural counties we can get to trial quicker than we can get ready, in State court.

So I was surprised to see that in the major urban areas Mr. Frank was saying that the opposite was true. We have trial lawyer associations, State trial lawyer associations in every State in the country. I have checked with Massachusetts, New York, Michigan, and Illinois, and while they don't have specific statistical data, the sense of the lawyers practicing in those large urban areas is that the congestion on the State side is a serious problem, and that there is no serious congestion problem on the Federal side, comparatively; but, comparatively, they can get to trial much quicker on the Federal side than on the State side.

You know, as further circumstantial evidence of this Mr. Chairman, I think it is astonishing that 50 State bar associations can resolve the same way on any issue.

Senator METZENBAUM. No; that doesn't astonish me at all.

Mr. BEGAM. It astonishes me.

Senator METZENBAUM. Not when the plaintiffs' bar and the defendants' bar both agree that is the direction in which they want to go.

I asked Mr. Frank whether or not you would poll your membership. I am not talking about the membership of ATLA. I am talking about the bar. I am talking about members admitted to the bar. Take a random 5,000 or 3,000, and let somebody who is an advocate of abolishing diversity on one side state the position, such as Judge Friendly, and let somebody who is an advocate of keeping diversity

jurisdiction state the position on the other. And then send out 5,000 random letters to the lawyers.

As we well know, as was testified to this morning, the House of Delegates did not overwhelmingly arrive at their conclusion. It was 164 to 127, something of that kind. So I don't find any problem at all in understanding how 50 bar associations where the more active people in many instances are the plaintiffs' bar and the defense bar would come to that conclusion.

That does not, in my opinion, reflect the attitude of the average practicing lawyer. Let me come back to this matter of statistics from Mr. Frank. I had asked him a series of questions. I won't read them. They are certainly available to you from the reporter at the conclusion of the hearings.

Senator METZENBAUM. There really is a difference in comparing apples and oranges?

Mr. FRANK. There is clearly statistical deficiency. I am the first to acknowledge it and I proclaimed it in my statement. I can give you only approximation.

Now I had previously been talking to him about the difference in dates, difference in years, difference in kinds of cases that were compared and had also gone into the question of Boston itself, as I recollect. In that situation, my recollection was it was almost a 2 to 1 ratio as far as time.

Senator METZENBAUM. Are you aware that the 1976 figures for the city of Boston, one of the five cities you cite in your testimony, indicate that the average time from filing to disposition of all civil cases in State court was 394 days, while in Federal court it was nearly twice as long, 690 days.

Mr. FRANK. I am not able to answer your question as to the Boston figures for that period. I will ask leave to amplify my remarks in the record as soon as I can in fact check them. I will ask Ms. Baker to help me get it as part of the transcript as quickly as possible.

Ms. Baker is seated to my right.

So that I don't think those statistics make the case.

Mr. BEGAM. What I have in front of me, that I don't think Mr. Franks used in his analysis, is this "Justice Delayed" study of the National Center for State Courts. The Boston figures there show a longer period of civil disposition time, and I believe that these really are the most current figures, a longer period for civil disposition time in State court than in Federal court.

I guess, like on so many things, as the Chair knows, you can get statistics to support most any position.

What is interesting, however, is that of the 17 jurisdictions analyzed in this particular study, in 16 of them there was a greater delay in State court than in Federal court. The only exception was New Orleans where the delay was 305 days on the Federal side and 288 on the State side.

Now they are talking about disposition. That is time from filing to disposition which would take into account settlements. I am talking about the case that does not settle. How long does it take it to get to trial? I tell you in Phoenix, Ariz., on the Federal side, and this is in support of your position of getting rid of congestion on the Federal courts, we simply cannot get a case to trial at all, and we won't until we get the first and hopefully the second of the 117 new Federal judges.

But this bill won't help us a bit, because 80 percent of our calendar is criminal.

Senator METZENBAUM. Mr. Begam, I am going to try to roll along, because I must bring this hearing to a conclusion.

Could you very succinctly tell me how plaintiffs will be adversely affected by passage of this law other than the fact that if they can choose a court it might give them one more sympathetic than if they didn't. That really is a concern of mine. I was a plaintiffs' lawyer. Make no bones about it. I never represented any defendant in my entire practice, that is, any defendant in a personal injury case, insurance company, railroad. I had the opportunity to do so. So I have a concern. I come from that background. I am concerned as to whether we are doing an injustice to plaintiffs if we pass this legislation.

Mr. SHEPHERD. I hope Senator that I may also address that subject. I would like to. Although I am a defense lawyer, I do sometimes act for the plaintiff.

Senator METZENBAUM. Well. I don't want to do something that comes out negative to the defendants, but I think that the chance of—the choice that we talk about in the first instance is the plaintiffs'.

Mr. BEGAM. In the first instance, I am persuaded that if we did have statistics that we would find that the two lines that we presently have, the Federal line and the State line, are self-regulating. I believe when there is a lot of congestion on the Federal side, plaintiffs choose the State side. That tends to create a self-regulating effect over a period of years.

But putting that aside, just on plain justice, there is simply no doubt in my mind that there are important factors involved.

In our country, particularly in the Western States, most of the Federal district courts are in the urban areas. Let's talk about tort cases. If a tort is committed in a rural area where there is diversity jurisdiction, we can get into an urban courtroom and away from the rural area.

In many instances, the rural area creates a bias not necessarily against one party or the other, but a bias against the adversary system of justice. Because the adversary system of justice which is our system of justice depends on a jury. The jury system or the success of the jury system depends on a mix of people.

In Mojave County, Ariz., as Senator DeConcini can attest, we don't have that mix that makes the jury system work. We have a sameness of social background, of political background, of ethnic background, of employment background that defeats the philosophy of a jury system. And where it is essential that the jury system work the way it was designed to work we sometimes have to get ourselves into Federal court and we are willing to pay the price of waiting longer in Arizona for a Federal trial than we would have to wait for a State trial.

Senator METZENBAUM. Yes.

Mr. BEGAM. I might finish because I would like to hear Mr. Shepherd advocate something in favor of plaintiffs because I have never heard that before. This is the fourth time I have testified on this subject in the last 2 years, twice before in the House and once before in the Senate. We filed written statements four times. On pages 16 to 18, of the written statement that we filed this time, I list what I call "justice factors" and examples of them. I have still not heard anyone, any wit-

ness rebut any of those or tell me why those "justice factors" are not important and how and why the present proposal to abolish diversity jurisdiction won't create those injustices. Nobody has responded to them as yet, Senator. So there is really my response to your question. It is on pages 16 to 18 of our written testimony.

Senator METZENBAUM. You cite three examples where the forum chosen is likely to have an effect on the ultimate outcome of the case. But in the first two of those examples if the corporations sued happened to be citizens of Arizona or if the claims were for less than \$10,000, your plaintiffs would have to go to the State courts; wouldn't they?

Mr. BEGAM. Yes, they would.

Senator METZENBAUM. Would they be subject to the same prejudices you alluded to?

Mr. BEGAM. Of course they would, yes. And by abolishing diversity jurisdiction we would be giving equal injustice to those who presently have the diversity option.

Senator METZENBAUM. Does that mean that every plaintiff who has to litigate in State court is not getting a just result?

Mr. BEGAM. Of course not. Most plaintiffs do litigate in the State court. It is only those who potentially would get an unjust result in State court who exercise the diversity option. As you know, that is a very small percentage of them.

Mr. SHEPHERD. As the Senator has pointed—

Senator METZENBAUM. He suggests that you are a wolf in shepherd's clothing.

Mr. SHEPHERD. Yes, how nice. [Laughter.]

Well, I have been introduced to you. I am John Shepherd from St. Louis. I have the pleasure of being the chairman of the House of Delegates of the American Bar Association. As Mr. Begam said, I have appeared many times on behalf of the defense in trial, but it just happens, and this may be true in many other jurisdictions, that sometimes a defendant's lawyer gets a pretty good plaintiff's case.

So, in the eighth circuit, I have the, what I am sure will be the temporary record of the largest verdict that has been affirmed. I mention that not out of any bragging, but I say it because it played a very important part in the question of where shall I file this lawsuit.

Quickly, this is a 23-year-old girl paralyzed on one side. The case is in the books. It is affirmed by the eighth circuit. She was from North Carolina. I had the choice of filing that lawsuit for her in rural Missouri, where the accident happened, or filing it in the Federal court.

Missouri is not atypical. Our appellate court has put a ceiling, not automatic, but it is there in reality, as to how much a plaintiff can recover. Not so in many of the decisions of the Federal court.

So, I elected, even though it required a unanimous jury verdict in the Federal court, to go into the Federal court where I knew that whatever verdict this girl got, she had a good chance of keeping it.

So the election was made not out of, I hope, any selfish reason on behalf of the lawyer, but here was a girl who will and does need continuing medical expenses and the Federal court was the place her case should be filed and was filed.

Now—

Senator METZENBAUM. Mr. Shepherd, I am very impressed with what you just said. I am going to let you finish. But as I sit here, I am

saying to myself, here is the man who is chairman of the House of Delegates who is obviously a very well respected member of the bar in Missouri, mainly a defense lawyer.

Doesn't it shock you or disturb you that if that little girl, had been injured in a rural county, and did not have a choice to go into the Federal court, she would have been so limited. Isn't it the fact that the defense bar and the bar association of Missouri could make their point known to the appellate court? That to me is such an absurdity that you can't get a verdict that will stand for more than a certain amount. It just shocks my conscience. Really, I think it is practically unconstitutional, but I suppose I am wrong about that and I won't practice law. I do think that any appellate court that says the most a verdict may be is \$50,000, \$100,000, or \$250,000, that appellate court ought to resign. They are not really doing any service to the American Bar.

Mr. SHEPHERD. Well, I sure am not here asking my appellate court in my State to resign. If you have misunderstood that, I don't want them to think that I came up here to Washington.

Senator METZENBAUM. You didn't say it; I did. [Laughter.]

Mr. SHEPHERD. OK.

Senator METZENBAUM. I commend you for the quality of your representation that you were able to take it into the Federal court, that you were able to prevail, but what bothers me is what if that little girl had been in a State court and couldn't have had that choice.

Mr. SHEPHERD. It would be shocking. I am not at all sure that it might not happen in some rural place in Ohio.

Senator METZENBAUM. No question about it.

Mr. SHEPHERD. But that is what we are here addressing is the reality. We can't let ourselves be shocked. We have got to face up to this situation as it really exists. I suggest to you, Senator, that in almost every community in this country, the Federal building is the building that is the best maintained and the grounds look good and it is the people's building.

This bill will tell the working people in that town that that is not their courthouse. They can't file a suit there. It is somebody else's courthouse. If they get hurt by some national corporation, they can't use that building. I suggest to you that closing the courthouse, the Federal courthouse to the working people of this country is a very serious thing. It is far more serious than just the lawyers.

Senator METZENBAUM. What are you and the State bar doing to rectify the situation with respect to the appellate courts and their actions in limiting the size of verdicts?

Mr. SHEPHERD. I think there are committees working on that in every State that I know of and perhaps Mr. Begam could address that question much better than I can. But what we are trying to do is make equal justice all over the country. You can't do it by closing the Federal court.

Senator METZENBAUM. You almost convinced me that it would be unequal not to. Because if you have only a State court matter under those circumstances, you're limited by the appellate courts' actions. I just am disturbed.

Mr. Begam, do you care to address yourself to that?

Mr. BEGAM. Yes. It is not really on point and I don't want to take much time on it, but obviously, as the chairman knows, the Association of Trial Lawyers of America for 30 years has been doing its best to correct the injustices that Mr. Shepherd points out. It disturbs the Chair. It disturbs the plaintiffs' bar and I think it disturbs the defense bar when that kind of injustice exists.

I simply say what I said before. We really don't address that injustice adequately by saying let's make it equal, let's make sure that even those who presently have the diversity option suffer the same injustice.

On that point, and there is no academic figure, I hasten to add in the United States for whom I have more respect than Professor Wechsler, but I can't help taking issue with him on one basic point. I think it goes to the heart of this bill. He said that Congress should preserve the great national assets of our Federal judicial system for cases which require Federal court handling. That is the philosophy that he brings, and I think that the proponents of this bill bring to supporting the bill.

But what are those Federal cases for which we are going to preserve these great national assets? I can tell you what they are in Arizona. Marijuana cases. Possession cases. Dyer act cases. Wetback cases. In large part the dregs of a Federal judicial calendar. What we are going to take away from those Federal judges is the case that Mr. Shepherd talks about. We are going to take away the massive product liability cases, the complex, esoteric product liability cases that require the finest kind of judicial attention. These are to be turned out so the judges can handle more of the narcotics cases that I think the State judges are better capable of handling in most major urban areas. I don't think it makes sense.

Mr. SHEPHERD. Wouldn't we be correct, I know we are pressed for time, but this is so important. You are going to take the product case away from the Federal court if it is a domestic U.S. company, but under the doctrine of alienage if it is a foreign product manufactured by a foreign company, they can use the Federal courts.

So what you are doing is simply closing the Federal court to the U.S. corporations and keeping it open to the foreign corporations.

Mr. REED. May I add something on a different subject? You asked a while ago what injustice might occur to litigants if this bill were passed. I would note the fact that you would lose the advantage of section 1407 of the Judicial Code which permits pretrial consolidation of multidistrict cases. I have in mind the O'Hare tragedy of 10 days ago. It would not be possible if this bill were enacted without other legislation putting those cases—

Senator METZENBAUM. Would a mass tort amendment meet that problem satisfactorily?

Mr. REED. It would meet that problem, yes sir. It is not a part of the bill as I understand it.

Senator METZENBAUM. Well—

Mr. SPECTER. Mr. Chairman, if I may, I would like to respond briefly. There is another similar disaster very close to the Chair's own home, the Beverly Hills Night Club fire, which could not have been handled adequately in any State court in that area that I am

aware of, but under the guidance of Judge Rubin in the U.S. district court sitting in Ohio, tremendous advances have been made along those lines.

I would also like to add, if I may, that the experiences, the examples set forth in our written statement to which Mr. Begam alluded are not unique to the Western States. I practice in Pittsburgh, an urban area, where we are fortunate enough to have a good mix of jurors, jurors with varied educational experiences, histories, and ethnic backgrounds.

Those experiences tend to bring to our State court decisions unbiased, reasoned results. Within an hour's drive from Pittsburgh, from our State court in my city, there are four county seats in four Pennsylvania counties with substantially different mixes of jurors, each one with a distinct personality.

I am sure that Senator Hatch could address himself to this, because he practiced in Pittsburgh, where I did. The opportunity for bias, conscious or unconscious, prejudice, conscious or unconscious, in those four communities has been demonstrated time and time again, just as it has in the neighboring counties in other States, in West Virginia and Ohio which border Pittsburgh.

Mr. SHEPHERD. I don't mean to be ungracious, and this is my first time to appear before the U.S. Senate and I appreciate it very much. I did have the opportunity to appear before Congress and at that time I was pleased that Mr. Sawyer, who is a trial lawyer, and I think perhaps on both sides of the table, sometimes for plaintiffs, sometimes for defense, said that with the additional Federal judges, with the enlargement of the magistrates authority, that though he was a sponsor of the bill, he withdrew that sponsorship.

It is my hope that, Senator, you will give this great consideration before you close these courts to the people.

Senator METZENBAUM. Would you be good enough to tell me what is the maximum verdict that the appellate court will not overrule?

Mr. SHEPHERD. Well, it isn't sealed in concrete and some of the courts have said that they do not, while they have the authority for a remittitur, they haven't exercised it in several years. I can give you the figure that the jury gave and the eighth circuit awarded which is the top in our circuit, it was \$1,813,000. We have no such verdict in the State court, but since I represent the defense mainly, I am not here advocating that either.

Senator METZENBAUM. What is the highest verdict that has been permitted to stand in State court?

Mr. SHEPHERD. I think, I wish I knew precisely, but it is right around \$1 million. I am not sure we have an affirmed verdict for as much as \$1,500,000, for a single plaintiff.

Senator METZENBAUM. Gentlemen, we thank you very much. We appreciate your being with us. I am sorry we didn't have more time. I still have one more witness and I am going to try to see how much I can shortcut his testimony so I can get to my 12 o'clock appointment since it is now 12:15.

Mr. SHEPHERD. Thank you, Senator.

Mr. REED. Thank you.

[The prepared statements of John Reed and Robert Begam follow:]

PREPARED STATEMENT OF JOHN REED

I am John Reed, of Ann Arbor. With me are John Shepherd, of St. Louis, and Edward Mullinix of Philadelphia. Mr. Shepherd is Chairman of the House of Delegates of the American Bar Association. Mr. Mullinix and I are members of the Council of the Litigation Section of the American Bar Association. Mr. Mullinix and Mr. Shepherd have both been practicing law, specializing in litigation, for about thirty years. I am a member of the faculty of the University of Michigan Law School, where I have responsibility for courses in Civil Procedure, Evidence, and Professional Responsibility.

By designation of the President of the American Bar Association, we appear before you to voice the opposition of the Association to the enactment of Senate Bill 679 and any other legislation that would abolish or significantly reduce the diversity jurisdiction of the federal courts.

Diversity jurisdiction, which is almost as old as the Constitution itself, demonstrably serves the ends of justice today, and the Congress should not alter that jurisdiction in the absence of a showing of compelling need for change. We believe that the proponents of change have not made, and cannot make, such a showing.

This Committee has already heard extensive testimony concerning the merits of the Bill, and has available to it the records of the hearings on similar bills in the Senate and in the House during the 95th Congress. We hesitate to reiterate at length many of the familiar justifications for diversity jurisdiction already presented to you, though we do endorse them. As examples of these familiar arguments that we propose not to enlarge on, let me mention briefly just two, before going to the negotiation that we believe lies at the heart of the matter.

First, we believe that the quality of the substantive and procedural law in the nation is significantly higher because of the creative tension and interchange that diversity jurisdiction affords between the state and federal judicial systems. That federal courts sometimes decide questions of state law is not undesirable, but in fact is beneficial. There are many benefits inherent in our present system of federal courts as working partners with the state courts in the enforcement of rights arising under state law just as the state courts are working partners with the federal courts in the enforcement of many rights arising under federal law. The coordinate jurisdictions of the state and federal courts have permitted the migration of ideas between the two systems. Each has learned from the other. This interaction has contributed materially to constant improvement in civil and criminal procedural rules, rules of evidence, and court-administration techniques. We would inevitably impede this useful process if we were to isolate the federal courts from the state courts in terms of the kinds of cases each can hear. Without diversity cases many lawyers who now practice in both federal and state courts would have much less occasion to be in both, and the flow of ideas in each direction would materially diminish.

A second familiar justification for diversity jurisdiction, with which we agree, is that it makes federal judicial service more attractive to the best and wisest legal minds. The quality of men and women drawn to federal judgeships will be better if the federal courts continue to deal with a broad range of questions, aided by diversity jurisdiction, rather than be restricted to an unbalanced diet heavily consisting of such federal questions as social security entitlement, immigration status, and auto theft, but lacking in the rich protein of private law. The quality of judges willing to subsist on such thin fare is likely to be lower.

But these arguments are makeweights only. They do not lie at the core. The justification, the heart of the matter, is that the availability of an alternative forum is often a "condition of justice," well worth its minor cost. Although some suggest that there is no longer any significant prejudice in state courts against out-of-state litigants, the trial lawyers of the nation know better: there is local prejudice, not only in state courts but sometimes in federal courts as well. Prejudice cannot be eliminated, but the availability of the federal forum for some cases gives litigants a choice that can be used to avoid or minimize prejudice in those cases where it is most likely to occur. And though some suggest that state juries are not different from federal juries because they are drawn from the same population, the trial lawyers of the nation know better: there are dramatic differences between one-county jury panels in state courts and district-wide (often state-wide) panels in federal courts. A fair result often depends on the ability to avoid a narrow, local bias.

In short, the availability of an alternative forum is not a bad thing but a necessary means to a fair result. A theoretical judicial system in a theoretical monolithic society might not need alternatives. But justice is not an abstraction. We deal with a real system in a real, complex, pluralistic society; and in that real world there is prejudice. The concurrent availability of a federal forum is often the only bulwark against that prejudice.

If the cost of maintaining diversity jurisdiction (as a bulwark against prejudice, and as a beneficial element of the judicial system for the other reasons so often stated) were enormous, one might reasonably consider abolishing it—although justice ought not be rationed. And it is clearly on the ground of cost, of burden, that the abolitionists stand. One seeks in vain for serious criticism of the handling of diversity cases, other than that in the aggregate they represent some unnecessary burden on the federal courts that could be removed by statute. On the whole, there seems general satisfaction with the way in which diversity cases are handled, provided that docket delays are not intolerable. Even concern over such matters as technical jurisdictional questions is seldom directed to quality of results but rather to the burden imposed. The problem always comes down to the question of judicial resources; and the response of the abolitionists to court congestion is not to increase the resources but to say that diversity jurisdiction should be jettisoned to lighten the load.

Although about a fourth of civil filings in the federal district courts are diversity cases, Mr. Meador's office in the Department of Justice calculates the cost of diversity jurisdiction at a mere nine million dollars. [Testimony of Daniel J. Meador before this Committee on March 21, 1979, at p. 4.] That figure is barely more than two percent of the 1977 expenditures for the entire federal judicial branch, which were themselves less than one-tenth of one percent of total federal expenditures. The dollar cost of diversity jurisdiction is de minimis, both relatively and absolutely. If diversity jurisdiction were of only marginal utility it still might be justified at that small cost. What we have, however, is an element of the citizen's access to justice with deep historical roots, with current justification, and with overwhelming support of the practicing lawyers of the fifty states. It is almost unthinkable that we should be considering its abolition when the cost is so slight.

The problem to which we all are addressing ourselves is, roughly stated, court congestion. It is not the fault of diversity jurisdiction, however, that many federal courts are crowded. Lawyers and their clients have not increased their reliance on diversity jurisdiction. Indeed the percentage of total caseload in the federal courts consisting of diversity cases has not increased. Congestion in the federal courts comes from the increased criminal caseload, from the statutory creation of new federal causes of action, from the geometric increase in controversy that comes with increased population, and, not least, from the increasing litigiousness of the American public and their government—what someone has called "hyperlexis." All of these things have increased federal judicial business, and only last year did the Congress begin to staff the courts in anything like an adequate way. But the problem, we cannot over-emphasize, has not come from a quixotic or mercenary increase in reliance on diversity jurisdiction.

The solution to the problem is not, we insist, to limit the public's access to the system by reducing the scope of its jurisdiction when that jurisdiction is serving a useful purpose in our society. The most obvious solution is to increase the capacity of the system as the 95th Congress did in authorizing additional court of appeals and district court judgeships. Another possibility is to improve the efficiency of the system, illustratively by measures now under study: experimentation with compulsory arbitration for certain kinds of cases, enlargement of magistrates' jurisdiction, reduction of the abuse of civil discovery procedures, and the like. The American Bar Association and its Litigation Section have been in the forefront of support for these studies and improvements. Other adjustments and improvements can and should be made; and we commit ourselves to earnest and principled service in the cause of that improvement. But we unqualifiedly oppose the Procrustean solution offered by Senate Bill 679 that would cut off from the federal courts a category of litigants because they exceed a preconceived notion of the capacity of the courts.

The argument that diversity cases should be shifted from the federal courts, which are overburdened, to the state courts, which can easily absorb them because of the state systems' collective larger capacity, is an inaccurate over-

simplification. Some federal district courts are not overburdened at all. Some state courts are so overburdened that it takes years to get a case to trial.

Some people have advocated curtailing diversity jurisdiction by legislation that would deny a plaintiff access to any federal district court in the state of which he is a citizen. They argue that a plaintiff suing in his own state cannot be said to need a federal court for the purpose of avoiding local prejudice, so there is no reason for diversity jurisdiction. This kind of change would have some highly undesirable consequences. Its practical effect would be to deprive the injured individual who has a claim against a national corporation (incorporated and having its principal place of business in another state) of access to the federal court in his home state even though he may prefer that court because he can get his case to trial there in six months or a year rather than the five years it will take in his state court. His alternative, if he can afford it, would be to start his suit in a federal court in another state. Some litigants would be able to do that. In those cases the only accomplishment will have been to increase the cost of litigation. That is something we deplore. Therefore, the American Bar Association opposes the enactment of any legislation that would eliminate the right of a resident plaintiff to bring a diversity action.

We call to your attention yet one more serious disadvantage that would result from either abolishing or curtailing diversity jurisdiction. We would lose the machinery now available, under section 1407 of the Judicial Code (28 U.S.C. § 1407), for pretrial consolidation in one district court of multidistrict litigation involving mass disasters, such as airline crashes, when diversity is the only basis for federal jurisdiction.

The legal profession is almost unanimous in opposing the abolition of diversity jurisdiction. Congressman Kastenmeier, appearing before a subcommittee of this Committee last year, charged that the profession's position is one of self-interest. Attributing self-interest to lawyers who favor diversity jurisdiction overlooks the point that it is the citizen-client whose interests are at stake and who wants to use the federal courts. The fact that the lawyer has the technical knowledge on which the client relies should not obscure the fact that the lawyer is merely an attorney, an agent, one acting for another. It will not wash to charge the legal profession with purely, or even predominantly, self-interest. We are satisfied that we are acting in the public interest. We think it infinitely sounder public policy to fund and administer the necessary judicial paraphernalia to meet a strongly perceived need than to eliminate from the courts a whole class of litigation because some of those courts have become crowded. It is more important to meet the need than to adjust the problem to fit the answer.

Moreover, opposition is not limited to the organized bar. Professor James William Moore, the dean of authorities in the United States on federal courts, procedure and jurisdiction, has long opposed suggestions for the abolition of diversity jurisdiction. He has written on the subject in his widely respected treatise (1 Moore, Federal Practice ¶ 0.71 [3.—2] (2d ed. 1978)):

"The Constitution envisages a working partnership between the state and federal courts under which each forum may enforce the law of the other sovereign whenever it is deemed appropriate. . . . The whittling away or surrender of diversity jurisdiction which serves a legitimate function under the Constitution, only weakens the federal system under which we have long prospered and, with fair success, have done justice between disputants."

The present system of coordinate federal and state jurisdictions has been an important part of our federalism that we should not lightly abandon. No one has yet come forward even to assert, much less demonstrate, that diversity jurisdiction, which had its genesis in the Constitution and has been with us ever since the first Judiciary Act in 1789 (1 Stat. 73), has ever resulted in any injustice to any litigant. For the reasons we have discussed, we believe that abolishing that jurisdiction would have a serious, adverse effect on the administration of justice in the United States.

This completes our formal statement. Mr. Shepherd, Mr. Mullinix and I will be pleased to respond to any questions you may have.

PREPARED STATEMENT OF ROBERT BEGAM

My name is Robert G. Begam and I am a practicing trial lawyer in Phoenix, Arizona. I appear before the Committee today on behalf of the Association of

Trial Lawyers of America, of which I am a past president. With me is Howard Specter of Pittsburgh. Howard is the Chairman of the ATLA National Affairs Department.

ATLA is a national bar association with over 34,000 members, consisting of practicing trial attorneys, as well as judges, law professors and law student members, who are interested in improving the litigation and dispute-resolving process in this country. Trial Lawyer Association members, for the most part, represent individuals who are injured—consumers usually—rather than corporate or insurance company interests.

Let me say at the outset that it is a great privilege for me to be testifying before the Senate Judiciary Committee and to be speaking for the trial bar in this particular matter. ATLA welcomes the interest demonstrated by this venerable Committee, your sister Committee in the House, and the entire Congress in searching for solutions to the overload, to the extent to which it exists, in the Federal court system. Since our clients are, generally, plaintiffs in civil law suits, it goes without saying that our clients and the members of my Association are the last persons who would be indifferent to court congestion and delays in getting to trial in any court. We and our clients cannot profit by delay.

The renewed inquiry into whether the abolition of diversity of citizenship jurisdiction of the Federal courts is an appropriate or advisable step is viewed with some apprehension by ATLA. However, this resumed effort demonstrates a recognition that abolition of diversity jurisdiction is a serious step indeed; a step to be taken only after clear and convincing evidence has been offered proving beyond any doubt that the system which has served us well for the past 200 years is now superfluous.

The burden of proof imposed on those who would abolish diversity jurisdiction is enormous and it is, in fact, theirs. The drive for abolition, or any legislation for that matter, can sometimes become habit-forming; proceeding by inertia alone, heedless of major changes in the climate which led to its rise. ATLA hopes this Committee will re-examine all the evidence and premises on which the habit of seeking the abolition of diversity could otherwise be built. The Committee procedure for examining diversity in this Congress should reflect a tabula rasa. We anticipate that no preconceived opinions will impede your inquiry.

THE STRUCTURE OF AMERICAN JUSTICE

Plato has said that one of the true measures of a civilization is the system it devises for resolving human conflicts. If Plato was right, and we think he was, the civilized society which we have created in the United States measures up very well indeed. Without question, we have the most comprehensive system of justice which human history has ever evolved—a complex of fact-finding and law-interpreting bodies, administrative and judicial, public and private. On the public-judicial side we have city, county, State, and Federal court systems, providing our citizens with not only an appropriate forum for dispute resolution but, in many instances, with a choice of forums as well. This, we submit, is good and essential to the grand design of the system of justice which we have devised and refined over the last two centuries.

The basic function of government is to serve people with respect to those societal functions that cannot effectively or appropriately be provided by themselves or by the private sector. Basic among the various governmental services is a court system. One of the most essential services provided by the Federal government is the Federal judicial system. To the extent to which it has co-existed with State judicial systems, it has always been an alternative rather than a primary or sub-system of justice. It is in the very offering of an alternative—an optional forum for dispute resolution—that we believe the Federal government is providing its citizens with a social service of unquestionable importance and legitimacy.

Diversity of citizenship jurisdiction in the Federal courts has been the key to the alternative system. Abolish it and you destroy an avenue on which so many rights have so long relied. The Federal courts have used diversity jurisdiction since 1789. They were given this power to become a parallel, supplementary system, because it was recognized by the First Congress that there was a strong possibility of prejudice in the courts of one State against litigants from other States. Congress very early recognized that prejudice was reflected in the quality of justice dispensed by the State courts. This perception—that

prejudice may exist against litigants from out-of-State—is still valid and is still the primary pillar for providing a choice of forums. Additionally, diversity jurisdiction today not only stands as a bulwark against State court prejudice, but it has also evolved to the point where its continued existence is vital for other, equally valid, reasons of fairness.

In the 95th Congress, this Committee and its House counterpart reopened for the first time since 1971 the inquiry into whether diversity jurisdiction should be abolished. Much of the testimony in the 1977-78 hearings focused on the existence of delays and backlogs in the Federal courts. Comparatively little testimony, it is fair to say, explored the parallel circumstances of the various State court systems. Yet, on the basis of this incomplete record, and on the basis of some bald assertions to the effect that the State courts could handle the volume, it was proposed and accepted by many that the alternative Federal forum should be eliminated in the name of "judicial efficiency."

We submit that the blind advocacy of "judicial efficiency," so vogueish in this and other contemporary legal debates, must be put in perspective. Court congestion is certainly not a virtue, but it may be symptomatic of a virtue—the virtue of a calm, deliberative, and thorough legal system which values the protection of human rights.

The characterization of the Federal courts as overcrowded is freely made, especially by the Federal bench and by those Federal court litigants who see diversity cases as "second-class" litigation presenting barriers to their own "first-class" causes of action. This characterization can lead to oversimplistic responses and remedies. The Chief Justice of the United States, Warren E. Burger, has time and again maintained that the Federal courts are inefficient and jam-packed. His remedy, sometimes proposed, other times imposed, is to totally deny certain litigants access to the Federal arena of justice. This approach of closing the courthouse door, if carried to its extreme, either through court rulings or legislation such as S. 679, carries with it the seeds of the destruction of the American system of justice as we have come to know it; all in the drive for efficiency. A noted commentator has written:

"The courts must grow and adjust to people's need to use them; people's rights should not be compromised or restricted in order to adjust to the courts' problems. Never should meritorious laws or legislation be conditioned by any predicted added use. The two are separate problems to be considered separately."

FEDERAL COURT WORKLOAD

This Committee has heard over the past two years, and doubtless will hear again, a litany of testimony from respected Federal jurists on how the Federal courts are bursting at the seams with cases. This certainly cannot be denied for some of the 94 districts, especially in the urban centers. The story, however, is not so one-sided. For example, one Federal judge, in a statement given during the last Congress to a Subcommittee of the House Judiciary Committee on the subject of whether to split his circuit and create additional judgeships wrote this about the burdens on the Federal bench:

Item.—"Judges are overworked." I do not think so. I know none who has a taste for golf or foreign tours who has had to give up either one. . . . My tastes happen to run to hunting and fishing and I have bagged more game and strung more fish in the four years I've been on the bench than in my 20 years in the practice of law. I work about a 40-hour week, occasionally coming in to check the mail on Saturdays, and less frequently take some work home to do in the evenings. I am absolutely current and have no delinquent matters to my charge.

To be sure, some courts are crowded and, to be sure, delays exist. But the underlying cause of congestion and postponements must be individually and calmly examined. More information is required than just the bare facts of how many of the Federal civil cases are diversity cases, what percentages go to trial, and how long they take to try. Old but threshold questions, such as the true impact of these cases on the over-burdened State courts in urban centers, have yet to be addressed. Most importantly, however, major legislative changes in the judicial workplace must be analyzed. These changes, both enacted and likely to be enacted, carry with them a collective impact on the level of the charge given to the Federal courts, potentially of such significance that it could render obsolete judgments made as recently as one year ago.

The most significant of these legislative measures is, of course, the additional judgeship bill. ATLA testified in 1977-78 that it would not engage in blindly

oversimplifying its position by saying "All we really need is more judges." The fact cannot be ignored, however, that 117 new Federal trial judges will make a substantial dent in any existing Federal backlog. Further, despite any vicissitude of the political process, it is likely that most of these new judgeships were placed, upon careful analysis, where they were needed. This remedy for the burdens placed on the Federal courts denies no rights and attacks the problem at its core. It has been, for that reason, a thoroughly acceptable solution and ATLA applauds the Congress for it.

Another acceptable approach to solving the crowded calendars in Federal courts lies in analyzing the charges given the courts to determine whether one particular type of case is creating specialized problems which can be solved with specialized treatment. Use a scalpel rather than a meat axe. The 95th Congress, recognizing the value of a *seriatim* approach, provided great potential for relieving Federal court burdens by enacting its reform of the procedures by which Federal courts handle bankruptcy and reorganization cases. Another example of the specialized approach can be seen in the Antitrust Procedural Improvements Act, recently ordered reported by this Committee. This measure carries potential for unlogging many of our urban, commercial law-oriented Federal trial courts; again without a sweeping denial of rights.

ATLA encourages Congress to continue its search for fair and even-handed methods and procedures for combatting delay and congestion, in both the Federal and State courts. We are on record as supporting the magistrates bill and we also would support increasing the jurisdictional amount for diversity cases, if the magistrate system could take care of the smaller cases adequately. We think it could; the two go hand-in-hand.

For many years we have supported arbitration in smaller medical malpractice and product liability cases, as opposed to other, more complicated civil litigation matters. We have also urged that improvements in mandatory pre-trial conferences, in mandatory settlement conferences, and in other procedural methods of handling the delay problem be implemented.

Other bills which propose narrowly defined relief for the Federal courts are also under consideration by this Committee; proposals such as re-evaluating those Congressional enactments which require that causes of action created therein be given priority treatment by the courts, as well as proposals changing discovery procedures, modifying the Speedy Trial Act, and the other concepts proposed by the Justice Department aimed at improving judicial efficiency. Many of these are receiving the careful study which they are due.

The fact is, simply stated, that legislation has already been approved reducing the mandate of the Federal courts and increasing the courts' capacity to deal with it. The Federal court charge stands to be further reduced by future Congressional enactments, all without the drastic encroachment on human and legal rights represented by the instant bill. To those who last year said that they understood our position but felt that the need to relieve the Federal courts of some of their burden was paramount, we say that the whole question of the extent of that burden must be re-examined.

STATE COURT BURDENS

The question is asked: "Can the State courts handle all the diversity cases?" The question goes both to the number of cases and to the nature of the cases. In the 95th Congress, there was a troubling tendency on the part of those advocating abolition of diversity to accept unquestioningly the assertion by the Conference of Chief Justices that the State court systems are "able and willing" to assume all or part of the diversity jurisdiction presently exercised by the Federal courts.

It would be presumptuous of ATLA to look behind that resolution to examine the degree to which the statistics in question were explored and debated, and by whom. Two observations can be made, however: (1) The sweeping generality of the statement, taking in all 50 States in one brave "can do" suggests a certain lack of hard statistical examination; and (2) Could the Conference, realistically, respond in any other way?

The State courts are emerging as a national organization and have taken on staff and projects in dramatic number. The point is, the Conference is in neither the position nor the state of mind to shrink from any suggestion of increased responsibility for State courts; and shrink it has not. Indeed, the chief spokes-

man for the Conference in this area of Federal-State relations has said that he wants the diversity cases turned over to the States without regard to whether the Federal courts are burdened by them at all. (He also advocates the return of Federal-question cases to the State courts.) Other proponents of abolishing diversity jurisdiction claim to understand, and even sympathize with, the value which injured plaintiffs place on the choice of bringing suit in Federal court; the choice must be revoked, they say, to ease the burden on the Federal bench and other Federal litigants. The Conference of Chief Justices, apparently, does not share this view.

ATLA wishes it could refer this Committee to testimony from State judges as frequently as the proponents of abolition can refer to the testimony from Federal judges and State Supreme Court Chief Justices or administrators. The fact is that the record falls short in this regard. The opinion of State trial judges on whether there is room on the trial calendars for diversity cases is, up to now, unavailable. The bare assertion by the Conference of Chief Justices seems to satisfy the proponents. I personally do not know any State trial judges who are prepared to embrace diversity cases with any degree of enthusiasm.

No one really knows what the actual impact of transferring the diversity cases will be on the State courts. The evidence consists primarily of the long division showing that the number of diversity cases divided by the number of State trial judges yields an apparently reasonable quotient.

The "average case load" approach completely ignores not only the differences between States but the differences within each State as well. We know that litigation tends to cluster around large urban population centers. Urban-center cases tends to be more complex. Metropolitan area State courts tends to be just as crowded, if not more crowded, than Federal courts which are, by and large, also in larger cities. Last year before Senator DeConcini's Subcommittee, the Conference of Chief Justices admitted that it was unaware of any statistics that would show exactly which State courts, standing by "ready, willing, and able," could be expected to receive and handle the new cases.

It should be noted that not every dollar saved by the Federal government in abolishing diversity jurisdiction would result in a dollar earned. The Conference of Chief Justices has repeatedly stated that the State courts will require Federal funds to permit them to be "ready and able" to handle diversity cases. (The willingness, while questionable at the trial level, appears to be free.) The Conference insists that the funds should have no strings attached, lest the independence of the State court system be compromised.

Since the Senate hearings of last year, the National Center for State Courts has published a study, in the Summer 1978 issue of *State Court Journal*, entitled "The Relative Impact of Diversity Cases on State Trial Courts." In that study, it is revealed that some 20 States would suffer a disproportionately high impact from the new cases. Seven States, according to the study, would be affected to the point where new judgeships would be required. Although the authors do generally endorse the Conference of Chief Justices' conclusion that diversity cases "could be handled in most instances without major additions to State judicial resources," they also call for further studies, emphasizing the need for refinement of the analysis of the impact within each State where the urban cluster problem will play such a determinative role.

Another recent publication of the National Center for State Courts (in cooperation with the National Conference of Metropolitan Courts), *Justice Delayed: The Pace of Litigation in Urban Trial Courts*, reinforces the notion that State trial courts in urban areas are already overcrowded. This report examines 21 metropolitan State courts of general jurisdiction to determine the pace of civil and criminal litigation. The study suggests that it is impossible to determine the causes of delay in trial courts and indicates that caseloads and backlogs may very well be affected by the customs of the local bench and bar as much as by anything else. The authors state:

"It is our conclusion that the speed of disposition of civil and criminal litigation in a court cannot be ascribed in any simple sense to the length of its backlog, any more than it can be explained by court size, caseload, or trial rate. Rather, both quantitative and qualitative data generated in this research strongly suggest that both speed and backlog are determined in large part by established expectations, practices, and informal rules of behavior of judges and attorneys. For want of a better term, we have called this cluster of related factors the 'local legal culture.'"

The authors tested this "local legal culture" conclusion by comparing the delay in State courts in 21 cities with the delay in Federal court in those same cities. The parallels were significant. Working with what statistics were already available, the authors compared median disposition time for all civil cases in Federal court to median disposition time for tort cases in the sister-State courts. (Median disposition time was expressed as the number of days between filing and disposition. A separate inquiry also examined the time between filing and commencement of trial for cases ending in a civil jury verdict.) In the words of the authors:

"There is striking relationship between the scales. . . . Time-to-injury trial in the two courts also tracks, although the relationship is less strong. . . . Given the considerable difference between state and federal courts in nearly all aspects of caseload, structure, and procedures, this relationship in processing times provides strong support for the existence of a local legal culture that affects the pace of civil litigation in both the state and federal courts of a community."

In this comparison, there were four cities for which the State court figures were not available, leaving 17 pairings. In 16 of these, the median disposition time for State courts exceeded that for the Federal court. We realize, of course, that "median" measurements can easily be distorted by one or a few extraordinarily delayed or expedited cases, but the disparity in some of the cities is so great as to be noteworthy nevertheless. For example, the median disposition times for Detroit are, State—788 days, Federal—274 days; for Pittsburgh, State—583 days, Federal—214 days; for Miami, State—331 days, Federal—122 days.

Another point made by the authors is the widespread public dissatisfaction with the lack of efficiency in the State courts. Fifty-seven per cent (57%) of the public is reported to believe "efficiency in the courts" to be a serious national problem, an expression of greater public concern than for pollution, education, racial problems, even the threat of war." (The statement has reference to State and local courts.)

While Justice Delayed may not conclusively prove that urban State trial courts are already backlogged and slower than the local Federal court in the same locale, it does suggest it and rather strongly. The figures also suggest that the existing burdens on State courts must be fully looked at before diversity jurisdiction is abolished. The impact of diversity cases on State trial courts may wind up crippling an already limping horse. "Judicial efficiency" at the Federal level will be of little consolation if it is achieved by strangling our State court system.

If the proponents of abolition of diversity are truly interested in amassing conclusive statistical evidence before deciding whether to tamper with age-old rights, then this Committee is in an unique position to gather and carefully weigh those statistics. To ask the Senate and the Congress to abolish diversity jurisdiction on a less complete basis would run counter to the hard-earned reputation of this Committee for carefully fashioned legislation.

PREJUDICIAL FACTORS; JUSTICE FACTORS

ATLA's opposition to abolishing diversity jurisdiction is not based solely upon the question of whether the diversity cases are too much for either the Federal or State courts to handle. Earlier, I made reference to the unique system of American justice which offers a choice of forum to those who need it. Trial lawyers value this choice for their clients for a number of reasons.

Diversity jurisdiction was created, we believe, to permit out-of-State litigants the opportunity to avoid discrimination founded upon in-State bias or prejudice. I submit that, despite what you have been assured by some, prejudice against an out-of-Stater lives on and strongly. A U.S. district court judge from the Western District of Texas writes:

"It is still my opinion that a Brooklyn Yankee driving a Cadillac automobile who has a serious accident with a Boerne farmer of German descent who is driving a pick-up truck cannot expect a fair trial in Comal County (and I say this from actual experience) whether he be a plaintiff or a defendant."

Anyone having occasion to try diversity cases can draw upon his experience for similar examples. One problem, of course, is the difficulty in isolating the home-State prejudice from other prejudices which may be subscribed to by those in the locale of the court. Take the above example. Was the Comal County jury anti-Yankee or just anti-Cadillac, pro-pick-up, or perhaps anti-non-German descent? When a Harlem-born black doctor sues the sheriff's son in a rural State

court in the South, are his chances of getting a fair trial diminished because he is from New York, because he is black, or because he is a doctor?

Diversity jurisdiction has evolved to the point where it now offers its protection to those who might otherwise suffer from many kinds of prejudice. It is true, as has been pointed out in statements opposing the position of ATLA, that these protections are available only to those litigants "fortunate" enough to be involved in cases with the requisite diversity of citizenship. What this means is that litigants not so fortunate do not have the same protections and thus may suffer injustice. Is the solution to this disparity the removal of the option from those who have it in order to create equal injustice? I think not.

Fortunately, these "justice" factors do not press in large volume on in-State plaintiffs, so preserving diversity for in-State plaintiffs will not have a heavy impact on case-load; but they recur often enough to deserve consideration. Last year, I testified before both the House and Senate Judiciary Committees on diversity. At that time, I offered three examples of cases where diversity protected against prejudice based on something other than the State of residence of the plaintiff. Although no other witnesses addressed these examples, I think it is important for those who would deprive plaintiffs of diversity jurisdiction to know exactly what they are doing. The three examples are:

(1) A Navajo couple is killed in a highway accident in northern Arizona with an interstate tractor-trailer registered in Texas. Three minor children survive. They have the choice, now, between a State court action in Holbrook, Arizona, with an all-white rural jury, and a Federal jury action in Phoenix.

(2) A student at Northern Arizona University has established residence in Flagstaff to participate in local political affairs. He loses an eye when a beer bottle manufactured by a Colorado company explodes. His choice is between a Flagstaff jury before whom he has a controversial reputation, a jury not overly sympathetic to college students anyway, and a Federal jury in Phoenix.

(3) There are, in Arizona, surviving relatives of eight people killed in the KLM-Pan Am crash in Tenerife, Canary Islands. Under present law they can sue in Federal court in Arizona and obtain the benefits of consolidation under multi-district complex litigation rules. If deprived of the diversity option, they would have to try an isolated State court action, or go to Federal court in New York to file suit, with significant extra expense and legal fees.

The above examples are taken from the actual experience of one trial lawyer practicing in Arizona. I am confident that all active practitioners who oppose limiting diversity could provide the Committee with many such examples.

Delay is another factor to be considered. It certainly appears to be the primary concern stressed by the proponents of the legislation.

In some jurisdictions, such as my State of Arizona, there is now more delay on the Federal side than on the State side. This is a relatively recent development. In 1971, when extensive hearings were conducted by Senator Burdick on this subject, the opposite was true. In other States there was and still is considerably more delay in State courts than in Federal courts, as the previously cited reports of the National Center for State Courts suggest. Given a choice of forums, there is a natural tendency for a plaintiff to stand in the shorter line, absent some countervailing consideration of profound impact. An Arizona plaintiff seeking redress for a wrong is not likely to wait 3 or 4 years for a Federal trial when he can get to State court in 12 to 16 months, unless he would be seriously prejudiced in the available State courthouse by other factors.

With the present system of "choice of forum," differences in delay time between State and Federal court tend to be self-adjusting. History demonstrates that these differences can be cyclical. Ten years ago in Arizona, by way of example, plaintiffs chose Federal court whenever possible because there was less congestion. This movement to the Federal courts, along with an expanded criminal load and a once-adequate number of judges, has converted Federal courts in Phoenix from current to congested. Plaintiffs now invariably choose State courts because they are faster.

There are other justice factors, to be sure. The mix of jurors in Federal court is generally the same as that in urban State courts but vastly superior to that in rural State courts. The whole balancing process of the jury deliberations is lost when everyone on the jury has a similar background, training, and outlook. Not every State is as ready as Arizona to embrace the progressive Federal Rules of Evidence and Procedure. There is substantial opinion that the State courts have a

long way to go before they can tackle the complex multi-State litigation which is handled so well in the Federal system. This is not meant to denigrate any State or State court system. The fact simply exists that the Federal courts can sometimes offer protections to those who need them which the State courts cannot.

THE DANGERS OF AN OVERSPECIALIZED FEDERAL BAR

Another reason for trial bar opposition may be overlooked by non-practitioners. We trial lawyers see each other all the time in both State and Federal court. Quite clearly, a drastic reduction of diversity cases would lead to a Federal specialty bar. This would be regrettable. In most States, as a practical matter, both the Federal and State systems have benefitted from the free circulation of lawyers and legal ideas between the two. In my own State of Arizona, which has always been among the first in the Nation to adopt Federal rules, there has always been considerable cross-fertilization with respect to desirable procedural practices. The trial bar in my State regularly practices in both the Federal and State courts. Limiting diversity jurisdiction would isolate the Federal bar and damage the healthy exchange which presently exists.

OPPOSITION TO ABOLITION OF DIVERSITY

Opposition to the idea of total abolition of diversity jurisdiction is shared by most legal practitioners. ATLA, primarily the plaintiff's bar, is joined in its opposition to a total ban on diversity by many lawyers in the defense community. The Defense Research Institute, in a statement given to the Senate Subcommittee on Improvements in Judicial Machinery, in 1978, declared its opposition to a total ban on diversity. The American College of Trial Lawyers, as evidenced by the testimony of Erwin Griswold before the Senate in 1978, also failed to support a total abolition of diversity jurisdiction. Industry lawyers, such as railroad counsel, are strongly against abolition.

While the Association of Trial Lawyers cannot claim to speak for every "card-carrying" member of the bar, we believe our position accurately reflects the views of most of the lawyers in the country engaged in the practice of tort or contract trial law (statistics show that there are as many contract cases filed under diversity as tort cases).

The reasons for this unanimous trial bar opposition should not be dismissed by the Senate Judiciary Committee, or anyone else, as simple "pocketbook protection." Lawyers, at least most of the ones I practice with, are deeply concerned with protecting the interests of their clients. It should disturb this Committee, and any investigator, that both the plaintiff and defense bars oppose total abolition of diversity—the pending proposal. Opposition to the bill by the bar stems from a concern to provide our clients, both plaintiffs and defendants, with a fair tribunal for resolving disputes.

Besides the trial bar, almost all State and local bar associations are overwhelmingly opposed to abolishing diversity jurisdiction. In a survey reprinted in the Senate hearings of last year, no State bar supported total abolition and only 2 major local bars voiced support of the concept.

This unanimity has recently been reinforced, and dramatically so. I refer to the news of about a month ago, that the governing body of the Montana Bar Association adopted a resolution in opposition to the ideas of abolishing diversity jurisdiction. Montana's was the 50th State bar to do so, either by full board resolution or by committee action when full board action is not permitted. In addition, of course, the American Bar Association opposes S. 679. This type of display of common feeling, from coast to coast, taking into account all possible variations on local sentiment, is and must be reserved for those issues of human rights so basic and true as to be beyond question.

Opposition by bar associations to abolition of diversity is premised upon a knowledge of the prevailing conditions in the courts, both State and Federal, in the particular jurisdiction. For example, in an article reprinted in the 1977-78 Senate hearings, the President of the District of Columbia Bar noted that a bill totally abolishing diversity jurisdiction would shift some 400 or more cases from a relatively backlog-free Federal District Court to the already overcrowded docket of the Superior Court.

The lack of support for this bill by almost the entire organized bar of the country is evidence that ATLA does not stand alone in opposition to the total

ban on diversity. We are comforted by the broad-based opposition to this bill because it refutes the criticism that opposition to S. 679 is just from a tiny handful of personal injury lawyers.

Finally, this Committee should recognize that this is an issue in which only lawyers are likely to have an interest. Just because no other segment of the public has voiced opposition to this bill, that is not an indication of general widespread support for S. 679. Citizens groups are not likely to understand the subtle implications of diversity jurisdiction. In this kind of debate, lawyers have a responsibility to speak out for that future client who, although presently unaware of his prospective plight, will be adversely affected if diversity is abolished. If Frankfurter was right in saying that "[t]he history of liberty has largely been the history of observance of procedural rights. . . ." the organized bar is meeting its obligation to the entire citizenry by fighting for the retention of diversity. Abolishing this jurisdictional right may not stir much emotional public debate, but this does not mean that its loss will not profoundly and detrimentally impact upon those of our citizens who find themselves in legal dispute.

SUMMATION

In conclusion, Mr. Chairman, I want to reiterate the concerns of the Association of Trial Lawyers of America about S. 679 and any bill abolishing or curtailing Federal diversity jurisdiction. The Association believes diversity jurisdiction preserves valuable rights for those citizens who are forced to seek redress in the courts.

Congress has an obligation to consider carefully the complete impact of this bill before it is enacted. Most people would agree that those who propose a change in the law should bear the burden of proof for making that change. The Association of Trial Lawyers of America has heard no substantial reason advanced for limiting diversity jurisdiction except the chance of lessening delay in the Federal courts, and a desire to lighten caseloads. We submit that the burden of proof has not been met. Citizens' rights should not be blindly sacrificed to the goal of "judicial efficiency." The right to seek redress in the fairest forum is a right worthy of retention by this and any other Congress. Precipitous action should be avoided.

Thank you for the opportunity to appear today, Mr. Chairman and Members of the Committee, and I welcome any questions.

Senator METZENBAUM. Professor Morrison, can you give us a 3-minute summary of your position? We will accept your entire statement for the record. It will be inserted at the conclusion of your oral testimony. I must tell you, sir, that I apologize for bringing you all the way down from Cambridge and then asking you to give it to us in 3 minutes. I don't wish to be insulting. I don't know what alternative I have. If there were another Senator present, I would ask him to take over.

STATEMENT OF PROF. ALAN MORRISON, VISITING PROFESSOR, HARVARD LAW SCHOOL

Mr. MORRISON. Senator, I appreciate your apology. I must confess in part that I have spent the previous hour and a half testifying before the Governmental Affairs Committee. So, my trip here is not entirely for the 3 minutes I will spend before you.

Senator METZENBAUM. You have given me peace of mind for the balance of the day. [Laughter.]

Mr. MORRISON. Now I hope that I can give you some convincing reasons to abolish diversity of citizenship jurisdiction.

I think John Frank of Phoenix, Ariz., one of the leading proponents of diversity, has focused the question in precisely the way I would like

to see it focused. That is away from statistics. This is what he said last year in the printed hearing, page 34:

Diversity performs a legitimate Federal service to the people of the United States. There are Federal services of varying degrees of utility and of necessity, such as giving out of seed catalogs, the highway program, school lunch program, Social Security.

I agree with him. That is precisely the question before this committee; but equally so, I wholeheartedly disagree with his solution, for it seems to me that there are far more important matters to go into the Federal courts than diversity of citizenship.

In an ideal world, Senator, we would all like to have options to be able to go to different courts. Some of the examples here of verdicts in the State court are to me, as they are to you, shocking. Unfortunately, diversity of citizenship is a luxury we can no longer afford in the Federal courts. There are simply other matters of greater pressing importance in my scheme of values.

I am aware of the benefits. They seem to me to be, certainly, benefits that no one can doubt. They just are not benefits that tip the balance in favor of diversity. Therefore, I recommend the adoption of S. 679, subject to the simultaneous adoption of other provisions for increasing access to Federal courts in other areas, some of which are already in S. 679. The first, of course, is the elimination of the \$10,000 requirement for a Federal question case. Incidentally, I see no reason for that exception for product safety matters under the Consumer Product Safety Act. It is an anachronism that made sense when there was a general Federal question, \$10,000 requirement.

Second, others have urged, before this committee and other committees, increasing access of citizens to review decisions of Federal agencies. The law of standing is outmoded. It ought to be changed. Federal courts, in many of these cases, are the only place where Federal questions can be decided. You don't have an option to go to the State court to review a decision of the Department of Transportation or the Federal Trade Commission. It simply is not possible.

Senator METZENBAUM. Professor MORRISON, do you have any trouble with the constitutionality of this bill?

Mr. MORRISON. Of abolishing diversity, no, I don't Senator. I would say, first, we are not totally going to abolish diversity because the interpleader actions are still based on diversity of citizenship jurisdiction. That would still be something. So to the extent to which the Constitution requires the Federal courts be used for some diversity cases, interpleader cases would still be in.

Second, I have proposed in my testimony a mass tort statute which I strongly urge that you adopt because those situations are not a case in which we take one case out of a Federal court and move it into a State court. If you abolish diversity entirely, you are taking cases out of Federal courts and moving them to State courts with no possibility of transfer under 28 U.S.C. 1404(a) or 1407 or other similar provisions. I propose the statute which I have annexed to my testimony to deal with that very problem.

Whatever the theoretical problem might be with abolishing diversity, and I do not see any, since I do not propose a total abolition of diversity. I see no problem in significantly cutting it back to only those

cases in which there is a legitimate Federal service performed because no State court can do that which the Federal courts can do.

Senator METZENBAUM. I did not inquire of Professor Reed and Mr. Begam, Mr. Specter or Mr. Shepherd as to whether they were concerned about the constitutionality of this legislation. If any of you are challenging its constitutionality, do you have any question about it, Professor Reed?

Dr. REED. Not I, nor Mr. Shepherd.

Mr. BEGAM. I hate to sound a note of dissent. I can't affirmatively tell you that I do, but with respect to taking away a right that has been on the books for 200 years, I am not prepared to say without taking a hard look at it.

Mr. SPECTER. There is nothing I can add to Mr. Begam's comment, with which I agree.

Senator METZENBAUM. Thank you.

Mr. MORRISON, would you wind up please?

Mr. MORRISON. Yes, I would urge the committee to look into the problem of pendent jurisdiction. There are a number of areas of Federal question jurisdiction, primarily those under the Federal Tort Claims Act in which there are often other parties who cannot now be brought into the Federal court unless there happens to be diversity. If diversity is abolished, they cannot be brought, but ought to be brought in.

I also ask the committee to give serious consideration to eliminating the problems involving absention and exhaustion of State remedies, particularly under 28 U.S.C. 1983.

If these additional benefits are brought into Federal court, in cases brought into Federal court, then I am prepared to support diversity of citizenship abolition because, in my view, they are far more important and the need for their being handled in the Federal court is far greater than is the run-of-the-mill diversity cases.

Senator METZENBAUM. As the legislation is drafted, do you support it?

Mr. MORRISON. I would support it, Senator, but I would like some additions to it.

Senator METZENBAUM. Thank you very much, Professor Morrison.
[Prepared statement of Mr. Morrison follows:]

PREPARED STATEMENT OF ALAN B. MORRISON

Mr. Chairman, members of the committee. I appreciate this opportunity to appear before you today regarding S. 679. Although I am a Visiting Professor at Harvard Law School for the 1978-79 academic year, my principal familiarity with the problems of diversity of citizenship jurisdiction derives from my position as director of Ralph Nader's Public Citizen Litigation Group, in which I served for six and a half years before going to Harvard, and to which I shall return on July 1st. Last April I had the privilege to appear before this Committee, in hearings chaired by Sen. DeConcini on this same subject, and in some sense, this testimony today is an update on my prior appearance.

In his testimony before this Committee last year, John Frank, Esq., of Phoenix, Arizona, one of the leading opponents of abolition of diversity, performed a real public service by putting the debate in terms which properly focus the issue. In the final portion of his prepared statement, he described the diversity system as one which:

"Provides a legitimate federal service to the people of the United States. There are federal services of varying degrees of utility and of necessity, such as the

giving out of seed catalogs, the highway program, the school lunch program, Social Security." (p. 34)

I agree wholeheartedly with his statement of the question presented, but equally wholeheartedly, I disagree with his resolution of it.

In an ideal world, we can agree, it would nice to have a choice of forums. Federal courts do provide a high quality of justice, and generally innovative procedures (including some advantages state courts cannot constitutionally provide). See, Note, Multi State Plaintiff Class Actions: Jurisdiction and Certification, 92 H.L.Rev. 718, 729-31 (1979). In addition, federal juries are chosen from different geographical boundaries than are state court's in many cases, and thus their outlooks may be different. Federal courts may also be better for some cases, but worse for others, or at least are perceived as such, and every lawyer likes to have a choice. I recently participated in drafting a complaint on behalf of an employee of a company which dominates the local city. His complaint is that he was fired for having blown the whistle on a variety of safety matters relating to the company's pharmaceutical products, and I would have loved to have had the option to go to the federal courts, but that option was simply not available.

The difficulty with providing all of these options is that there is only so much room in the federal courts, and thus the question becomes, in light of those limits, where does diversity sit on the relative priority scale? In Mr. Frank's terms, diversity jurisdiction is a federal service, but like the highway program, one whose time has come and gone. Just as in today's energy crunch, we should not be building roads to encourage automobile traffic, so in today's court crunch, we ought not to be opening the federal courthouse doors to diversity cases, when other more deserving lawsuits are waiting to replace diversity cases. Like the federal budget, the caseload of the federal courts is not infinitely expandable, and in my scheme of values, Congress ought to, with the exceptions noted below, abolish diversity and replace it with other actions which have a higher claim to the federal courts.

Why do I favor the abolition of diversity? Let me say at the outset, that there are no right or wrong answers on this issue: rather, it is a question of relative benefits. Thus, in examining the testimony urging the retention of diversity, I found that the reasons given were not wrong, but simply insufficient to convince me of their merit. I agree that choice is desirable, that many federal judges are superior to state judges, that many, but not all, federal procedures are better, and that local prejudice may be less in federal than in state courts. I am also aware of the argument regarding cross-fertilization and elitism of federal practice and find that they have some merit. Nonetheless, I am not persuaded that those reasons justify making nearly 25 percent of the business of federal courts diversity suits, which can also be brought in the state court, across the street, around the corner, or a few miles away.

However, there are two parts to my position, the second being, replacing or diversity cases with other litigation which I consider to have a higher claim to a place in the federal courts than diversity suits. The first "substitute" is contained in Section 2(a) of S. 679 which would eliminate the \$10,000 requirement in all federal question cases. The need for such an amendment is particularly great in light of the Supreme Court's recent decision in *Chapman v. Houston Welfare Rights Organization*, — U.S. — 47 U.S.L.W. 4528 (May 14, 1979), in which the Court concluded that no jurisdiction would lie under 28 U.S.C. § 1343 based on a claim that a state social security rule was in conflict with a federal rule on the theory that the complaint did not state a federal cause of action within the meaning of 42 U.S.C. § 1983 or the Social Security Act. But as former Federal District Judge Harold Tyler pointed out in wrestling with the question of valuation under Section 1331, "... 'priceless' does not necessarily mean 'worthless'..." *Fifth Avenue Peace Parade v. Hoover*, 327 F. Supp. 238, 242 (S.D.N.Y. 1971). There is, I suggest, simply no place for valuing any federal rights, particularly constitutional rights, and the efforts to do so are both time consuming to litigants and the courts, and ultimately counterproductive. On the other hand, I do not understand why S. 679 in Section 3(a) retains the \$10,000 requirement for Consumer Product Safety Act suits, except those against the United States. Once \$10,000 is eliminated for all other controversies, I see no reason why it should be retained for these. As a matter of policy, why are small suits involving product safety any less appropriate for federal courts than similar actions under the Securities Laws, Truth-in-Lending Act, or the Clayton Act? I see no difference, and urge the Committee to modify Section 3(a) accordingly.

Second, I urge the Committee to enact provisions liberalizing standing in the federal courts. This Committee and others have heard considerable testimony in the past, and I understand will hear further testimony in the future, on the need for Congressional action to rectify overly restrictive decisions that the courts have issued, often at the urging of the Department of Justice. I do not propose to discuss this issue today, but I want it made clear that my support for abolition of diversity is very much dependent upon its replacement with other important cases, and those which have been rejected due to outmoded notions of standing are among the highest priority on my list.

Third, Congress ought to clarify and perhaps expand the doctrine of pendent jurisdiction as it relates to federal question cases. The Supreme Court has recently narrowed the scope of the doctrine, primarily at it relates to pendent parties and not pendent claims, seeing in Congress' narrow definition of diversity jurisdiction, an intent to deny federal jurisdiction to claims arising out of the same transaction or occurrence as federal claims, but lacking federal question jurisdiction. See, *Owen Equipment and Erection Co. v. Kroger*, 437 U.S. 365 (1978), and *Aldinger v. Howard*, 427 U.S. 1 (1976). Duke University Law Professor Thomas D. Rowe, a former member of this Committee's staff, has written an excellent article in which he argues, quite persuasively I believe, that the rationale of those cases ought not to apply when jurisdiction is founded on federal questions rather than diversity. See, "Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms," 92 H.L. Rev. 963 (1979). While I believe that the courts will agree with his analysis, undoubtedly much litigation will be required before the issues are finally resolved. I would prefer to see Congress step in and add a provision to title 28, specifically granting pendent jurisdiction over both parties and claims, where the standards for pendent jurisdiction set forth in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966) are met.¹

One of the principal areas where such a statute could eliminate considerable confusion is under the Federal Tort Claims Act for those cases in which the claim itself against the United States is founded on state law. In such cases, the government has steadfastly resisted attempts by plaintiffs to bring in all potential defendants in one forum and to have all related questions finally decided there. One recent case, *Ortiz v. United States* — F.2d. — (1st Cir. No. 78-1321, decided March 30, 1979), ultimately upheld the right of plaintiff to amend his complaint to sue the third party defendant which the United States itself had impleaded, but at a considerable cost in terms of time and effort to the parties and significant expenditure of judicial resources. That kind of litigation of that kind of issue simply has no place in the federal courts today.

Fourth, the Supreme Court has recently expanded the use of the doctrine of exhaustion and abstention to require federal civil rights plaintiffs to litigate their cases in state courts, no matter how great their need for federal forums, and how unlikely their chances of vindication in state courts. To the extent that these decisions can be justified on the grounds of overcrowded federal courts, the elimination of diversity and the addition of one hundred and ten new federal district judges by the 1978 Omnibus Judge Act, should reverse that trend, but I fear that the Supreme Court will not do so alone. Therefore, Congress must step in to be sure that important federal rights are not lost by exhaustion of plaintiffs, who are thus deprived of their rights while litigating for what may be many years in hostile state courts.

Fifth, one of the ironies of diversity, with its intent to protect against local prejudice, is that it fails to perform that function in many cases, such as libel actions against out of state media, because of the rule of complete diversity. Thus, a local official can preclude removal against a major newspaper or national network by joining as a defendant a "publisher" of that libel in the person of the local news dealer or network outlet. However, as the testimony of F.A.O. Schwarz on behalf of Time, Inc., and others before this Committee last year demonstrated, the principal issue in such a case is often a federal one—that of privilege under the First Amendment—and yet it is only a federal complaint, not a defense, that entitles a case to be removed from a state court.

Although I have not considered fully all of the ramifications of allowing removal of federal defenses, I generally support permitting removal where the federal defense will, if successful, be dispositive of the outcome of the litigation. It should not matter, for purposes of federal jurisdiction, whether it is the

¹ Professor Rowe endorses such a statute. See, 92 H.L.Rev. at 1002-1004.

plaintiff or the defendant that is relying on federal law, since reasons of uniformity and experience in federal questions apply regardless of party alignment. In that regard, the Committee should carefully consider the possibility of denying removal in a defendant's home jurisdiction, and should also consider measures to avoid the possibility of collusive defenses, particularly for anti-trust claims arising in contract litigation.

There is one other important class of cases in which jurisdiction is based on diversity that does meet the standard of a "legitimate federal service", primarily because its presence in federal court is not simply the result of transferring a single, two-party claim from the state to the federal system because of the preference of one or more of the parties. This class of cases should be in federal courts because there are distinct advantages in having them litigated in the federal system, and no state system can provide similar benefits. I refer to those cases, principally mass accidents such as the recent crash of the DC-10 at O'Hare Airport, but also including product liability cases, such as the exploding gas tanks on the Ford Pintos of the early 1970's which do not provide independent federal question jurisdiction, but which ought to be consolidated in one forum, at least for pre-trial and possibly for trial purposes. Those cases, unless all plaintiffs choose to file them in a single state court, could not be consolidated if diversity were completely abolished, since there is no procedure allowing interstate transfer of related cases, and in many jurisdictions, even intrastate transfer is difficult if not impossible. By providing diversity jurisdiction in the federal courts in those cases, Congress would be providing a service function analogous to that provided by 28 U.S.C. § 1335 which grants a district court jurisdiction in interpleader actions where there is minimal diversity of citizenship.

In order to remedy the problem created by multiple party actions in multiple jurisdictions, I have drafted an Amendment to Title 28, which I have designated Section 1332a and written as a separate section, so that its effects can easily be seen. Because my testimony last year explained both the rationale for such a provision, the operation and purposes of the various portions of it, and the need for a corresponding amendment to the removal statute, I will not repeat them today. As I indicated last year, the details of the proposals as to the number of claimants and amounts involved are quite flexible; it is the principle about which I am concerned. A copy of that proposed amendment, which was apparently not included as part of the hearing record last year, although it was appended to my written statement at that time, is attached to this statement, and I ask that it be included in his record.

The time of the federal courts is a scarce commodity, and it is the duty of this Committee to apportion it among the most deserving cases. Lawsuits founded on diversity long held claim to a portion of the time of the federal courts, but the reasons for that claim are no longer of sufficient importance to warrant the continuation of a general grant of diversity jurisdiction. There are simply too many other competing claims, which, at least in my judgment, ought to have higher priority in the federal courts. Accordingly, on the assumption that Congress will, at the same time as it abolishes the general grant of diversity jurisdiction, enact the substitutes for it which I have outlined above, I support S. 679's abolition of diversity. I stand ready and willing to assist the Committee in any way possible in its important work in this area.

Thank you very much.

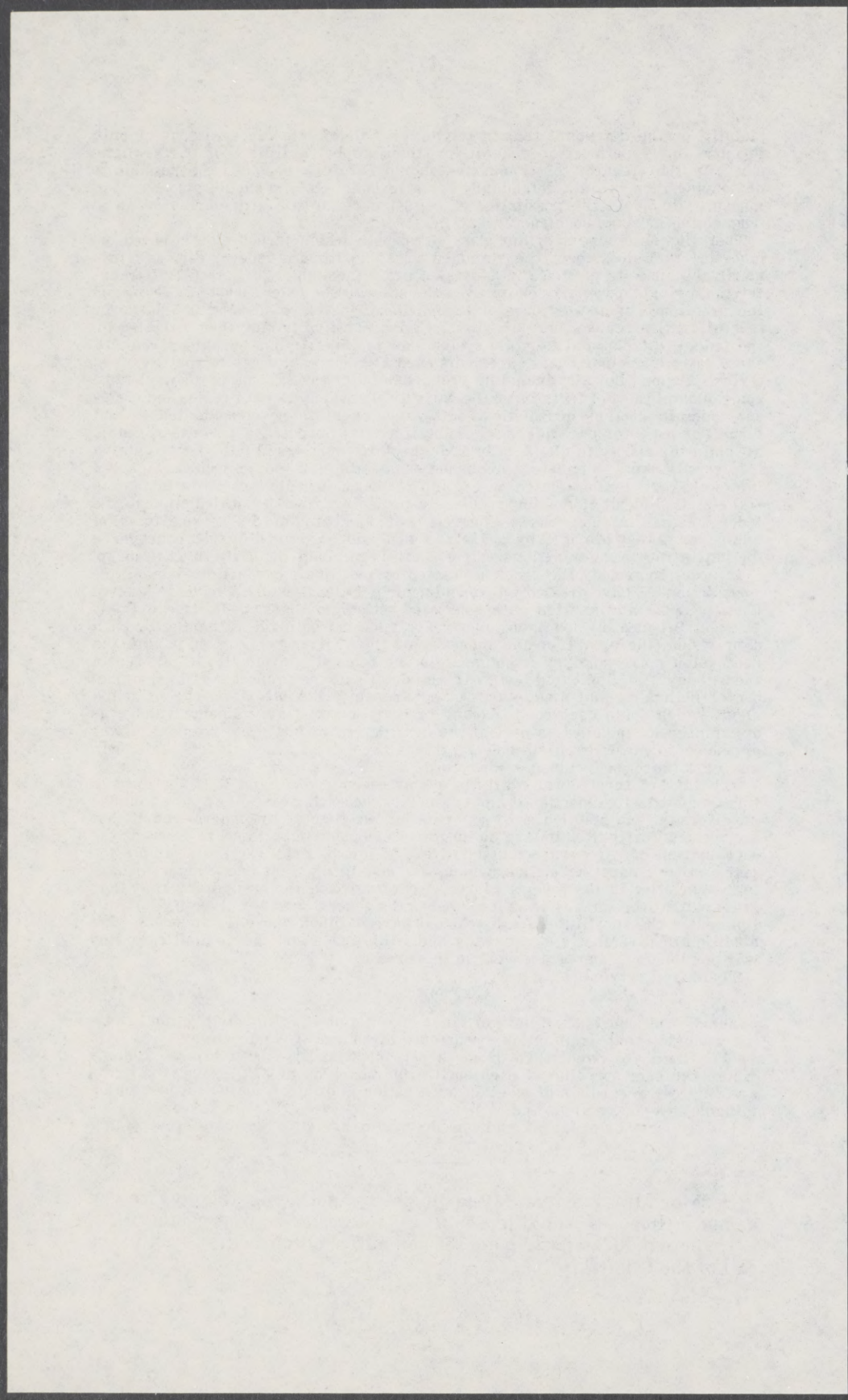
SECTION 1332A

The district courts shall have original jurisdiction over any civil action involving a single event, transaction, occurrence or course of conduct if:

- (1) There are twenty-five or more persons who have been injured thereby where the sum or value of each such injury exceeds \$1,000, exclusive of costs and interest, regardless of whether such action is brought, maintained, or maintainable as a class action; and
- (2) At least one plaintiff and one defendant are citizens of different states.

Senator METZENBAUM. My apologies for not being able to give you as much time as I would like to. I was interested in your comments.

[Whereupon, at 12:22 p.m., the committee adjourned, subject to the call of the Chair.]



APPENDIX

96TH CONGRESS
1ST SESSION

S. 679

To eliminate the amount in controversy requirement for Federal question jurisdiction, to modify the jurisdictional requirements with respect to diversity of citizenship, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 15 (legislative day, FEBRUARY 22), 1979

Mr. METZENBAUM (for himself, Mr. KENNEDY, and Mr. DOMENICI) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To eliminate the amount in controversy requirement for Federal question jurisdiction, to modify the jurisdictional requirements with respect to diversity of citizenship, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "Jurisdictional Amend-
4 ments Act of 1979".

5 SEC. 2. (a) Section 1331 of title 28, United States
6 Code, is amended to read as follows:

1 **"§ 1331. Federal question**

2 "The district courts shall have original jurisdiction of all
3 civil actions arising under the Constitution, laws, or treaties
4 of the United States."

5 (b) The item relating to section 1331 in the table of
6 sections for chapter 85 of title 28, United States Code, is
7 amended by striking out "; amount in controversy; costs."

8 SEC. 3. (a) Section 23(a) of the Consumer Product
9 Safety Act (15 U.S.C. 2072(a)) is amended—

10 (1) by striking out "subject to the provisions of
11 section 1331 of title 28, United States Code, as to the
12 amount in controversy,"; and

13 (2) by striking out the period at the end thereof
14 and inserting in lieu thereof ": *Provided*, That the
15 matter in controversy exceeds the sum or value of
16 \$10,000, exclusive of interest and costs, unless such
17 action is brought against the United States, any
18 agency thereof, or any officer or employee thereof in
19 his official capacity."

20 (b) Section 23 of the Consumer Product Safety Act (15
21 U.S.C. 2072) is amended by redesignating subsection (b) as
22 subsection (c) and by inserting immediately after subsection
23 (a) the following new subsection:

24 "(b) Except when express provision is made in a statute
25 of the United States, in any case, in which the plaintiff is

1 finally adjudged to be entitled to recover less than the sum or
2 value of \$10,000, computed without regard to any setoff or
3 counterclaim to which the defendant may be adjudged to be
4 entitled, and exclusive of interests and costs, the district
5 court may deny costs to the plaintiff and, in addition, may
6 impose costs on the plaintiff.”.

7 SEC. 4. (a) Subsections (a) and (b) of section 1332 of
8 title 28, United States Code, are each amended by striking
9 out “\$10,000” and inserting in lieu thereof “\$25,000”.

10 (b) Section 1332(a) of title 28, United States Code, is
11 amended by striking out paragraph (1) and by redesignating
12 paragraphs (2), (3), and (4), and all references thereto, as
13 paragraphs (1), (2), and (3), respectively.

14 (c) Section 1332(c) of title 28, United States Code, is
15 amended by striking out “section 1441” and inserting in lieu
16 thereof “section 1335”.

17 (d) Section 1332(d) of title 28, United States Code, is
18 amended by inserting immediately after “section” the follow-
19 ing: “and section 1335 of this title”.

20 (e) The section heading for section 1332 of title 28,
21 United States Code, is amended by striking out “Diversity of
22 citizenship” and inserting in lieu thereof “Alienage”.

23 (f) The item relating to section 1332 in the table of sec-
24 tions for chapter 85 of title 28, United States Code, is

1 amended by striking out "Diversity of citizenship" and in-
2 serting in lieu thereof "Alienage".

3 SEC. 5. (a) Section 1335(a)(1) of title 28, United States
4 Code, is amended by striking out "as defined in section 1332
5 of this title,".

6 (b) Section 1335 of title 28, United States Code, is
7 amended by adding at the end thereof the following new sub-
8 section:

9 "(c) For purposes of this section, the term 'claimants of
10 diverse citizenship' means claimants who are—

11 "(1) citizens of different States;

12 "(2) citizens of a State and citizens or subjects of
13 a foreign State;

14 "(3) citizens of different States and in which citi-
15 zens or subjects of a foreign State are additional par-
16 ties; or

17 "(4) a foreign State, as defined in section 1603(a)
18 of this title, and citizens of a State or of different
19 States.".

20 SEC. 6. Section 1342(1) of title 28, United States Code,
21 is amended by striking out "diversity of citizenship" and in-
22 serting in lieu thereof "alienage".

23 SEC. 7. (a) Section 1391(a) of title 28, United States
24 Code, is amended—

1 (1) by striking out "wherein jurisdiction is founded
2 only on diversity of citizenship"; and

3 (2) by striking out "in which the claim arose" and
4 inserting in lieu thereof "in any judicial district in
5 which a substantial part of the events or omissions
6 giving rise to the claim occurred, or a substantial part
7 of property that is the subject of the action is situ-
8 ated".

9 (b) Section 1391(b) of title 28, United States Code, is
10 repealed, and subsections (c) through (f) of such section, and
11 all references thereto, are redesignated as subsections (b)
12 through (e), respectively.

13 SEC. 8. Section 1441(a) of title 28, United States Code,
14 is amended—

15 (1) by inserting "as provided in paragraph (2) or"
16 immediately after "Except" and by adding at the end
17 thereof the following new paragraph:

18 "(2) If the original jurisdiction of the district courts of
19 the United States is based upon section 1332(a) (1) or (2),
20 such action may be removed only by a party in interest prop-
21 erly joined and served as a defendant who is a citizen or
22 subject of a foreign State."; and

23 (2) by repealing subsection (b) and redesignating
24 subsections (c) and (d), and all references thereto, as
25 subsections (b) and (c), respectively.

1 SEC. 9. The amendments made by this Act shall apply
2 to any civil action commenced on or after sixty days from the
3 date of enactment of this Act.

Questions of Senator Thurmond to
Daniel J. Meador

- (1) As I explained earlier, one of my primary concerns is the impact of this legislation on the state court system. My home state of South Carolina will ^{probably} need approximately as many new state court judges as the number of federal judges we are receiving under the Omnibus Judgeship Act to handle this additional caseload. Are you aware of any date which gives a district-by-district breakdown of the relative caseloads in state and federal court. Should S. 679 be passed, what specific measures do you propose to aid state courts in areas in which their dockets are severely overloaded?
- (2) Mr. Meador, do you have available to you data containing such a district-by-district breakdown of the caseloads in federal and state courts. If so, could you provide this committee with such information. If not, could such data be obtained?
- (3) A number of practicing attorneys with whom I have discussed this type of legislation remain concerned with the problem of local prejudice against certain litigants. In my opinion, the existence of diversity jurisdiction provides an invaluable alternative which allows these litigants to pursue their claims or defenses in federal court. This opinion will be eliminated by passage of

S. 679. What specific suggestions do you have for dealing with this problem in the event that S. 679 does become law?

(4) What do you feel is the primary reason for the overwhelming opposition of state bar associations and other organizations of attorneys?

(5) Mr. Meador, could you go into more detail concerning the considerations which led your department to support a total abolition bill in this Congress?

(6) Do you believe that we should include a proposal regarding mass tort cases and would such a provision best be structured?

Responses of Daniel J. Meador
to Questions of Senator Thurmond

United States Department of Justice



OFFICE FOR IMPROVEMENTS IN THE
ADMINISTRATION OF JUSTICE
WASHINGTON, D.C. 20530

April 25, 1979

Honorable Edward M. Kennedy
Chairman, Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Honorable Strom Thurmond
United States Senate
Washington, D. C. 20510

Dear Senator Kennedy and Senator Thurmond:

On March 21, 1979, I testified before the Judiciary Committee, on behalf of the Department of Justice, in support of S. 679, a bill to abolish the general diversity jurisdiction in the federal courts. Senator Thurmond, who was unable to remain for the entire hearing, requested that I respond in writing to some questions he had prepared. This letter is my response to Senator Thurmond's questions, and I request that it ~~be made part of the record of the hearing.~~

Question 1. The Senator asked whether the Department had data, on a district-by-district basis, on relative caseloads in state and federal courts; or, if the Department did not have the data, where they could be obtained.

Caseload data for the federal courts are found in the Annual Report of the Director, Administrative Office of the United States Courts. That annual volume analyzes civil and criminal caseloads in federal trial and appellate courts. More refined data on federal caseloads may be obtained upon request from the Administrative Office.

State data, on the other hand, are not so readily available. The National Center for State Courts is in the process of establishing data bases and is expected to have useful data in the future. For the present, however, the only general source is the State Court Caseload Statistics: Annual Report 1975, which is currently being published. A draft of the 1976 version of the report is expected this summer. To our knowledge, no other comprehensive report of the caseloads of state courts is available.

The 1975 draft report was the source for data appearing in an article published in the State Court Journal 1/ to which Senator Thurmond referred at the hearing on March 21, 1979. That report provides caseload data for an entire state rather than by federal district, so comparisons between state and federal data must be made on a state-by-state rather than federal district-by-district basis.

Regrettably, caseload data have sometimes been cited before the Congress without full appreciation of its limitations or its sources. An example can be found in testimony early last month before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice in opposition to H.R. 2202, the House counterpart to S. 679. Data were cited that suggested that delays in the state courts in five urban areas (Boston, Manhattan, Brooklyn, Chicago, and Philadelphia) were, on average, nearly twice that in the comparable federal district court (41 months in state court; 22 months in federal court). 2/ A careful analysis reveals, however, that the data cited were not comparable, and in one instance, where more reliable data are available, the data were completely inaccurate.

The apparent source for the data was testimony before the same subcommittee in the 95th Congress. 3/ In that testimony, the source for the state data was a report from the Institute for Judicial Administration. The data reported were for calendar year 1974, included personal injury cases only, and apparently measured the average delay from the filing of complaint to the termination of the case. The federal data, on the other hand, included all jury trial cases in 1976, and

1/

Flango and Blair, The Relative Impact of Diversity Cases on State Trial Courts, State Court Journal 20 (Summer 1978).

2/

Testimony before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice, March 1, 1979 (Statement of Rep. Dan Glickman; oral remarks of Mr. Robert Begum).

3/

Diversity of Citizenship/Magistrate Reform: Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on Judiciary, 95th Cong., 1st Sess. 234 (1977) (Statement of John P. Frank).

the period of time measured was the median time from "issue" to trial. ^{4/} Clearly, any attempt to compare data of two distinctly different case types in two different years is meaningless. It is even more meaningless to compare elapsed times measured from different stages of litigation. Further, we have been advised by a former Director of the Institute for Judicial Administration -- the source for the state data -- that the Institute had so little confidence in the accuracy of its data that it has ceased promulgating them.

Finally, in one of the jurisdictions cited, more reliable data present a completely different picture. In the data cited above, it was reported that the delays in the Boston state courts were 42 months, while the delay in the federal district court for Massachusetts was 34 months. (As we noted above, different periods of time were measured). Statistics for 1976 which reflect the median time between the filing of the complaint and disposition in both Boston (Suffolk County Superior Court) and the federal district court for the District of Massachusetts reveal, however, that the delay in the Boston court was 394 days ^{5/} (13 months) while the delay in the federal court was 690 days ^{6/} (23 months). Thus, the relative delays in those two courts were the opposite of what the earlier data reported. Until more comprehensive data bases can be established for the state court systems, any comparisons between state and federal courts will be questionable.

Such data as there are, however, indicate that there is no nationwide pattern. In some states delays in state courts are longer than in the federal courts, and in others the delays in the federal courts are longer.

^{4/} Administrative Office of United States Courts, Annual Report of the Director, Table C-10 (1976).

^{5/} National Center for State Courts, Justice Delayed 94 (Appendix B) (1978).

^{6/} Administrative Office of United States Courts, Annual Report of the Director, Table C-5 (1976).

Question 2. The Senator expressed concern about the impact the passage of S. 679 might have on state courts and inquired what measures the Department would propose to aid state courts in areas in which there are severely overloaded dockets.

It must be emphasized that the abolition of federal diversity jurisdiction would merely return to the state courts cases that arise under state law. Although in some areas more state court judges might have to be appointed to handle the additional caseload, the result is simply to route the judicial business to the forum in which it most appropriately belongs.

Without reliable state data, it is difficult to determine the precise effect this legislation might have on state court systems. As I pointed out in my testimony, if federal diversity jurisdiction were abolished, the states would experience an average increase in civil filings of only 1.03%, and there would be little or no effect on judicial business in the vast majority of state courts. For those states in which there may be a greater impact, it is worth noting that in recent years the federal government has been providing substantial amounts of aid to state court systems. During the past ten years, nearly 229 million federal dollars have been funneled to the state court systems either directly or indirectly through the Law Enforcement Assistance Administration. Federal monies have also been used to aid in supporting the Institute for Court Management and the National Center for State Courts, both of which provide substantial assistance to the state courts.

Furthermore, there are a growing number of agencies such as the National Center for State Courts that are available to provide a broad array of programs and technical expertise to aid the state courts in various ways. Increasingly, also, state court judges are taking advantage of training opportunities such as those provided through the National Judicial College and the American Academy of Judicial Education to help them improve their techniques in handling cases and managing their caseload.

In addition, the proposed Dispute Resolution Act (S. 423), will provide some relief to state court systems. That proposal would encourage the development of minor dispute resolution mechanisms at the state and local level through a seed money grant program of \$15 million for each of the next four years. The increased use of nonjudicial means to resolve disagreements

between parties will reduce the number of cases that result in lawsuits, thereby alleviating court congestion. The Department of Justice over a year ago established three Neighborhood Justice Centers to demonstrate the utility of certain types of non-judicial dispute settlement procedures and to stimulate wider use of such procedures. S. 423 would also create a Resource Center to assist states and localities in developing new kinds of minor dispute procedures.

Question 3. Senator Thurmond commented that many practicing attorneys were concerned about the problem of local prejudice against certain litigants and asked for specific suggestions of ways to deal with the problem in the event S. 679 is enacted.

The diversity provision was included in the Constitution because of fear that an out-of-state litigant would be the subject of prejudice in a foreign state court simply because he was an outsider. Undoubtedly, bias because of a person's race, religion, or national origin has not been unusual, and outright prejudice against certain litigants may exist in some of our court systems. In our modern-day society, with nearly instantaneous communications and the American penchant for travel and for changing the state of residence, it cannot really be said, however, that bias directed at someone simply because he is a resident of another state approaches the magnitude of the other biases present in our society.

Moreover, to the extent that biases do exist against out-of-staters, that problem might be dealt with in several ways. Senator Howell Heflin has suggested some possibilities. One method would be to improve state change of venue provisions to allow transfer when bias against an outsider is shown. A second possibility would be to provide for removal to the federal district court, by the out-of-state defendant, for the sole purpose of transferring the case to another state court when bias has been demonstrated. We would be happy to work with the Committee in further consideration of these or other suggestions, if the Committee is interested.

Question 4. The Senator asked what, in my opinion, is the primary basis for opposition to this legislation by state bar associations and other organizations of attorneys.

Perhaps the most succinct way this question can be answered is to quote from a statement I made last year:

There appear to be two reasons for practitioner opposition. One is the natural and human tendency to oppose change. I think that exists, to some extent, in most people but I regret to say that I think it exists, among lawyers, to a higher degree than among some other groups. The sad fact is that historically, in England and in this country, some of the most significant judicial reforms have been made not at the instance and initiative of the practicing bar, but in spite of the practicing bar.

This is not to say we should disregard the views of the bar. Far from it. But we must bear in mind that inherent instinctive resistance to change that exists in the profession. This resistance to change is understandable. Lawyers are familiar with the existing system. They have mastered it. They are comfortable with it. Change calls for a redoing of some of their habits and thought.

A second reason for the practicing bar opposition to any curtailment of diversity is that, if given a preference and free choice about the matter, lawyers will always prefer an arrangement that gives them a choice of forum. It is simply one more technical avenue available for them in pursuing their client's interest.

There is nothing dishonorable about this. A litigating lawyer likes a choice of judges, procedure and courts, and diversity jurisdiction gives him this choice.

While these reasons are understandable, they do not justify continuing the present system. We must consider the interest of the public and of the justice system as a whole. 7/

7/
Meador, Diversity Jurisdiction in the Federal Courts: The Need for Change, 2 District Lawyer 48, 50 (June 1978).

It should be noted that not all lawyers take this position. Testimony has been offered by a number of lawyers in both House and Senate hearings over the past two years in support of abolishing or restricting diversity jurisdiction. These lawyers have spoken on behalf of such groups as the American College of Trial Lawyers, the Legal Services Corporation, and public interest practitioners. 8/

Question 5. Senator Thurmond asked why the Department is supporting complete abolition of diversity jurisdiction now, when it supported only curtailment during the last Congress.

Early in the 95th Congress, we supported legislation that would have prevented a plaintiff from invoking diversity jurisdiction in his home state. We continued to evaluate that proposal and others in the light of information that subsequently became available. Thus, later in the Congress, we also voiced support of the measure enacted by the House of Representatives (H.R. 9622), which would have abolished all diversity jurisdiction with the exception of interpleader. For several reasons, we continue to support that approach.

First, we have become more aware of the immense burden that diversity cases impose on the federal courts. These cases constitute 24 percent of the civil caseload. That figure alone might not be persuasive, but we have also learned that diversity cases are much more time-consuming than the ordinary case. For example, although diversity cases account for approximately one-quarter of the civil caseload in the

8/

Diversity of Citizenship/Magistrate Reform: Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on Judiciary, 95th Cong., 1st Sess. 57, 293, 295, 297, 298 (1977) (Statement of Thomas Ehrlich; Letter of William Shernoff; Letter of National Senior Citizens Law Center; Letter of Alan B. Morrison; Letter of Thomas E. Deacy, Jr., on behalf of American College of Trial Lawyers); Federal Diversity of Citizenship Jurisdiction: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on Judiciary, 95th Cong., 2nd Sess. 81, 149, 158, 170, 195 (1978) (Statement of Erwin N. Griswold; Statement of John Ballentine; Statement of John C. Landis; Statement of Frederick A. O. Schwarz; Statement of Charles Stephen Ralston on behalf of the NAACP Legal Defense Fund).

federal courts, over forty percent of the cases that are terminated during or after pretrial are diversity cases. Nearly forty percent of the cases going to trial are diversity cases, and almost two-thirds of all civil jury trials are diversity cases. These data show that diversity cases occupy the time and resources of the federal judiciary out of proportion to their number.

Second, we have become aware of other significant burdens which are not reflected in the statistics. These are thoroughly discussed in a study recently completed by Professor Thomas Rowe, Jr., of the Duke Law School. A copy has been provided the Judiciary Committee staff. The study examines some of the non-obvious effects of diversity jurisdiction -- factors that would not exist if the cases were tried in state court. Professor Rowe makes a convincing case for the abolition of diversity jurisdiction.

Finally, we were influenced to support abolition of general diversity jurisdiction by the broad range of support that proposal has received from the judges of both the state and federal courts, thoughtful members of the legal profession, serious students of the federal judiciary, and diverse public interest groups. Indeed, the only opposition to this proposal comes from some segments of the practicing bar.

Question 6. The Senator asked whether the Department favored inclusion of a provision to permit federal diversity jurisdiction of mass tort cases, and, if so, how that provision might best be structured.

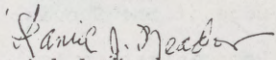
Although we support abolition of the general diversity jurisdiction, we recognize that in certain situations there is a substantial functional justification, in light of contemporary needs, for making a federal forum available. Statutory interpleader is such a situation, and we support its retention in S. 679. Another situation may be the so-called mass tort cases.

There are basically two ways a federal forum could be provided for mass tort cases. One would be to federalize the substantive law. That is, Congress -- pursuant to its powers under the Commerce Clause of the Constitution -- could enact a statute creating a federal cause of action in these cases; jurisdiction in the district courts could then rest on 28 U.S.C. §1331 and 1337. Another way to provide a

federal forum for mass tort cases would be through a special statutory enactment under the diversity of citizenship clause of Article III of the Constitution. Through a carefully designed jurisdictional statute, Congress could authorize federal district courts to entertain cases where personal injury or property damage is suffered by many persons, as the result of a single event or occurrence, where there is some diversity of citizenship between the parties. Although the Department of Justice has not taken a position on either of these approaches, we would be happy to work with the Committee on the development of a sound proposal, if the Committee so desires.

I hope that the above adequately responds to the questions raised by Senator Thurmond. If there are other questions, I would be happy to answer them.

Sincerely,


Daniel J. Meador
Assistant Attorney General

ADDITIONAL PREPARED STATEMENTS FOR
THE RECORD

Prepared Statement of Judge Henry
J. Friendly

My name is Henry J. Friendly. I was appointed to the United States Court of Appeals for the Second Circuit in 1959 and served as Chief Judge from 1971 to 1973. In 1974 I took senior status when I was appointed as Presiding Judge of the Special Court under the Regional Rail Reorganization Act, to which I devote such of my time as is needed.

I congratulate Senator Kennedy, the other Senators who have sponsored the bills, S. 678 and S. 679, on which you have asked me to testify, and the staffs of the Committee, of Senator Kennedy, and of other Senators, who have labored diligently and with good effect.

Federal Question and Diversity Jurisdiction

Let me turn first to S. 679 which would eliminate the jurisdictional amount requirement in federal question cases and would largely abolish diversity jurisdiction. I favor both proposals. Since there seems to be universal agreement on the first, I shall not discuss it. Unhappily the same concord does not exist as to the second.

It is surprising to hear this proposal characterized as something new. There were intense efforts in Congress to abolish diversity/jurisdiction with respect to corporations from 1878 to 1887 and from 1892 to 1911. Consideration of abolition was recommended in 1914 by a committee including such illustrious names as Charles W. Eliot, Louis D. Brandeis and Roscoe Pound. Professor Frankfurter, as he then was, called for full reconsideration of diversity jurisdiction in a lecture at the Cornell Law School in 1928, 13 Cornell L. Q. 499, which was followed by new legislative attention. Although Professor Frankfurter's opposition was founded to some extent on the inequities wrought by Swift v. Tyson, Mr. Justice Frankfurter reiterated in his dissent in National Mutual Ins. Co. v. Tide Water Transfer Co., Inc., 337 U.S. 582, 651 (1949), that:

An Act for the elimination of diversity jurisdiction could fairly be called an Act for the relief of the federal courts.

The American Law Institute's proposal to curtail diversity jurisdiction was approved at the Annual Meeting in 1965 -- three years before completion of the portion of the study relating to federal question jurisdiction the broadening of

which has been claimed to have been the essential quid
 for the restriction of diversity.
pro quo/ My own views that diversity jurisdiction should
 not be merely restricted but substantially abolished were
 presented in the lectures I gave in November 1972 at the
 Columbia Law School, Federal Jurisdiction: A General
 View, pp. 139-52.

I repeated these, with some changes in emphasis,
 in my testimony of September 29, 1977 before the Sub-
 committee on Courts, Civil Liberties, and the Adminis-
 tration of Justice of the Committee on the Judiciary of
 the House of Representatives, Hearings, Serial No. 21,
 95th Cong. 1st Sess. pp. 199-218. Although essentially
 I have little to add, it may be convenient to restate
 my position, making a few additions and bringing the
 figures up to date.

My interest in diversity jurisdiction dates back
 to 1927, when Professor Felix Frankfurter, as he then
 was, asked me to assist in preparing a history of the
 diversity of citizenship jurisdiction of the federal
 courts. Unhappily his many other interests forced him
 to abandon the project; what would have been the sub-
 stance of the first chapter appeared over my name in
 1928, entitled The Historic Basis of Diversity Jurisdiction,

41 Harv. L. Rev. 483. My main interest was in endeavoring to ascertain, from the debates in the Constitutional Convention, the state ratifying conventions and the first Congress, and from the Federalist papers and other contemporary writings, just why the founders authorized and the first Congress so broadly implemented a jurisdiction that had been hotly contested and was not very strongly supported -- especially the puzzling authorization in the first Judiciary Act for the in-state plaintiff to sue the out-state defendant, which I now think may have been due in part of a desire to give the lower federal courts enough business to justify the cost of having them. I concluded that, in addition to the traditional justification of prejudice against out-staters, there was a pervasive distrust whether at least some state courts would be fair to the interests of creditors, whether out-staters or in-staters; this would account for both the breadth of the grant and for at least some of the opposition to it. Looking to more recent times, I noted that the growth in the work of the federal courts in administering federal law would "not abate, since it is responsive to deep social and economic causes"; that only diversity jurisdiction was "out of the current of these nationalizing forces"; and that "the unifying tendencies of America

here make for a recession of jurisdiction to the states" The last proposal, if it can be called one, was doubtless premature in 1928; in 1979 it is overdue. Quite simply, diversity of citizenship jurisdiction is an idea whose time has gone.

The main reason why we must abolish diversity jurisdiction is because any rational cost-benefit analysis demonstrates it has become a luxury we can no longer afford. Later I will present statistics on the workload of the federal courts that will prove this. Bare statistics, however, tell only part of the story. Before approaching them, it is necessary to understand how drastically the essential tasks of the federal courts have changed from as recently as 1961, when President Kennedy took office, let alone when I first wrote on the subject in 1928.

In 1928 we were only a half century away from the grant of general federal question jurisdiction to the federal courts in 1875. More important, we had not even begun to appreciate what their role would become in the enforcement of civil rights. The civil rights laws of the Reconstruction Congresses had largely remained dead letters; their resuscitation as a means of vindicating the rights of citizens against state officers dated only

from the 1961 decision in Monroe v. Pape, 365 U.S. 167. The impact of the Monroe decision was accentuated by its coincidence with the extension of most of the provisions of the Bill of Rights to the states and broadened interpretation of these provisions. While the chief federal court impact of this extension was on habeas corpus for state prisoners, it had an effect on civil rights as well. Along with this have come new and more expansive readings of the equal protection and due process clauses of the Fourteenth Amendment. The equal protection clause, characterized by Mr. Justice Holmes in 1927 as "the last resort of constitutional arguments," Buck v. Bell, 274 U.S. 200, 208, has often become the first. Since the epoch-making 1954 decision in Brown v. Board of Education, 347 U.S. 483, the federal courts have endeavored to root out racial discrimination in every phase of life. The equal protection clause has also been invoked, with varying degrees of success, against discrimination based on other factors -- sex, age, residence, legitimacy, religion, alienage and wealth. A reading of the due process clause to require hearings with respect to all sorts of official action, even discipline in public schools, has led, as I said in 1975, to "a greater expansion of procedural due process in the last five years than in the entire period since ratification of the

Constitution." The task of giving reality to these new doctrinal developments falls primarily on the lower federal courts.

There has been an equal if not greater expansion of federal civil rights by legislation. Here the landmarks are the Voting Rights Acts of 1957 and 1965, the more comprehensive Civil Rights Acts of 1964 and 1968, and the Age Discrimination in Employment Act of 1968.

These developments have had an enormous impact on the business of the federal courts. This impact is described in detail in the valuable Annual Reports of the Director of the Administrative Office, including the preliminary report for the year ending June 30, 1978. Unless otherwise noted, I shall rely on these comprehensive reports.

In the fiscal year 1960 only 280 suits were filed under federal civil rights statutes. By 1970 the figure had risen to 3586, an increase of over 1100% as compared with one of 45% in civil cases generally. See Hart & Wechsler, The Federal Courts and the Federal System, p. 950 n. 3. For the last three years the figure has been in the range of 12,000 to 13,000, Report of the Director of the Administrative Office, Table 18. These figures are in addition to the nearly 22,000 suits filed in 1978

by federal and state prisoners.

In addition to civil rights litigation, the years since 1961 have also witnessed a tremendous expansion of federal court litigation under statutes passed many years before. The 1935 Congress would hardly have expected the Social Security Act to be a great breeder of federal litigation. Yet actions under that statute have risen from 537 in 1961 to some 10,000 in each of the last three years. A group much smaller in numbers but vastly greater in difficulty consists of cases involving the conformance of state welfare programs to federal standards; their difficulty is enhanced by the incredible complexity and obscurity of the HEW regulations which by comparison make the Internal Revenue Code seem suitable reading for teenagers. Another set of New Deal statutes which had a delayed blooming in the courts was the securities legislation of 1933 and 1934. Securities and commodities cases, primarily actions under the SEC's Rule 10b-5, grew from 267 in 1961 to 1700 in 1978; many of these are class actions.

We must add three fields in which Congresses over the past decade have invoked the commerce power to create an enormously more important role for the federal government and correspondingly for the federal courts. The first is safety. The most important single statute is

the Occupational Safety and Health Act of 1970, but there are special acts dealing with motor vehicles, pipelines, coal mines, ports and waterways, and consumer products. A second is transactions between sellers and buyers and between lenders and borrowers; I could list the statutes but this committee hardly needs citations. The third is the environment. The basic statute, the National Environmental Policy Act of 1969, has been supplemented by others dealing more specifically with such subjects as water quality, clean air and noise control. For further details I refer you to the illuminating Impact Study on pp. 119-148 of the Report of the Director of the Administrative Office of the Courts for 1976.

The new business of the federal courts is much more taxing than the old business was. A single school desegregation case can occupy a district judge for years. First he must determine whether the plaintiffs have made out a case for relief. If they have, he must devise a suitable plan, after hearing all interested groups. Then will come the problems of enforcement. Finally, modifications of the plan may become necessary in the light of experience. Similar remarks could be made in regard to suits concerning the conditions of prisoners and mental hospitals, where federal courts have felt obliged to work

out detailed codes affecting nearly every aspect of operation. If you want some notion what an environmental action can mean as a drain on the time of a federal court, in this instance a court of appeals, I invite your attention to the 28 page opinion of Judge Griffin Bell (as he then was) in State of Texas v. EPA, 499 F.2d 289 (5 Cir. 1974), in which the court was obliged to delve deeply into abstruse issues of technology and statistical theory, without benefit of prior agency adjudication or of rulemaking under § 553 of the Administrative Procedure Act. Much of the new business consists of class actions; some 6000 of these were pending in the district courts as of June 30, 1978. The handling of actions such as I have been describing is no more like that of the ordinary law suit than the operation of the Queen Elizabeth II is like paddling a canoe.

Being a federal judge today thus is altogether different and infinitely more demanding business than when I went on the bench twenty years ago. The federal courts have become, as they should be, the primary protectors of the basic civil rights of all citizens; they also have been assigned vital tasks relating to welfare programs, protection against various sorts of fraud and

overreaching, the promotion of safety, and the protection of the environment. Proper performance of these tasks, as well as such traditional federal business as admiralty, antitrust, bankruptcy, copyright, patents and trademarks, and the speedy enforcement of the expanding federal criminal law, demands all that a federal judge can give. He should not be distracted by cases, all turning on state law, which a state judge can generally handle as well and in many instances can handle better.

It is with this background that I turn to the overall statistics. In the year ended June 30, 1978, there were 138,770 civil filings in the district courts, an increase of 6.3% over 1977 and of 58.9% over 1970, the date of the last increase in district judgeships prior to the increase of some 25% in 1978. In the absence of legislation curtailing some heads of federal jurisdiction, this increase is bound to continue. The members of this committee knew better than I that the increased legislative activity of the past decade has not come to a stop, or even to a pause. If Congress is convinced that there is a serious problem and that it has devised a sound solution, it will not and generally should not be deterred from enacting legislation because of the new burdens this

will impose on the federal courts, although, as the Chief Justice has been urging for some years, it should clearly recognize them.

This predictable heavy increase in federal question litigation cannot be handled by a corresponding increase in the number of federal district judges. First, that is a solution which almost nobody wants. The strength of the federal judiciary has come in no small part from its relatively modest size. It would, of course, be hard to argue that the present complement of district judges is the maximum or say exactly how many are too many. But certainly a point does come when further increases in the number of district judges would destroy the very values of the federal judiciary we wish to preserve. Second, an increase in district judges paralleling the increase in workload is a solution we do not get. Last year's authorization of additional district judgeships was to meet needs first identified by the Judicial Conference in 1972 when the civil filings were 96,173 as against the 138,770 of 1978. Third, whatever the merits or demerits of appointing additional district judges to cope with ever increasing dockets in those courts, this remedy is unavailing in the courts of appeals, since an increase means either too many judges in existing

circuits or an increase in the number of circuits beyond the two additional ones the Hruska Commission recommended but Congress did not authorize. Both solutions are highly undesirable, for reasons developed in the Commission's report, Structures and Internal Procedures: Recommendations for Change. See pp. 126-31. In 1972 I reported that "The Courts of Appeals are already in a state of crisis" with filings of 14,535 appeals -- a 273% increase over 1960 as compared with an increase of only 64% in district court filings. In 1978 filings in the courts of appeals had grown by another third to 18,918 -- twice that of 1968 when the number of court of appeals judges was last augmented prior to last year's modest increase of 35 judges. Moreover, the avalanche of filings has had a predictable result: The backlog of pending appeals climbed to an all time high of 16,648 in 1978, nearly twice the number of 1970. And this is despite the fact that these courts have adopted almost all conceivable devices -- some think too many -- in order to increase their productivity. I refer to such practices as the radical restriction on oral argument in almost all circuits; the drastic reduction in time allotments when oral argument is allowed; the practice of deciding many cases from the bench with (or perhaps without) an oral

statement of reasons and of disposing of them by order or memorandum, all supposedly without precedential force; the increased use of district judges in the courts of appeals, which S. 678 would properly curtail; and the general trend toward assembly line methods which the volume of business compels. Of course, the new judges will help but, again, that need was discerned in 1972, when there were 450 cases per panel, as against the 585 of 1978. Moreover, the courts of appeals will get an added influx of business when the 117 new district judges begin to produce. We cannot realistically hope for or even want much greater increase in the output per judge of the courts of appeals since it would mean a decline in the quality of these decisions, only a small percentage of which are even sought to be and only a still smaller percentage of which are reviewed by the Supreme Court. The only effective way to avert a flood in the courts of appeals is to decrease the flow.

This is the background against which the committee must consider the abolition of diversity jurisdiction. Diversity cases stand apart from all others in the federal courts. They involve no claim of federal right; rather they are based solely on state law. Their subject matter is exactly like that of cases which, in much

larger numbers, are being tried daily in the courts of the states by judges who are thoroughly experienced in handling them.

The number of these cases is sizable. In 1978, 31,625 diversity cases were filed in the district courts; these comprised 23% of the civil filings. Appeals in 1976 diversity cases were filed in the courts of appeals in 1978; these were 16% of the civil cases and 11.5% of the total cases arising from the district courts. This is more than the total business of any circuit except the Fifth and Ninth and, by a small margin, the Second.

Apart from the time which these cases take from more important tasks, they involve federal judges in difficult tasks of ascertaining state law which they are ill equipped to perform. Sound as was the decision in the Erie case, it substituted one difficulty for another. Professor Moore devotes 168 pages of his treatise to outlining these problems. These have been magnified by the fact that the added requirements of expertise on federal law that have been imposed on federal judges have inevitably lessened their familiarity with state law. The problem is not simply the initial fear that Erie made the federal judge a "ventriloquist's

dummy" but that it takes inordinate labor for him to understand the ventriloquist. The days when the typical federal judge had just graduated from a career in which he had been trying personal injury and contract actions have long since passed, certainly in the larger cities and in many others as well. The new judge's trial experience will more likely have been in federal fields -- as a prosecutor or defense lawyer, in antitrust, ^{civil rights,} labor or securities law litigation. Even the lawyer who is well versed in many branches of state law when he goes on the federal bench cannot keep up with it; he has enough trouble in maintaining pace with the manifold judicial and legislative developments in the federal field. Save in the simplest cases he thus must learn, or relearn, the state law applicable in each diversity action. These may be of any sort save matrimonial and probate, and he is not likely to get one of the same sort soon again. If the state law is not clear, he must make the best guess he can; he may make the wrong guess and there can be no appeal to any state tribunal. The problem in the courts of appeals is even worse since one or more or even all of the judges hearing a diversity appeal may not come from the state whose law is in question. Moreover, the very availability of litigation of a state claim in a

federal court postpones the authoritative state decision that would otherwise be inevitable. In contrast state judges live with cases involving state law, and if the law is not clear, the highest court of the state will make it so. I thus emphatically dissent from statements that no one can have anything against diversity jurisdiction except the time it takes. I believe that it has again become, just as it was before Erie although now for a different reason, a negative factor in the due administration of justice in our federal system.

Let me illustrate this by a case on which I sat last fall. In the same week in which we heard the Attorney General's appeal from an order holding him in contempt for refusal to produce informers' files in a suit brought by the Socialist Workers' Party, we were confronted with an appeal from the Eastern District of New York in Martin v. The Maintenance Company, 588 F.2d 355. The plaintiff, Jeffrey Martin, was a 10-year-old New Jersey boy, who had suffered a serious foot injury in descending an escalator while attending a New York Mets baseball game. The defendants were the City of New York as owner of Shea Stadium, the Mets as operator, The Maintenance Co. as maintainer of the escalator, and Otis Elevator Co., the manufacturer. No one in his senses could think the New

York courts would not do justice to this unfortunate lad because his home was on the west rather than the east side of the Hudson River; indeed there was no real question that at least some defendants were liable. On the other hand there were most serious issues of contribution and indemnity among the defendants. One of the judges was from Vermont, and the two New Yorkers had been on the federal bench for 23 and 19 years respectively. In that period the New York Court of Appeals had been transforming this field of New York law. The briefs cite 91 New York cases, of most of which we had never heard. We did as well as we could but an experienced New York judge could have done the job more readily and with more assurance. As to one important question we simply had to guess whether the New York Court of Appeals would pursue a trend further than it yet had done. We guessed it would. If we were wrong, the losing party had no such redress as it would have had from a similar decision of the New York Appellate Division.

A recent article by Professor Thomas D. Rowe, Jr., Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms, 92 Harv. L. Rev. 963, brings up a whole battery of new arguments for abolition,

of which even such a veteran as I had never thought. His general thesis is stated as follows, id. at 964:

In sum, the existence of the general diversity jurisdiction has pervaded, and I dare say confused theory and operation in the federal courts to an extent little perceived. The likely workings of a system without diversity, and the opportunities for other desirable changes that would follow, should not be the least of the arguments for abolishing it.

Basically Professor Rowe's position is that, in an effort to prevent a mushrooming of diversity jurisdiction, the federal courts have developed a number of limiting principles which they apply across the board but which have no proper place in federal question jurisdiction or perhaps indeed in the alienage jurisdiction retained by S. 679. Your staff can brief you on the details. I commend you to the professor's conclusion, 92 Harv. L. Rev. at 1011-12:

Especially if further reforms accompany or follow it, but even if they do not, abolition of diversity jurisdiction would probably constitute one of the greater steps since the adoption of the Federal Rules of Civil Procedure toward the goals rule 1 sets for civil litigation in the federal courts -- "the just, speedy, and inexpensive determination of every action".

The concern expressed by proponents of diversity that eliminating diversity cases from the federal courts would place too serious a burden on the state courts is of their own making and ignores readily available statistics. This ghost should have been laid eight years

ago by Senator Burdick's article in 48 North Dakota Law Review, but more recent and comprehensive figures are now available. The volume of state court litigation is so great that the increase from the transfer would hardly be noticed. Judge McGowan has recently estimated that shifting all the diversity cases to the more than 6,500 state court judges would increase their dockets by approximately one-half of one percent on the average. McGowan, Federal Jurisdiction: Legislative and Judicial Change, 28 Case Western L. Rev. 517, 526-27 (1978). A detailed statistical analysis prepared by the National Center for State Courts of state caseload statistics for 1975 and federal statistics for fiscal years 1976 and 1977 reveals that federal diversity cases, if aggregated by state, represented between 0.14 and 3.58 percent of the 1975 general jurisdiction civil filings in state courts. If these cases were allocated evenly among the states, each state would realize an average 1.03 percent increase in civil filings, or an average of 6.97 additional cases per judge. While some states may require a few additional judges to manage the increase in their caseloads, the authors of the study endorse the conclusion reached by Minnesota Chief Justice Robert J. Sheran: "While the transfer of the cases would add nationally to

the burdens of state courts in some areas which have serious backlogs of their own, they could be handled in most instances without major additions to state judicial resources." See Flango and Balir, *The Relative Impact of Diversity Cases on State Trial Courts*, 2 *State Court Journal*, Summer 1978, pp. 20-26. The clincher should be that the Conference of State Chief Justices, at its meeting in the summer of 1977, affirmatively expressed willingness to assume the diversity jurisdiction of the federal courts. (See The Third Branch, Vol. 9, No. 8, p. 6).

I say "should be" since the advocates of retention of diversity have come up with a variation, namely, that the transfer would be effected only at the cost of added delay to litigants who would be forced to proceed in

state courts. Mr. John P. Frank has offered comparisons to this Committee, as he did to the House Committee, of the median time interval from issue to trial in 1974 personal injury cases in state courts and 1976 jury cases in federal courts. While somewhat apologetic about the significance of these statistics, he proceeds to draw conclusions from them that are entirely unwarranted. The authors of the 1974 State Calendar Status Study relied upon by Mr. Frank explicitly

cautioned, at p. xiv, that their study is "not intended to be a picture of general calendar congestion," warning that "No generalization on the entire status of a court's calendar can or should be drawn." Personal injury cases clearly are not a fair sample of the total mix. At least in the large cities of which Mr. Frank spoke, there is a high concentration of such cases among plaintiff personal injury specialists and lawyers for defendant insurance companies; delay in getting these cases to trial may simply be due to the difficulty in finding a date suitable for the lawyers on both sides. Moreover, delay is a notorious weapon for the defense of personal injury cases. Since judgments in such cases typically do not bear prejudgment interest, the defendant benefits from every month of delay. Finally, the number of cases is nothing like Mr. Frank's 34,000. In 1978 there were only 2,275 jury trials in diversity cases, plus 1,374 in non-jury ones, although the proportion of diversity cases reaching trial is almost twice that of other civil cases. One can argue that delay in trials means an equivalent delay in other dispositions but we have no figures on this. Moreover, one must weigh whatever added delay, if any, diversity cases would encounter on being shifted to state courts against the greater expedition this move would create for the trial of federal question cases in the federal courts -- an important consideration which Mr. Frank does not mention.

The most striking thing about the present debate is that the proponents of retaining diversity jurisdiction no longer place significant weight on the traditional justification, a supposed prejudice against outstaters. Doubtless this is because of a recognition that this argument could not possibly support retention of the jurisdiction when invoked by an instater and that if this goes, the rest would not be worth keeping. Mr. Frank was very forthright about this in his testimony before the House Committee -- "if diversity is to be eliminated, you might as well get rid of all of it." Here again, however, there is a new variant. It is said that there are rural regions where there is prejudice against all outsiders whether instaters or outstaters. Testifying before Representative Kastenmeier's subcommittee, Mr. Frank said he suspected "that for a lot of reasons it makes a difference in Wisconsin whether you're in Spooner or in the Federal district court in Milwaukee." Perhaps it may also make a difference whether one is in Attleboro or in the Federal District Court in Boston. But the question arises why the resident of Spooner should be forced to litigate in Milwaukee or the resident of Attleboro in Boston -- if state law permits him to bring a suit or requires that a suit be brought against him near his home.

Mr. Frank's prime argument has now become that by disposing of some 34,000 diversity cases a year, the United States is carrying on "a social service of very considerable value" -- "just as school lunches are a social service or carrying the mail". I fail to perceive the analogy to carrying the mail -- a function no state can perform. Compared to school lunches, diversity jurisdiction is more like giving a lunch to every hundredth pupil. "The marginal utility of this service", as I noted in 1972, "must rank exceedingly low in any scale of priorities of what the Federal Government should do for the citizens of the several states." Surely it is a basic principle of our system that the federal government should not engage in social services that are mostly performed by the states. Diversity jurisdiction, on any account, is a field where the federal contribution is small; the only question open to debate is how small. The same bar associations that urge you to retain diversity jurisdiction usually are loud in protest against the exercise of federal power when states can do the job pretty well. A little consistency might be in order.

Another argument is that diversity jurisdiction is needed to prevent federal judges from becoming narrow technicians and thus to add to the joys of the federal

bench; that it is required to give lawyers an exposure to the federal procedural system and to carry the message back to the states or vice versa; and that, in some vague way, it creates a valuable "partnership" between state and federal courts. I have dealt with these arguments in my 1972 lectures at pp. 144-45; they have even less force now, if that were possible, than they did then. Just consider some heads of federal jurisdiction aside from diversity -- administrative law, admiralty, antitrust, aviation, bankruptcy, civil rights of many sorts, communications, constitutional law, copyright, criminal law, election cases, energy, environmental law, pensions, food and drug cases, federal consumer and borrowers protection statutes, labor law, patent law, railroads and trucking, securities law, federal tax law, trademark law, unfair competition, social security and welfare cases, and countless more. This explosion of federal question cases insures that federal judges will not be lacking in breadth or in matters to whet their interests. It also insures that lawyers of every sort will increasingly find themselves in federal court without the aid of diversity. With all respect to Mr. Frank I simply cannot believe that, with the array I have mentioned, the busy litigating lawyer is not frequently in the federal courts without the aid

of diversity. Mr. Frank says all these fields are in the hands of specialists; at least in the larger cities personal injury and insurance cases, two of the largest heads of diversity jurisdiction, really are. In 1979 diversity is no longer needed to make state courts aware of the Federal Rules of Civil Procedure which were adopted in 1938.

Finally there is the argument that it is somehow wrong to deprive lawyers of their option to sue in federal or state court, depending on which they think will best serve their client's cause. This, I believe, is what truly lies behind the array of bar association opposition that has been paraded. It simply ignores that the federal courts were intended from the outset to be courts of severely limited jurisdiction; lawyers and their clients are not entitled to go there unless there is some good reason why a federal court should hear their case. Once there may have been a good reason in the case of the out-of-state party. There no longer is.

I trust that in evaluating the opposition of bar associations, Congress will consider the quality of their arguments and not simply their brute force. As

Elihu Root, a president of the American Bar Association, said many years ago:

Lawyers are essentially conservative. They do not take kindly to change. They are not naturally reformers The lawyers who have authority as leaders of opinion are men, as a rule, who have succeeded in their profession, and men naturally tend to be satisfied with the conditions under which they are succeeding.

Elihu Root, *The Layman's Criticism of the Lawyer*, 39 Am. Bar. Assoc. Rep. 386, 390-91. Congress has a broader constituency. Its duty is to concentrate the resources of the federal judiciary where they are most needed and can do the most good.

Let me emphasize, in concluding this part of my discussion, that the desire of most federal judges to be rid of diversity jurisdiction does not stem from a desire to do less work or to deny access to worthy suitors. It stems rather from a desire to do a better job for the suitors who need that access to assert rights created by the Constitution and by Congressional statutes, old and new. Diversity jurisdiction, today simply an excrescence

on the proper work of the federal courts, will have to be abolished sometime. What better time than now?

New Courts of Appeals

I now turn to S. 678. I shall not attempt to deal comprehensively with this important bill. Let me begin with the proposal for two new Courts of Appeals: a Court of Appeals for the Federal Circuit and a Court of Tax Appeals. I favor these proposals in principle although I have some serious questions on details. For a fuller presentation of my views on the basic issues, I refer to Part VIII of my 1972 lectures (pp. 153-71) entitled "Patents and Taxes."

The need for a single Court of Tax Appeals was exposed forty years ago by Professor Roger Traynor, as he then was, in an article in 38 Columbia Law Review

STATEMENT OF CHARLES ALAN WRIGHT

My name is Charles Alan Wright. I am Charles T. McCormick Professor of Law at The University of Texas. I regret that I will be out of the country at the time of these hearings and that convalescence from surgery has limited my work and my travel during much of the spring because I should like very much to be present in person to testify in support of S. 679, the bill that would abolish general diversity of citizenship jurisdiction. There is no single piece of legislation pending in Congress that would do more to add to the efficiency of the federal courts and to make rational the distribution of business between the state and federal judicial systems.

Appended to this statement is a copy of the prepared statement of my testimony on March 17, 1978, to the Subcommittee on Improvements in Judicial Machinery. S. 679, the bill now under consideration, is identical with S. 2389, 95th Congress, the bill to which my 1978 statement was primarily directed. Although statistics for fiscal 1978 are now available, and it would be possible to rewrite my statement to incorporate those figures, they show no significant change from the figures of the prior year on which I relied in the earlier statement. I would call the attention of the committee this year also to the published record of the 1978 hearings, Federal Diversity of Citizenship Jurisdiction, Hearings on S. 2094, S. 2389, and H.R. 9622 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 95th Cong., 2d Sess. (1978). My testimony appears at pages 44-63 of those

Hearings and includes my answers to the questions of Senator De Concini and the subcommittee counsel as well as some remarks I directed to the testimony of John P. Frank, who had preceded me as a witness.

I have had the advantage, in preparing the present statement, of seeing the preliminary testimony that Mr. Frank will give to this committee this year. There is nothing in it that comes as a surprise. It is much the same as his testimony last year before Senator De Concini's subcommittee and in 1977 before Representative Kastenmeier's subcommittee of the House Judiciary Committee. Indeed the arguments he makes are essentially those he made in 1963 in his well-known article, Frank, For Maintaining Diversity Jurisdiction, 73 Yale L.J. 7 (1963). Because, as I say in my 1978 statement, John Frank is a dear and respected friend, with whom I have been allied many times in efforts to improve the administration of justice, I think I dare quote the remark made about him by Professor David P. Currie of the University of Chicago Law School. "Like an Orwellian broken record, John P. Frank has unabashedly argued for diversity jurisdiction on a broader basis: State Courts Bad, Federal Courts Good." Currie, The Federal Courts and the American Law Institute, 36 U.Ch.L.Rev. 1, 5 (1968).

In the opening footnote to his 1963 article Mr. Frank says that he had shown his manuscript to me and to three others and that "we" concur generally in the conclusion here reached." That was true in 1963. It is not true in 1979. The world of the federal courts has changed markedly in the intervening years, but Mr. Frank's arguments remain the same. Diversity cases were a luxury that could be afforded in 1963. The caseload of the federal courts has more than doubled since then, and there is no longer room for luxuries.

Classes of litigation that were barely known in 1963 now make up a heavy part of the federal docket. Civil rights cases have increased at an almost exponential rate and a large part of the time of federal judges is spent hearing cases brought under Acts of Congress that were not on the books in 1963. These litigants cannot be told that they must wait their turn until the court has disposed of automobile accident cases or contracts disputes that are in federal court only because of the accident of diversity.

In his preliminary statement Mr. Frank speaks one more of "the educational value of having two systems in interaction." Again this is an argument that made sense in 1963, when there were only 63,000 civil cases of all types in federal court. But in fiscal 1977 there would have been 99,000 civil cases in federal court even if there had not been a single diversity case. We no longer have a specialized federal bar. The increase in litigation and the expansion of kinds of litigation means that every lawyer today must be at home both in federal and state court, and we do not need to preserve diversity in order to foster the interaction that Mr. Frank rightly values.

The essence of Mr. Frank's position is that the roughly 32,000 cases now brought in federal court because of diversity will be brought in some court, and that it does not aid the overall administration of justice to move them from federal court to state court. In his 1971 testimony to a Senate subcommittee he said that there "is not any good in moving the manure from one pile to another pile." Diversity Jurisdiction, Hearings on S. 1876 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 92nd Cong., 1st Sess. 258 (1971). In his preliminary testimony for the present hearings he has abandoned the barnyard metaphor in favor of one drawn from the carnival world, and tells us that the proposal to abolish

diversity is nothing but a "jurisdictional variation of the old three shell game."

The argument is without merit, whatever the figure of speech used to present it. It is simply not true that these cases will require as much time of the judicial system if they are in state court as if they are in federal court. Whenever a case is brought in federal court it is necessary to decide whether it is properly within the limited jurisdiction of those courts. That question simply does not arise if the case is brought in a state court, where general jurisdiction is the rule. Mr. Frank ignores that aspect of the matter in his preliminary testimony. In his testimony last year to Senator De Concini's subcommittee he was asked about it and responded:

But the amount of time which is taken in determining whether a diversity case can be in the Federal courts is extremely small.
* * * The percentage of waste on this is below, infinitely below one tenth of 1 percent of the cases. There just is not much of a problem. We could almost always tell whether there is diversity or whether there is not.

Federal Diversity of Citizenship Jurisdiction, Hearings on S. 2094, S. 2389, and H.R. 9622 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary 43 (1978).

My own judgment -- and I make a large part of my living writing about these matters -- is that Mr. Frank grossly underestimates the complexity of the rules on whether there is federal jurisdiction and the percentage of cases in which jurisdiction issues arise. The point is so significant that I repeat here some of the figures I set forth in my 1978 statement. In my multi-volume Treatise, my collaborators and I devote 414 pages to the rules on diversity jurisdiction. 13 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 569-855 (1975); 14 id. 1-128 (1976). This is in the main volume alone. Many more pages are spent on this subject in the pocket parts in which

we deal with the reported cases since the main volumes were published. But even this is far from all. Amount in controversy has always been almost entirely a problem in diversity cases, because specific statutes have granted jurisdiction without regard to amount in most federal question cases. We require 156 pages to state the complex rules on measuring amount. 14 id. 355-511 (1976). We have a 32-page section on removal in diversity cases, id. § 3723, and much of the rest of the 257-page chapter on removal deals with problems that are peculiar to diversity cases. A large part of our lengthy discussion of venue, 15 id. 1-199 (1976), relates only to diversity cases. Finally, in volumes 4 to 12 of the Treatise there are numerous sections indicating how particular procedural devices are affected by the limitations on federal jurisdiction.

Assistant Attorney General Meador has recently provided me with a monograph by Professor Thomas Rowe of the Duke Law School based on research supported by the Office for Improvements in the Administration of Justice. Rowe, Significant Nonobvious Effects of the Abolition of the General Diversity Jurisdiction (1979). Professor Rowe's conclusion, id. at 56, is that

the considerable simplification in federal practice resulting from abolition would be an important benefit of the measure, rendering mostly superfluous "the enormous infrastructure that has grown up to support and define the diversity jurisdiction." Many complex and important problems that are disproportionately products of diversity jurisdiction would virtually disappear.

These are the complicated and wholly unnecessary problems that Mr. Frank writes off so casually.

It would be bad enough, at a time when courts are crowded, if the only cost imposed by these jurisdictional rules were the tremendous waste of time for judges and lawyers and delay for litigants. Unfortunately there is

another and even greater cost: injustice. In Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978), a wrongful death judgment for \$234,756 was taken away from a widow because third-party defendant's disclosure, on the third day of trial, that avulsion of the Missouri River had put its principal place of business in Iowa, not Nebraska, meant that there was no longer federal jurisdiction of the case. At least there is a possibility that Mrs. Kroger can begin her litigation again in the state court. That possibility was not open to the plaintiff in Knee v. Chemical Leaman Tank Lines, Inc., 293 F.Supp. 1094 (E.D.Pa. 1968). There defendant, which had admitted that it was a Delaware citizen, carefully waited until the statute of limitations would bar a new suit in state court before asserting that its principal place of business was in Pennsylvania, and thus that there was no diversity. The class of plaintiffs who were seeking damages for pollution of Lake Champlain in Zahn v. International Paper Co., 414 U.S. 291 (1973), bore the expense and burden of two years of litigation through the district court, the court of appeals, and the Supreme Court, before learning that their action could not go forward because the claims of many of them were for less than \$10,000. I have picked out these cases to cite because their facts are dramatic and the injustice of what happened obvious. I have not picked them out because they are unusual, because unfortunately they are not. A lawyer as able as Mr. Frank would doubtless have avoided these traps -- but all too many competent lawyers are ensnared in them to the cost of their clients.

There is another important respect in which a case becomes more difficult in federal court than it would be if in state court. In diversity cases the federal judges are subject to the rule of Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), and must apply state law as best they are able to discern it. State

courts are free to decide for themselves authoritatively what the state law is. It does not meet the point for Mr. Frank to say that he has never known anyone to decline a federal judgeship because of the burdens of determining state law. The fact is that the burdens are there and that they would not be there if the case were in state court. The determination of state law is an unnecessary complexity that is inherent in diversity litigation. Unfortunately for the litigants, it not infrequently happens that the federal courts, despite their best efforts, are wrong in their prediction of state law. See Hertz, Misreading the Erie Signs: The Downfall of Diversity. 61 Ky.L.J. 861 (1973); cf. Thomas, The Erosion of Erie in the Federal Courts: Is State Law Losing Grounds?, 1977 B.Y.U.L.Rev. 1 (1977). The Erie doctrine will not vanish if diversity is abolished, but it will be shrunken to a faint shadow of its present importance and difficulty.

Finally, it is hardly surprising that Mr. Frank's committee has been able to obtain resolutions supporting preservation of diversity from a vast number of bar associations. I do not doubt for a moment that the practicing bar favors continuance of diversity and would probably favor expanding that jurisdiction to the constitutional limits. What Judge Charles E. Clark and I wrote years ago, in a different but not unrelated context, bears repeating here.

Even without a professional referendum, we are willing to acknowledge the strong probability that a majority of present practitioners, if called upon to vote, would favor retention of the present system without substantial change. Such, indeed, is so usual a result in all jurisdictions that we can accept it as a truism; the rank and file of the bar will always work for the practice it knows, will, indeed, view with suspicion, if not active dislike, a system even in smooth operation next door across those imaginary, but sharp, lines which divide states. Reform has always come, must always come, from the students and leaders, not those whose horizons are limited by their office walls or at most by the walls of the nearest courtroom.

Clark & Wright, The Judicial Council and the Rule-Making Power: A Dissent and a Protest, 1 Syracuse L.Rev. 337, 348 (1950). Or as a state procedural reformer put it, in explaining why David Dudley Field's system of "fact pleading" did not work: "the only penalty for over-pleading was one the individual lawyer was willing, however reluctantly, to incur -- the breakdown of the entire system." Skinner, Pre-Trial and Discovery Under the Alabama Rules of Civil Procedure, 9 Ala.L.Rev. 202, 204 (1957).

I have been repeatedly impressed by the unselfishness of the American practicing lawyer. It has been my experience, on a variety of committees over the years, that when the facts are fully set before a lawyer, he will vote for reforms that are in the best interest of the judicial system even though they may be against his own interest, or that of the class of clients that he usually represents. But until the lawyer is educated in this way, he inevitably reacts in terms of his own particular and often limited experience.

To the average practitioner diversity seems generally to work well. He is unaware of the burdens it imposes on the system. He sees in diversity an opportunity for choice of forum in many cases and it is not remarkable that lawyers like to have a choice rather than to have a particular court imposed upon them. Mr. Frank makes no suggestion that the bar groups whose resolutions he enumerates adopted these resolutions after careful study on the basis of a fair and balanced statement of facts about diversity. I believe they represent nothing more than the instinctive reaction of lawyers, who have not been fully informed about the arguments each way and "whose horizons are limited by their office walls," to favor continuance of a system with which they are familiar and that in their individual experience has not worked badly.

These expressions of sentiment cannot be ignored -- but neither can they be given undue weight. This Committee has the opportunity to inform itself on all of the facts and to see the costs that diversity exacts. I hope that when it has done so the Committee will join President Carter, Chief Justice Burger, Attorney General Bell, and the Judicial Conference of the United States in pressing for this reform that will so well serve the national interest.

PREPARED STATEMENT OF
American Council of Life Insurance

1850 K Street, N.W.
Washington, D.C. 20006
(202) 862-4230

Linwood Holton
Vice President and General Counsel

March 21, 1979

Honorable Edward M. Kennedy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Re: S.679, a bill "To eliminate the amount in controversy requirement for Federal question jurisdiction, to modify the jurisdictional requirements with respect to diversity of citizenship, and for other purposes."

Dear Mr. Chairman:

I am writing to you on behalf of the American Council of Life Insurance to present the views of the Council on the bill S.679. The Council has a membership of 484 life insurance companies which have 95 percent of the life insurance in force in the United States.

The Council is opposed to section 4 of S.679 which would amend 28 U.S.C. section 1332 to abolish diversity of citizenship as a basis of jurisdiction of Federal district courts. The right of a party to litigate in a Federal district court, when diversity requirements are met, as well as in the state court is a valuable right of civil litigants which should be preserved.

Federal courts in diversity of citizenship cases provide litigants with procedural advantages that are not and cannot be provided by a state court. For example, the federal system provides the machinery for the 100 mile extra-territorial service of process, the 100 mile "bulge" available to subpoena witnesses, and allows pretrial discovery in any one of the U.S. Districts without resorting to supplemental proceedings in state courts. Another advantage of the federal courts is that it provides an out of state litigant with a court that has familiar procedures rather than a local court where the procedures may be different and unknown.

S.679 would require life insurance companies to litigate nearly all cases in state courts and subject them to greater risk of local prejudice. While the causes of prejudice may have been reduced between individual persons, local prejudice and distrust of the outsider still exist in certain rural areas and metropolitan centers,

particularly when a large out of state corporation is in litigation against a local individual. State judges who are elected in their districts and juries which are selected from the smaller state districts may have many more temptations to favor a local resident over a litigant from outside of the state.

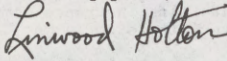
S.679 would effectively eliminate the federal removal option for most life insurance companies. The present diversity rules are working well, and there is no demonstrated need for this drastic change. In many instances the Federal district courts are in a better position, because of less crowded dockets and a variety of other reasons, to provide more efficient and satisfactory handling of litigated matters.

As a result of the bill, a much greater volume of cases would wind up in the state courts, increasing the financial and administrative burdens on state and local governments. They are already struggling under their current responsibilities and are less able and probably less willing than the Federal government to bear the increased costs. In most instances this will result in less efficient and less uniform administration of justice.

For these reasons, we recommend that the provisions in S.679 to abolish diversity of citizenship jurisdiction be deleted from the bill.

We respectfully request that this letter be included in the printed record of the hearings on S.679.

Sincerely yours,



Linwood Holton
Vice President and
General Counsel

LH:kr

cc Members, Committee on the Judiciary

Additional Submission of John Frank

The State Bar of Arizona and the Committee to Maintain Diversity Jurisdiction assume that most if not all members of the Senate Judiciary Committee have heard directly from their state bars on this subject within the past 12 months. Attached, as a cross-section of bar sentiment, are letters which have come to our attention.

Alabama	Montana
Indiana	Nevada
Iowa	Ohio
Kansas	South Carolina
Massachusetts	Utah
Mississippi	Vermont
	West Virginia

ALABAMA STATE BAR

OFFICE OF THE PRESIDENT
 HUGH W. ROBERTS, JR.
 P. O. BOX 1439
 TUSCALOOSA, ALABAMA 35401

TELEPHONE
 205-759-5771

April 3, 1979

Honorable Howell T. Heflin
 U. S. Senator from Alabama
 Senate Office Building
 Dirksen Building
 Washington, D. C. 20510

Dear Howell:

It is my understanding that the bill to abolish diversity jurisdiction in the federal courts is under consideration by the Senate Judiciary Committee. It is my further understanding that hearings on the matter will continue through April.

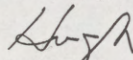
The views of the Alabama State Bar on the abolition of diversity jurisdiction have been made known to our congressional delegation. To reiterate the Alabama State Bar's position, I speak as President in opposition to the abolition or any substantial alteration of diversity jurisdiction.

As a former practicing attorney at the Alabama State Bar and with your long and distinguished background in matters judicial, I feel certain that you can understand the practicing attorney's opposition to the actions heretofore undertaken to effect abolition or alteration of diversity jurisdiction.

May we count on your support?

With best wishes I am

Sincerely yours,



Hugh W. Roberts, Jr.

HWR:kew

cc: Reginald T. Hamner
 Executive Director
 Alabama State Bar

BCC: Mr. John P. Frank, Chairman
 Committee to Maintain Diversity Jurisdiction
 and for the State Bar of Arizona



Indiana State Bar Association

April 2, 1979

COPY
Honorable Birch E. Bayh, Jr.
United States Senate
363 Russell Office Building
Washington, D. C. 20510

Dear Senator Bayh:

It is our understanding that the Senate Judiciary Committee, of which you are a member, is holding hearings through the month of April, 1979.

I wish to take this opportunity to re-confirm the position of the Indiana State Bar Association opposing either abolition or any substantial alteration of federal diversity jurisdiction.

We will greatly appreciate your support of our position.

Sincerely,

Jack Lyle

JL:bj

cc: Mr. John P. Frank ✓



THE IOWA STATE BAR ASSOCIATION

EDWARD H. JONES, SECRETARY
1101 FLEMING BUILDING
DES MOINES, IOWA 50309
TELEPHONE 515 - 243-3179

April 9, 1979

Senator John Culver
United States Senate
Washington, D. C. 20510

Re: Diversity Jurisdiction

Dear John:

As you know, the Senate Judiciary Committee is having hearings on the above subject and will continue them through April. As you also know, The Iowa State Bar Association is very much opposed to either abolition or substantial alteration of the diversity jurisdiction.

You will recall your position on this subject last session and we sincerely hope that your posture has not changed. Chief Justice Burger has been conducting a one man lobbying effort on this subject. He has the support of Griffin Bell and this combo is a pretty tough act to follow. However, it would have a very serious effect on our state courts and the legislation should not be enacted. As you are undoubtedly aware the measure bogged down in the House Committee the other day at the last moment. We are aware of the intention of some of the Senate leadership to pass the bill.

It seems to us out here that before this legislation should be adopted - the main argument in support thereof being "Federal Court congestion" - the Congress should wait to evaluate the impact on the Federal Courts of the 152 new judgeships, the drastic revisions in the Bankruptcy Law, the current consideration of expanded magistrate's jurisdiction, the successful experimentation with federal arbitration and the consideration of arbitration legislation.

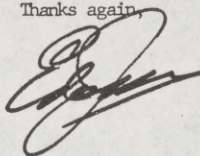
We see no need to transfer the diversity cases to our state courts thereby increasing their caseloads and depriving the Iowa citizen of redress which has been available since Iowa became a state.

In short, old friend, this measure ought to be very carefully studied - at least for the next few years. It has worked well for the last 200 years.

Thanks so much for your consideration of this matter.

Please give my best regards to Park Rinard, Patty Sarcone and the other members of your most excellent staff. Incidentally, your boy Tim out here is one hell of a kid and he and Park did a great job for us on a passport problem we had on a charter recently to Rio.

Thanks again,



EHJ/mjb

BC: John P. Frank



Kansas Bar Association

April 12, 1979

WILLIAM C. FARMER
President
208 West Douglas, #830
Wichita, Kansas 67202, (316) 267-5293

The Honorable Robert Dole
Senate Office Building
Washington, D.C. 20510

Dear Senator Dole:

The Kansas Bar Association consisting of 3500 lawyers is opposed to the pending legislation to abolish diversity jurisdiction in federal courts. We understand this Bill is now in the Senate Judiciary Committee for consideration. A similar Bill is H.B. 2202.

We disagree with those who say the need for retaining this jurisdictional mandate no longer exists. Anyone who has handled this type of case in our federal courts readily appreciates the importance of diversity jurisdiction where interstate litigation is concerned. Such jurisdiction provides uniform rules of procedure, discovery, pre-trial procedures, controls and trials. Federal case law has been built uniformly across the nation so that litigants in any one state are cognizant of the procedures and laws in every other state. This valuable system would be lost in a large segment of litigation if this legislation becomes a reality.

By way of contrast, rules of procedure, property rights, jurisdictional requirements and many other factors in state courts have a great variance and cause confusion and dissatisfaction with the court systems varying so much from one jurisdiction to another. Local prejudices are an expression of human nature and are bound to be present in many instances.

It does seem inconsistent to us, that at the very time the President of the United States is in the process of appointing 152 new federal judges to take care of the case load, the Congress is considering taking away a very large segment of the jurisdiction of such courts. To pour salt in the wound, these thousands of cases would be dumped on already over-burdened state courts which are not equipped physically, financially or uniformly to handle this burden.



Kansas Bar Association

Page Two

WILLIAM C. FARMER
President
200 West Douglas, #830
Wichita, Kansas 67202, (316) 267-5293

The Kansas Bar Association is most conscious of the jealous prerogative of the citizen to demand and expect fairness, equity and justice from our courts. The present organization of our federal and state courts, built by two hundred years of judicial and legislative discretion has developed a compatible and workable system. The Bar Association is greatly concerned when anything occurs to tamper with one of the citizen's most precious rights, i.e., the right to justice under the law in a fair and speedy trial. We feel that to dump this huge burden on state courts which are ill equipped to meet the burden does great damage to justice and the litigant.

This is the era of consumer rights, civil rights, product liability retribution and complex class action litigation. Imagine the chaos that would exist in a state court trying to direct and supervise the Firestone Tire litigation in fifty states with inadequate powers to reach across state lines in discovery process or enforcement procedures. Mr. and Mrs. John Q. Public would really look at justice with a jaundiced eye if such a valuable tool of justice was taken away from him or from her.

We sincerely hope that you will study this matter in great depth and not make a mistake that might destroy, not protect, the citizen's rights to free and open courts in a system designed to meet their needs.

Thank you for your thoughtful consideration.

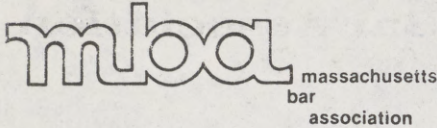
Very truly yours,

William C. Farmer

William C. Farmer, President
KANSAS BAR ASSOCIATION

WCF:jmt

cc: Mr. Herbert Marshall, President-Elect
bcc: Mr. John P. Frank, State Bar of Arizona



one center plaza, boston, massachusetts 02108 / (617) 523-4529

Roy A. Hammer
President

April 24, 1979

Senator Edward M. Kennedy
2241 Dirksen Office Building
Washington, D. C. 20510

Dear Senator Kennedy:

As you know, there are currently pending in the Congress two bills which would seek to abolish diversity of citizenship jurisdiction, so-called, in the federal courts. These, I understand, are numbered S. 679 and HR. 2202.

Our Association believes it important to reaffirm our position in opposition to such legislation, whether it be to abolish or to substantially curtail diversity jurisdiction--a position adopted by the Board of Delegates in 1978.

As you no doubt know, a significant reorganization of the courts of the Commonwealth was enacted last year. A chief objective of the Act was to provide a mechanism for redirecting the crushing burden of civil litigation from our Superior Court to other forums for resort. The embryonic implementation period of court reorganization is under way. To cut off the federal court avenue for the complex and time-consuming cases that now can be brought in the U.S. District Court, in Massachusetts, may have an unsalutary effect on this implementation.

And, of course, the U.S. District Court for Massachusetts was greatly assisted with the recent appointment of four distinguished individuals to carry out its judicial task.

We hope that you will consider our views in this regard and give this matter further study before taking it on a course that would not be beneficial to the citizens of the Commonwealth.

Sincerely,

Roy A. Hammer

cc: Richard K. Donahue
John P. Frank ✓
Craig H. Baab

GEORGE H. VAN ZANT
EXECUTIVE DIRECTOR

MISSISSIPPI STATE BAR

620 NORTH STATE STREET
JACKSON, MISSISSIPPI 39201

AREA CODE 601
948 4471

April 9, 1979

Honorable Thad Cochran
United States Senator
322 Russell Senate Office Building
Washington, D. C. 20510

Dear Thad:

The Senate Judiciary Committee is considering S 679 to abolish diversity jurisdiction in the federal courts.

The Board of Commissioners of the Mississippi State Bar in 1978 voted to oppose removal of diversity jurisdiction.

Last year Congress voted 152 new federal judgeships which should give some relief to handling these cases.

If diversity jurisdiction was abolished, this would increase the workload on Mississippi's 30 Circuit Judges by 25 per cent plus add many thousands of dollars in costs to the state court system.

We hope you will consider our position on this matter when final action is taken by the Senate Judiciary Committee on S 679.

Sincerely yours,



George Van Zant

GVZ:al

cc: Hon. Raymond L. Brown
Hon. Jack A. Travis, Jr.

bcc: Mr. John P. Frank, Chairman ✓
Committee to Maintain Diversity
Jurisdiction
24th Floor, 100 W. Washington, Street,
Phoenix, Arizona 85003



STATE BAR OF MONTANA

2030 ELEVENTH AVENUE • WASHINGTON PLAZA
P. O. BOX 4669 • HELENA, MONTANA 59601 • (406) 442-7660

May 6, 1979

Committee to Maintain Diversity Jurisdiction
24th Floor
100 West Washington Street
Phoenix, AZ 85003

Office of the President
Reply to: Theodore K. Thompson
P.O. Box 1472
Heav, MT 59901

Re: Federal Diversity Jurisdiction

ATTENTION: John P. Frank

Dear Mr. Frank:

At its May 4, 1979 meeting the Board of Directors of the State Bar of Montana voted unanimously to oppose any abolition or substantial modification of diversity jurisdiction in our Federal Court system. It is our understanding that there is presently proposed legislation before the Senate Judiciary Committee which would, in effect, abolish diversity jurisdiction. As I doubt that any member of the State Bar of Montana will be able to appear before the Judiciary Committee, we request that you, or your Committee, convey our opposition.

TKT/tkt

Very truly yours,

Theodore K. Thompson

xc: Kent Parcell
Max Baucus

46-678 555

OFFICERS

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*Theodore K. Thompson
P. O. Box 1472
Heav, MT 59901

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414 Davison Bldg
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*C. S. McCracken
P. O. Box 1645
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P. O. Box 152
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*George W. Hunt
507 Pleasant Street
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ABA DELEGATE
*Robert Conditos
P. O. Box 2268
Great Falls, MT 59403

EXECUTIVE DIRECTOR
*Kent M. Parcell

*Executive Committee

State Bar Of Nevada

300 E. First Street • Reno, Nevada 89501 • (702) 329-4100

J. ROGER DETWEILER
Executive Director

March 19, 1979

John P. Frank, Esq.
100 West Washington St.
Committee to Maintain Diversity
Jurisdiction
Phoenix, Arizona 85004

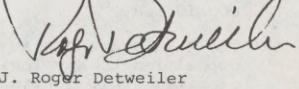
Dear Mr. Frank:

Thank you for your recent letter regarding legislation pending in Congress which would either abolish or markedly diminish diversity jurisdiction.

Please be advised that at a meeting of the Board of Governors of the State Bar of Nevada held in Death Valley, Ca. May 3-4, 1978, the Board voted to oppose the legislation then pending in Congress which would eliminate diversity jurisdiction and this position was subsequently reported to the American Bar Association.

I hope this will be helpful.

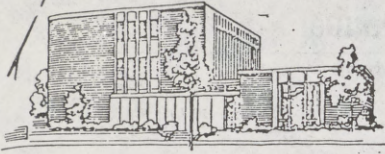
Sincere regards,



J. Roger Detweiler

JRD:bw

46-678 556



JAMES D. MCINTIRE
DIRECTOR OF GOVERNMENT AFFAIRS

OHIO STATE BAR ASSOCIATION

OFFICE OF GOVERNMENT AFFAIRS

SUITE 545, 41 S. HIGH STREET, COLUMBUS, OHIO 432

TELEPHONE 614/221-6983

March 23, 1978

The Honorable Howard Metzenbaum
405 Russell Senate Office Building
Washington, D. C. 20510

Dear Senator Metzenbaum:

The House of Representatives recently passed H.R. 9622, which would abolish the diversity of citizenship jurisdiction of the U.S. Federal District Courts. I am advised that H.R. 9622, and other legislation on the same subject, is currently pending before the Senate Judiciary Committee.

On Friday, February 3, the Executive Committee of the Ohio State Bar Association adopted a resolution opposing the elimination of diversity jurisdiction of U.S. Federal District Courts.

Attorneys remain convinced that a right to the choice of jurisdiction, where diversity of citizenship exists, is an important right, and one which should be preserved. Proponents of the legislation talk frequently in terms of reducing the caseload of Federal court judges, but the effect of such a change on the caseload of State court judges has apparently gone unconsidered.

The Ohio State Bar Association respectfully requests your opposition to any legislation which would eliminate the diversity of citizenship jurisdiction of the U.S. Federal District Courts.

Thank you for your consideration.

Sincerely,

James D. McIntire
Director
Government Affairs

JDM/j

cc: Michael Colley; Joseph B. Miller; Sam Bartlo; A. Russell Smith,
Irving I. Saul, 1101 Centran Bldg.
6929 N. Main St., Dayton, OH 45415 Akron, OH 44308

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SOUTH CAROLINA BAR

1321 BULL STREET
P. O. Box 11039
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE (803) 799-6653

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Robert N. Dullant

April 2, 1979

Honorable Strom Thurmond
Senate Office Building
Washington, D.C.

Dear Senator:

The House of Delegates of the South Carolina Bar has adopted a resolution opposing abolition of or substantial alteration of diversity jurisdiction in the United States District Courts. We know that the Senate Judiciary Committee is currently holding hearings on a bill to abolish diversity jurisdiction, and the purpose of this letter is to let you know that those of us in South Carolina who daily deal with the matter feel that the enactment of such legislation would be a mistake. While we are aware of the crowded dockets in the Federal Courts, we believe that the new Judges recently authorized will go a long ways towards alleviating the situation. We also do not believe that diversity cases are the chief culprit in the over-crowded Federal dockets. Finally, abolishing diversity jurisdiction will not result in fewer cases being filed. It will only result in transferring those cases from the Federal dockets to the State dockets, dockets which are also quite crowded. The original purpose of granting diversity jurisdiction to the Federal courts is still a valid one, and we trust you will see fit to oppose the bill to abolish such jurisdiction in the Federal Courts.

With best personal regards, I am

Sincerely yours,

J. D. Todd, Jr.
President

JDT, JR/ag

BC: Mr. John P. Frank, Chairman ✓
Committee to Maintain Diversity
Jurisdiction
24th Floor, 100 West Washington St.
Phoenix, Arizona 85003



UTAH STATE BAR

Office of the Executive Director

425 EAST FIRST SOUTH
SALT LAKE CITY, UTAH 84111

Dean W. Sheffield
Executive Director

Marsha B. Hanson
Administrative Assistant

April 3, 1979

Senator Orrin G. Hatch
United States Senator
125 South State, Room 5430
Salt Lake City, Utah 84138

Dear Senator Hatch:

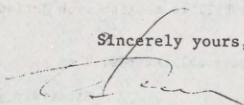
As a member of the Senate Judiciary Committee, we contacted you some time ago to express the opposition of the Utah State Bar Commission to abolish diversity in Federal Court jurisdiction.

Mr. John P. Frank of the Committee to Maintain Diversity Jurisdiction had also been authorized to state the opposition of the Utah State Bar.

As you know, the Senate Judiciary Committee is holding hearings on the proposed legislation this month. We reiterate our opposition to the legislation and urge that you oppose it in Committee.

Mr. Frank will be appearing before the Senate Judiciary Committee. The position he asserts is much the same position as that of the Utah State Bar Commission.

Sincerely yours,


Dean W. Sheffield
Executive Director

DWS/tm

cc: Senator E. J. (Jake) Garn
John C. Beaslin, President
Utah State Bar

bcc

Vermont Bar Association

Reply To: P. O. Box 988
Burlington, VT 05402

April 4, 1979

President
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President-Elect
Chester S. Ketcham
Secretary
Louis P. Peck
Treasurer
George E. Rice, Jr.
Executive Director
Lawrence J. Tugueon

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Louis P. Peck
George E. Rice, Jr.
Hon. Wynn Underwood

The Honorable Patrick J. Leahy
United States Senator
Senate Office Building
Washington, D. C. 20510

Dear Patrick:

I understand that the Senate Judiciary Committee will shortly consider a bill to either limit or abolish diversity jurisdiction in federal courts. The Vermont Bar Association has opposed this, and I do personally. With the substantial increase in federal judges, it makes no sense to me at all to eliminate what has been estimated to be a quarter of the workload of a federal judge. As I am sure you know, the civil jury docket of our federal judges is comparatively light, and if the diversity cases were removed, they obviously would have even less to do. It seems to me that this is an alternative which any litigant should have available, at least to the extent that we now do.

Cordially,

S-JOHN M. DINSE

John M. Dinse

jmd/s

bcc: John P. Frank, Esquire



THE WEST VIRGINIA STATE BAR
E-404 STATE CAPITOL
CHARLESTON, WEST VIRGINIA 25305

DUKE NORDLINGER STERN
EXECUTIVE DIRECTOR

February 16, 1978

(304) 348-8414

The Honorable Robert C. Byrd
United States Senate
Washington, DC 20515

Dear Senator Byrd:

At its meeting on February 3, the Board of Governors of The West Virginia State Bar unanimously voted to oppose any legislation which would abolish diversity of citizenship as a ground for Federal jurisdiction. It was felt the removal of such jurisdiction would have the effect of denying citizens of West Virginia access to the Federal courts in a number of cases and deprive them of vital rights.

With best wishes, I am

respectfully yours,

Duke Nordlinger Stern

DNS:km



THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA

April 10, 1979

In reply refer to:

Dear ATLA Member in North Carolina:

NATIONAL AFFAIRS
DEPARTMENTChairman
HOWARD SPECTER
Grant Building
Pittsburgh, PA 15219
(412)456-2000Department Director
C. THOMAS BENDORF
ATLA Home Office

In early March, the National Affairs Department made an attempt to reach every ATLA member in North Carolina by telephone. Our purpose was to alert you to the key role that Congressman Lamar Gudger stood to play in an impending House Judiciary Subcommittee vote on a bill to abolish the diversity of citizenship jurisdiction of Federal courts. Although Mr. Gudger may not be your Congressman, we had reason to believe he would be sensitive to the views of the trial bar state-wide. I am writing now to bring you up to date on the proceedings.

On March 28, the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, of the House Judiciary Committee, decided unanimously to defer further action on the bill in order to see what the Senate would do with its proposal to abolish diversity jurisdiction. Last year, this same Subcommittee (with different membership) approved the abolition bill unanimously, thus springing it on its way to passage on the floor of the House by a 2-1 margin. Many observers felt that there would again be easy sailing this year.

We do not know what slowed the Subcommittee down, but I can report to you that several Members, including one proponent of the bill, cited the swelling ranks of practicing lawyers who had made known to them their feelings concerning diversity jurisdiction. We have seen some of the letters which were sent to Congressman Gudger. They are uniformly well-conceived, well-expressed, and appropriate.

The fight now moves to the Senate Judiciary Committee, which contains no Senator from North Carolina; but we may come back to you for further help. The proponents' momentum could shift back to the House, and the "Courts" Subcommittee, at any time.

We thank those of you who have passed along to us what you have learned about Congressman Gudger's attitude on the bill. We urge you to do so if you have not.

On the behalf of all ATLA members who did not have the opportunity to participate in this first skirmish of the 96th Congress, I thank you for your prompt response.

Sincerely,

Howard A. Specter

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

WILLIAM E. FOLEY
DIRECTOR

JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

JAMES A. MCCAFFERTY
CHIEF
STATISTICAL ANALYSIS AND
REPORTS DIVISION

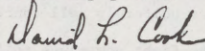
February 9, 1979

Mr. Mike Remington
Counsel, Subcommittee on
Courts-Civil Liberties and
Administration of Justice
Room 2137-Rayburn House
Office Building
Washington, D. C. 20515

Dear Mike,

Enclosed are the statistics you requested on diversity case filings in the United States District Courts for the twelve month period ending June 30, 1978. This material updates the data we provided for 1977 which was included in your Ninety Fifth Congress' Hearing Record at pages 352-376.

Sincerely yours,



David L. Cook
Assistant Chief

Enclosure

United States District Courts
Diversity Cases Filed Showing Residence of Plaintiff
July 1, 1977 - June 30, 1978

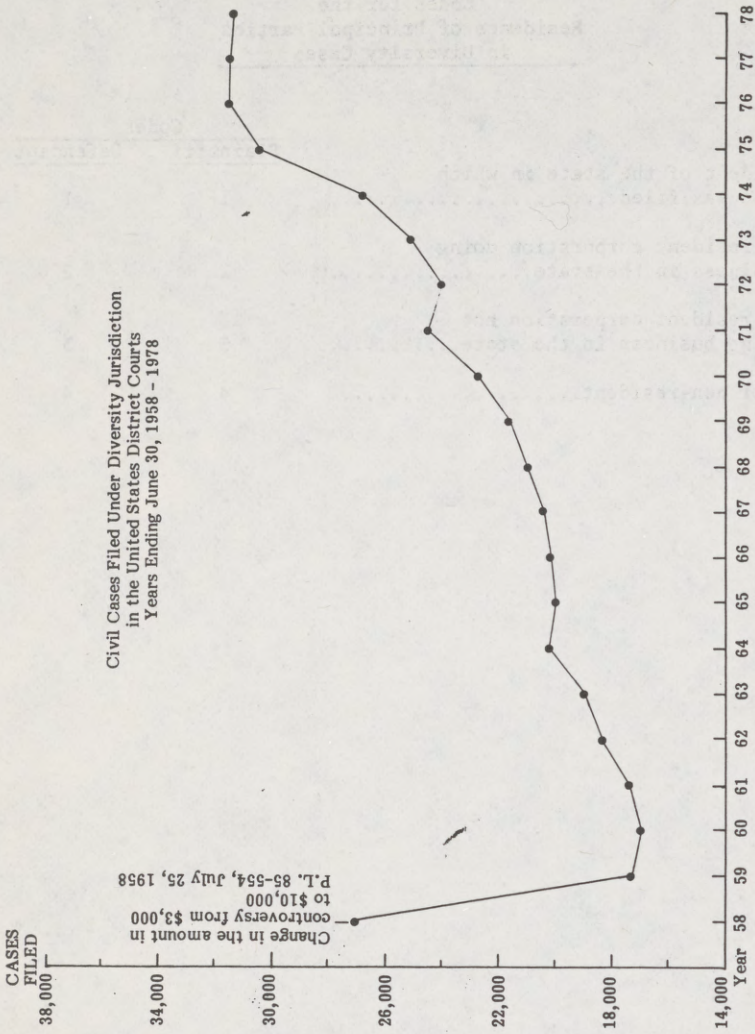
<u>Residence of Plaintiff</u>	<u>All Diversity Cases</u>		<u>Diversity Cases, Less Removals from State Courts</u>	
	<u>No. of Cases</u>	<u>Percentages</u>	<u>No. of Cases</u>	<u>Percentages</u>
Total.....	31,625	100.0	25,953	100.0
Resident of the state.....	18,951	59.9	14,098	54.3
Non-resident company doing business in the state.....	3,489	11.0	3,141	12.1
Non-resident company not doing business in the state..	2,974	9.4	2,833	10.9
Other non- resident.....	6,211	19.7	5,881	22.7

United States District Courts
Diversity Cases Filed Showing Residence of Parties
July 1, 1977 - June 30, 1978

Residence of Parties	All Diversity Cases		Diversity Cases, Less Removals from State Courts	
	No. of Cases	Percentages	No. of Cases	Percentages
Total.....	31,625	100.0	25,953	100.0
Both parties state residents.....	152	0.5	129	0.5
<u>Plaintiff a state resident and</u>				
Defendant corp. doing business.....	9,203	29.1	6,980	26.9
Defendant corp. not doing business.....	5,296	16.7	3,491	13.5
Defendant other non-resident.....	4,300	13.6	3,498	13.5
<u>Plaintiff corporation doing business</u>				
Defendant resident..	2,167	6.9	2,088	8.0
Defendant corp. doing business.....	409	1.3	341	1.3
Defendant corp. not doing business.....	614	1.9	465	1.8
Defendant other non-resident.....	299	0.9	247	1.0
<u>Plaintiff corp. not doing business</u>				
Defendant resident..	2,061	6.5	2,008	7.7
Defendant corp. doing business.....	509	1.6	479	1.8
Defendant corp. not doing business.....	209	0.7	169	0.7
Defendant other non-resident.....	195	0.6	177	0.7
<u>Plaintiff other non-resident</u>				
Defendant resident..	4,346	13.7	4,233	16.3
Defendant corp. doing business.....	998	3.2	919	3.5
Defendant corp. not doing business.....	456	1.5	365	1.4
Defendant other non-resident.....	411	1.3	364	1.4

Codes for the
Residence of Principal Parties
in Diversity Cases

	Codes	
	<u>Plaintiff</u>	<u>Defendant</u>
Resident of the state in which case was filed.....	1	1
Non-resident corporation doing business in the state.....	2	2
Non-resident corporation not doing business in the state.....	3	3
Other non-resident.....	4	4



Source: Administrative Office of the United States Courts

TABLE 1
UNITED STATES DISTRICT COURTS
Diversity Cases Filed
Showing Residence of Plaintiff
July 1, 1977 - June 30, 1978

CIRCUIT AND DISTRICT	TOTAL	RESIDENCE OF PLAINTIFF			
		1	2	3	4
TOTAL ALL DISTRICTS..	31,625	18,951	3,489	2,974	6,211
DISTRICT OF COLUMBIA.	377	191	43	21	122
FIRST CIRCUIT.....	1,334	779	119	146	290
MAINE.....	104	61	12	7	24
MASSACHUSETTS.....	112	396	53	70	116
NEW HAMPSHIRE.....	159	68	12	17	62
RHODE ISLAND.....	167	103	20	9	35
PUERTO RICO.....	269	151	22	43	53
SECOND CIRCUIT.....	3,057	1,883	190	309	675
CONNECTICUT.....	299	203	18	16	62
NEW YORK NORTHERN.....	112	66	9	6	31
NEW YORK EASTERN.....	690	483	37	59	111
NEW YORK SOUTHERN.....	1,753	1,029	115	213	396
NEW YORK WESTERN.....	108	61	8	11	28
VERMONT.....	95	41	3	4	47
THIRD CIRCUIT.....	3,746	2,070	339	354	983
DELAWARE.....	103	46	5	4	48
NEW JERSEY.....	1,019	577	94	76	272
PENNSYLVANIA EASTERN.....	1,870	1,053	182	153	482
PENNSYLVANIA MIDDLE.....	289	164	18	22	85
PENNSYLVANIA WESTERN.....	465	230	40	99	96
VIRGIN ISLANDS.....	-	-	-	-	-
FOURTH CIRCUIT.....	2,751	1,611	280	242	618
MARYLAND.....	458	194	27	84	153
NO. CAROLINA EASTERN.....	110	63	18	9	20
NO. CAROLINA MIDDLE.....	84	46	15	12	11
NO. CAROLINA WESTERN.....	130	60	23	20	27
SOUTH CAROLINA.....	832	575	88	31	138
VIRGINIA EASTERN.....	559	341	49	36	133
VIRGINIA WESTERN.....	229	124	27	18	60
W. VIRGINIA NORTHERN.....	80	50	5	3	22
W. VIRGINIA SOUTHERN.....	269	158	28	29	54
FIFTH CIRCUIT.....	7,113	4,331	842	654	1,286
ALABAMA NORTHERN.....	620	379	98	57	86
ALABAMA MIDDLE.....	179	98	26	24	31
ALABAMA SOUTHERN.....	210	138	22	22	28
FLORIDA NORTHERN.....	107	66	12	7	22
FLORIDA MIDDLE.....	304	189	46	21	48
FLORIDA SOUTHERN.....	504	288	60	89	67
GEORGIA NORTHERN.....	752	449	102	92	111
GEORGIA MIDDLE.....	227	112	30	25	60
GEORGIA SOUTHERN.....	262	139	30	15	76
LOUISIANA EASTERN.....	791	530	68	40	153
LOUISIANA MIDDLE.....	84	57	5	3	19
LOUISIANA WESTERN.....	312	218	21	10	63
MISSISSIPPI NORTHERN.....	257	137	28	31	61
MISSISSIPPI SOUTHERN.....	547	321	61	53	112
TEXAS NORTHERN.....	781	445	131	78	127
TEXAS EASTERN.....	501	349	36	10	106
TEXAS SOUTHERN.....	439	255	54	58	72
TEXAS WESTERN.....	235	160	12	19	44
CANAL ZONE.....	1	1	-	-	-

TABLE 1 (Continued)
UNITED STATES DISTRICT COURTS
Diversity Cases Filed
Showing Residence of Plaintiff
July 1, 1977 - June 30, 1978

CIRCUIT AND DISTRICT	TOTAL	RESIDENCE OF PLAINTIFF			
		1	2	3	4
SIXTH CIRCUIT.....	3,162	1,959	281	354	568
KENTUCKY EASTERN.....	236	93	23	23	97
KENTUCKY WESTERN.....	166	106	15	12	33
MICHIGAN EASTERN.....	1,019	680	58	165	116
MICHIGAN WESTERN.....	129	69	11	14	35
OHIO NORTHERN.....	532	360	53	51	68
OHIO SOUTHERN.....	298	163	52	26	57
TENNESSEE EASTERN.....	370	231	31	27	81
TENNESSEE MIDDLE.....	189	126	20	13	30
TENNESSEE WESTERN.....	223	131	18	23	51
SEVENTH CIRCUIT....	2,633	1,497	536	240	360
ILLINOIS NORTHERN....	1,381	659	376	176	170
ILLINOIS EASTERN.....	146	95	15	10	26
ILLINOIS SOUTHERN....	176	123	14	8	31
INDIANA NORTHERN.....	278	172	40	11	55
INDIANA SOUTHERN.....	431	292	65	21	53
WISCONSIN EASTERN.....	159	112	19	10	18
WISCONSIN WESTERN....	62	44	7	4	7
EIGHTH CIRCUIT....	2,160	1,369	208	182	401
ARKANSAS EASTERN.....	223	166	17	8	32
ARKANSAS WESTERN.....	215	130	22	10	53
IOWA NORTHERN.....	101	77	4	6	14
IOWA SOUTHERN.....	143	89	21	3	30
MINNESOTA.....	289	188	25	25	51
MISSOURI EASTERN.....	494	332	36	65	61
MISSOURI WESTERN.....	254	167	24	16	47
NEBRASKA.....	248	127	35	21	65
NORTH DAKOTA.....	85	43	13	12	17
SOUTH DAKOTA.....	108	50	11	16	31
NINTH CIRCUIT.....	3,039	1,944	342	284	469
ALASKA.....	80	48	10	13	9
ARIZONA.....	249	166	27	11	45
CALIFORNIA NORTHERN..	538	373	55	62	48
CALIFORNIA EASTERN...	128	94	14	9	11
CALIFORNIA CENTRAL...	925	600	83	93	149
CALIFORNIA SOUTHERN..	108	70	17	7	14
HAWAII.....	171	76	16	17	62
IDAHO.....	108	58	20	9	21
MONTANA.....	126	85	16	11	14
NEVADA.....	132	75	9	5	43
OREGON.....	289	179	42	34	34
WASHINGTON EASTERN...	57	37	9	3	8
WASHINGTON WESTERN...	128	83	24	10	11
GUAM.....	-	-	-	-	-
NORTHERN MARIANAS...	-	-	-	-	-
TENTH CIRCUIT.....	2,253	1,312	307	187	447
COLORADO.....	327	164	49	28	86
KANSAS.....	472	339	47	14	72
NEW MEXICO.....	282	141	27	41	73
OKLAHOMA NORTHERN...	214	121	38	32	23
OKLAHOMA EASTERN.....	159	94	21	14	30
OKLAHOMA WESTERN.....	532	308	93	37	94
UTAH.....	164	97	20	14	33
WYOMING.....	103	48	12	7	36

TABLE 2
UNITED STATES DISTRICT COURTS
Diversity Cases Filed
Showing Residence of Plaintiff
(Exclusive of Cases Removed from State Courts)
July 1, 1977 - June 30, 1978

CIRCUIT AND DISTRICT	TOTAL	RESIDENCE OF PLAINTIFF			
		1	2	3	4
TOTAL ALL DISTRICTS...	25,953	14,098	3,141	2,833	5,881
DISTRICT OF COLUMBIA.	362	180	40	20	122
FIRST CIRCUIT.....	1,157	645	104	131	277
MAINE.....	87	48	11	6	22
MASSACHUSETTS.....	522	310	44	59	109
NEW HAMPSHIRE.....	147	60	11	16	60
RHODE ISLAND.....	146	87	17	8	34
PUERTO RICO.....	255	140	21	42	52
SECOND CIRCUIT....	2,702	1,575	170	301	656
CONNECTICUT.....	274	179	18	16	61
NEW JERSEY.....	98	53	9	6	30
NEW YORK NORTHERN....	605	404	33	58	110
NEW YORK SOUTHERN....	1,542	853	101	208	380
NEW YORK WESTERN....	95	50	8	9	28
VERMONT.....	88	36	1	4	47
THIRD CIRCUIT.....	3,458	1,821	323	349	965
DELAWARE.....	100	44	5	4	47
NEW JERSEY.....	892	467	85	73	267
PENNSYLVANIA EASTERN..	1,769	969	176	153	471
PENNSYLVANIA MIDDLE..	276	152	17	22	85
PENNSYLVANIA WESTERN..	421	189	40	97	95
VIRGIN ISLANDS.....	-	-	-	-	-
FOURTH CIRCUIT....	2,251	1,179	252	235	585
MARYLAND.....	409	158	24	83	144
NO. CAROLINA EASTERN..	94	49	16	9	20
NO. CAROLINA MIDDLE..	58	24	13	11	10
NO. CAROLINA WESTERN..	115	50	22	20	23
SOUTH CAROLINA.....	560	328	78	28	126
VIRGINIA EASTERN.....	515	304	44	35	132
VIRGINIA WESTERN.....	206	106	25	17	58
W. VIRGINIA NORTHERN..	64	35	5	3	21
W. VIRGINIA SOUTHERN..	230	125	25	29	51
FIFTH CIRCUIT.....	5,617	3,056	742	608	1,211
ALABAMA NORTHERN.....	422	206	88	56	72
ALABAMA MIDDLE.....	132	52	26	23	31
ALABAMA SOUTHERN.....	156	90	18	22	26
FLORIDA NORTHERN.....	88	50	11	7	20
FLORIDA MIDDLE.....	188	100	30	16	42
FLORIDA SOUTHERN.....	383	192	50	82	59
GEORGIA NORTHERN.....	567	309	88	85	105
GEORGIA MIDDLE.....	207	98	29	25	55
GEORGIA SOUTHERN.....	235	114	30	15	76
LOUISIANA EASTERN.....	687	438	60	36	153
LOUISIANA MIDDLE.....	66	43	3	3	17
LOUISIANA WESTERN.....	249	160	18	10	61
MISSISSIPPI NORTHERN..	188	78	23	31	56
MISSISSIPPI SOUTHERN..	359	157	53	49	100
TEXAS NORTHERN.....	459	345	122	71	121
TEXAS EASTERN.....	468	319	33	10	106
TEXAS SOUTHERN.....	349	177	50	53	69
TEXAS WESTERN.....	193	127	10	14	42
CANAL ZONE.....	1	1	-	-	-

TABLE 2 (Continued)
UNITED STATES DISTRICT COURTS
Diversity Cases Filed
Showing Residence of Plaintiff
(Exclusive of Cases Removed from State Courts)
July 1, 1977 - June 30, 1978

CIRCUIT AND DISTRICT	TOTAL	RESIDENCE OF PLAINTIFF			
		1	2	3	4
SIXTH CIRCUIT.....	2,410	1,286	252	343	529
KENTUCKY EASTERN.....	184	45	22	22	95
KENTUCKY WESTERN.....	107	54	13	12	28
MICHIGAN EASTERN.....	647	338	51	158	100
MICHIGAN WESTERN.....	108	51	9	13	35
OHIO NORTHERN.....	478	315	50	49	64
OHIO SOUTHERN.....	256	127	46	26	57
TENNESSEE EASTERN.....	303	173	26	27	77
TENNESSEE MIDDLE.....	134	76	19	13	26
TENNESSEE WESTERN.....	193	107	16	23	47
SEVENTH CIRCUIT...	2,195	1,123	509	231	332
ILLINOIS NORTHERN....	1,254	562	361	171	160
ILLINOIS EASTERN.....	96	52	14	8	22
ILLINOIS SOUTHERN....	92	48	13	7	24
INDIANA NORTHERN....	253	150	40	11	52
INDIANA SOUTHERN....	336	202	64	20	50
WISCONSIN EASTERN....	123	82	14	10	17
WISCONSIN WESTERN....	41	27	3	4	7
EIGHTH CIRCUIT....	1,673	948	178	170	377
ARKANSAS EASTERN.....	161	112	12	8	29
ARKANSAS WESTERN.....	177	96	20	9	52
IOWA NORTHERN.....	81	57	4	6	14
IOWA SOUTHERN.....	99	51	16	3	29
MINNESOTA.....	223	139	17	21	46
MISSOURI EASTERN.....	358	207	31	63	57
MISSOURI WESTERN.....	202	121	24	15	42
NEBRASKA.....	225	109	33	19	64
NORTH DAKOTA.....	50	16	10	11	13
SOUTH DAKOTA.....	97	40	11	15	31
NINTH CIRCUIT.....	2,343	1,365	292	264	422
ALASKA.....	46	22	8	10	6
ARIZONA.....	189	120	19	10	40
CALIFORNIA NORTHERN..	390	243	47	55	45
CALIFORNIA EASTERN...	98	66	12	9	11
CALIFORNIA CENTRAL...	751	451	74	90	136
CALIFORNIA SOUTHERN..	93	61	15	6	11
HAWAII.....	150	61	14	16	59
IDAHO.....	88	43	18	8	19
MONTANA.....	81	44	15	11	11
NEVADA.....	107	55	7	5	40
OREGON.....	233	134	39	31	29
WASHINGTON EASTERN...	32	17	6	3	6
WASHINGTON WESTERN...	85	48	18	10	9
GUAM.....	-	-	-	-	-
NORTHERN MARIANAS....	-	-	-	-	-
TENTH CIRCUIT.....	1,785	917	278	180	410
COLORADO.....	255	104	42	28	81
KANSAS.....	371	249	41	14	67
NEW MEXICO.....	217	92	21	41	63
OKLAHOMA NORTHERN...	159	84	34	28	13
OKLAHOMA EASTERN.....	113	53	20	14	26
OKLAHOMA WESTERN.....	444	224	91	36	93
UTAH.....	138	75	18	13	32
WYOMING.....	88	36	11	6	35

TABLE 3
United States District Courts
Diversity Cases Filed Showing Nature of Suit
and Residence of Plaintiff
July 1, 1977 - June 30, 1978

Nature of Suit	TOTAL	RESIDENCE OF PLAINTIFF			
		1	2	3	4
TOTAL CASES.....	31,625	18,951	3,429	2,976	6,211
CONTRACT ACTIONS, TOTAL.....	15,224	8,257	2,160	2,556	1,551
INSURANCE.....	3,153	2,084	545	336	188
MARINE ACTIONS.....	-	-	-	-	-
MILLER ACTIONS.....	901	405	154	228	114
NEGOTIATION.....	172	65	24	42	41
RECOVERY OF OVERPAYMENTS AND ENFORCEMENT OF JUDGMENTS	10,998	5,703	2,137	1,950	1,208
OTHER CONTRACT ACTIONS.....	927	446	243	107	131
REAL PROPERTY ACTIONS, TOTAL.....	4	2	1	-	1
CONDEMNATION OF LAND.....	238	43	138	42	15
ENCLOSURE.....	120	32	32	21	35
RENT, LEASE, AND EJECTMENT.....	234	167	40	28	21
TURTS TO LAND.....	311	182	42	28	70
OTHER REAL PROPERTY ACTIONS.....	15,471	10,246	386	310	4,529
TORT ACTIONS, TOTAL.....	260	376	18	11	255
PERSONAL INJURY:	600	412	16	14	158
AIRPLANE.....	-	-	-	-	-
ASSAULT, LIBEL, AND SLANDER.....	984	851	16	7	110
DEFECTIVE PRODUCTS.....	5,169	3,110	55	38	1,558
RAILROADS.....	283	101	28	8	1,788
MOTOR VEHICLE.....	6,359	4,339	77	51	1,662
MEDICAL MALPRACTICE.....	546	339	46	57	104
OTHER PERSONAL INJURY.....	920	510	158	128	126
PERSONAL PROPERTY DAMAGE.....	-	-	-	-	-
PROPERTY DAMAGE IN LENDING.....	-	-	-	-	-
OTHER PERSONAL PROPERTY DAMAGE.....	-	-	-	-	-
ACTIONS UNDER STATUTES, TOTAL.....	-	-	-	-	-
ANTITRUST.....	-	-	-	-	-
BANKRUPTCY.....	-	-	-	-	-
TRUSTS.....	-	-	-	-	-
TRANSFER (9150).....	-	-	-	-	-
APPEAL (301).....	-	-	-	-	-
BANKS AND BANKING.....	-	-	-	-	-
CIVIL RIGHTS.....	-	-	-	-	-
DECEIT.....	-	-	-	-	-
JURY.....	-	-	-	-	-
ACCOMMODATIONS.....	-	-	-	-	-
WELFARE.....	-	-	-	-	-
WILDERNESS.....	-	-	-	-	-
WILDLIFE.....	-	-	-	-	-
CIVIL RIGHTS (1100).....	-	-	-	-	-
MACARTHUR (1100).....	-	-	-	-	-
FLORIDIAN STABILIZATION ACT.....	-	-	-	-	-
ENVIRONMENTAL MATTERS.....	-	-	-	-	-

TABLE 3 (Continued)
United States District Courts
Diversity Cases Filed, Substantive
and Residence of Plaintiff
July 1, 1977 - June 30, 1978

Nature of Suit	TOTAL	RESIDENCE OF PLAINTIFF			
		1	2	3	4
ACTIONS UNDER STATUTE'S, CONTINUED					
DEPORTATION.....	-	-	-	-	-
PRISONER PETITIONS:					
MOTIONS TO VACATE SENTENCE.....	-	-	-	-	-
PAROLE BOARD REVIEW.....	-	-	-	-	-
PRISON OFFICIALS - HARASS, CONSP.,	-	-	-	-	-
PRISON OFFICIALS - HARASS, CONSP.,	-	-	-	-	-
PRISON OFFICIALS - HARASS, CONSP.,	-	-	-	-	-
CIVIL RIGHTS.....	-	-	-	-	-
FONFETURE AND PENALTY.....	-	-	-	-	-
AGRICULTURAL ACTS.....	-	-	-	-	-
FOOD AND DRUG ACT.....	-	-	-	-	-
LABOR LAW.....	-	-	-	-	-
RAILROAD AND TRUCKING REGULATIONS.....	-	-	-	-	-
AIR TRAFFIC REGULATIONS.....	-	-	-	-	-
OCCUPATIONAL SAFETY AND HEALTH ACT.....	-	-	-	-	-
OTHER FORFEITURE AND PENALTY SUITS.....	-	-	-	-	-
LABOR LAWS:					
LABOR STANDARDS ACT.....	-	-	-	-	-
LABOR MANAGEMENT RELATIONS ACT.....	-	-	-	-	-
LABOR MANAGEMENT RELATIONS AND DISCLOSE ACT.....	-	-	-	-	-
RAILWAY LABOR ACT.....	-	-	-	-	-
OTHER LABOR LITIGATION.....	-	-	-	-	-
PRODUCTS PROPERTY RIGHTS:					
PATENT.....	-	-	-	-	-
COPYRIGHT.....	-	-	-	-	-
TRADEMARK.....	-	-	-	-	-
SECURITIES, COMMODITIES, AND EXCHANGES.....	-	-	-	-	-
SOCIAL SECURITY LAWS:					
BLACK LUNG CASES.....	-	-	-	-	-
OTHER.....	-	-	-	-	-
STATE REAPPORTIONMENT SUITS.....	-	-	-	-	-
TAX SUITS.....	-	-	-	-	-
OTHER STATUTORY ACTIONS.....	-	-	-	-	-
OTHER ACTIONS, TOTAL.....	3	2	-	1	-
DOMESTIC RELATIONS.....	-	-	-	-	-
INSANITY.....	-	-	-	-	-
PROBATE.....	2	1	-	1	-
SUITS INVOLVING LOCAL OFFICIALS.....	1	1	-	-	-
TOTAL.....	1	1	-	-	-

TABLE 4
United States District Courts
Diversity Cases Filed Showing Nature of Suit
and Plaintiff's Residence
July 1, 1977 - June 30, 1978
(Including Cases Removed from State Courts)

Nature of Suit	TOTAL	RESIDENCE OF PLAINTIFF			
		1	2	3	4
TOTAL CASES.....	29,953	14,098	3,141	2,933	5,801
CONTRACT ACTIONS, TOTAL.....	12,143	5,659	2,576	2,456	1,412
INSURANCE.....	1,978	1,015	501	319	143
MORTGAGE.....	-	-	-	-	-
MILITARY.....	-	-	-	-	-
NEGOTIABLE INSTRUMENTS.....	817	341	145	224	107
RECOVERY OF OVERPAYMENTS AND ENFORCEMENT OF JUDGMENTS	102	57	24	42	39
OTHER CONTRACT ACTIONS.....	9,166	4,261	1,906	1,871	1,123
REAL PROPERTY ACTIONS, TOTAL.....	713	266	230	98	116
CONDEMNATION OF LAND.....	4	2	1	-	1
FORECLOSURE.....	216	31	136	40	15
RENT, LEASE, AND EJECTMENT.....	13	13	10	15	19
TORTS TO LAND.....	15	40	30	15	15
OTHER REAL PROPERTY ACTIONS.....	238	107	35	24	72
TORT ACTIONS, TOTAL.....	13,098	8,132	335	278	4,353
PERSONAL INJURY.....	590	318	17	9	246
ASSAULT, LIBEL, AND SLANDER.....	468	290	14	12	152
EMPLOYERS' LIABILITY ACT.....	-	-	-	-	-
AIRLINE.....	837	716	14	7	100
MOTOR VEHICLE.....	4,379	2,453	42	35	1,800
MEDICAL MALPRACTICE.....	275	175	64	4	178
OTHER PERSONAL INJURY.....	5,256	3,577	64	40	1,575
PERSONAL PROPERTY DAMAGE.....	490	295	41	53	101
FRAUD INCLUDING TRUTH IN LENDING.....	734	398	143	118	113
OTHER PERSONAL PROPERTY DAMAGE.....	-	-	-	-	-
ACTIONS UNDER STATUTES, TOTAL.....	-	-	-	-	-
ANTITRUST.....	-	-	-	-	-
BANKRUPTCY SUITS.....	-	-	-	-	-
TRUSTS.....	-	-	-	-	-
TRANSFER (1950).....	-	-	-	-	-
WILLS.....	-	-	-	-	-
BANKS AND BANKING.....	-	-	-	-	-
CIVIL RIGHTS.....	-	-	-	-	-
VOTING.....	-	-	-	-	-
JONES.....	-	-	-	-	-
ACCOMMODATIONS.....	-	-	-	-	-
WELFARE.....	-	-	-	-	-
OTHER CIVIL RIGHTS.....	-	-	-	-	-
COMMERCE (ICC RATES, ETC.).....	-	-	-	-	-
NARCOTIC ADDICT REHABILITATION ACT.....	-	-	-	-	-
ECONOMIC STABILIZATION ACT.....	-	-	-	-	-
PROFESIONAL FEES.....	-	-	-	-	-

TABLE 4 (Continued)
United States District Courts
Diversity Cases Filed Showing Nature
and Residence of Plaintiff
July 1, 1977 - June 30, 1978
(Excluding Cases Removed from State Courts)

NATURE OF SUIT	RESIDENCE OF PLAINTIFF			
	1	2	3	4
TOTAL				
ACTIONS UNDER STATUTES, CONTINUED				
DEPORTATION.....				
PRISONER PETITIONS.....				
MOTIONS TO VACATE SENTENCE.....				
PAROLE BOARD REVIEW.....				
PRISON OFFICIALS - MABEAU'S CORPUS.....				
PRISON OFFICIALS - MABEAU'S, ETC.....				
REVIEW OF CONFINEMENT.....				
FOREFEITURE AND PENALTY.....				
AGRICULTURAL ACTS.....				
FOLIO AND DRUG ACT.....				
LIQUOR LAWS.....				
RAILROADS AND RAILROCKING REGULATIONS.....				
REGULATIONS REGARDING THE CONDUCT OF BUSINESS.....				
REGULATIONS REGARDING OCCUPATIONAL SAFETY AND HEALTH ACT.....				
OTHER FOREFEITURE AND PENALTY SUITS.....				
LABOR LAWS.....				
FAIR LABOR STANDARDS ACT.....				
FEDERAL LABOR RELATIONS ACT.....				
LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT.....				
RAILWAY LABOR ACT.....				
OTHER LABOR LITIGATION.....				
PROTECTED PROPERTY RIGHTS.....				
COPYRIGHT.....				
TRADEMARK.....				
SECURITIES, COMMODITIES, AND EXCHANGES.....				
SOCIAL SECURITY LAWS.....				
BLACK LUNG CASES.....				
STATE EMPLOYMENT SUITS.....				
TAX SUITS.....				
OTHER STATUTORY ACTIONS.....				
OTHER ACTIONS, TOTAL	2	1	1	1
DEFACTO RELATIONS.....				
IN-SITU.....				
PRIVATE.....				
SUITS INVOLVING LOCAL OFFICIALS.....	2	1	1	1
OTHER.....				

TABLE 5 (Continued)
United States District Courts
Diversity Cases, by Siding Nature of Suit
and Residence of Parties
July 1, 1977 - June 30, 1978

NATURE OF SUIT	TOTAL	Residence of Parties							
		1-1	1-2	1-3	1-4	2-1	2-2	2-3	2-4
ACTIONS UNDER STATUTES, CONTINUED									
DEPORTATION.....	-	-	-	-	-	-	-	-	-
PRISONER PETITIONS.....	-	-	-	-	-	-	-	-	-
ACTIONS TO VACATE SENTENCE.....	-	-	-	-	-	-	-	-	-
PAROLE BOARD REVIEW.....	-	-	-	-	-	-	-	-	-
PRISON OFFICIALS - HABEAS CORPUS.....	-	-	-	-	-	-	-	-	-
PRISON OFFICIALS - MANDAMUS, ETC.....	-	-	-	-	-	-	-	-	-
CIVIL RIGHTS.....	-	-	-	-	-	-	-	-	-
FORFEITURE AND PENALTY.....	-	-	-	-	-	-	-	-	-
AGRICULTURAL ACTS.....	-	-	-	-	-	-	-	-	-
FOOD AND DRUG ACT.....	-	-	-	-	-	-	-	-	-
LIQUOR LAWS.....	-	-	-	-	-	-	-	-	-
REGULATIONS.....	-	-	-	-	-	-	-	-	-
AIR TRAFFIC REGULATIONS.....	-	-	-	-	-	-	-	-	-
OCCUPATIONAL SAFETY AND HEALTH ACT.....	-	-	-	-	-	-	-	-	-
OTHER FORFEITURE AND PENALTY SUITS.....	-	-	-	-	-	-	-	-	-
LABOR LAWS:	-	-	-	-	-	-	-	-	-
FAIR LABOR STANDARDS ACT.....	-	-	-	-	-	-	-	-	-
FAIR LABOR PRACTICES ACT.....	-	-	-	-	-	-	-	-	-
LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT.....	-	-	-	-	-	-	-	-	-
RAILWAY LABOR ACT.....	-	-	-	-	-	-	-	-	-
OTHER LABOR LITIGATION.....	-	-	-	-	-	-	-	-	-
PROTECTED PROPERTY RIGHTS:	-	-	-	-	-	-	-	-	-
COPYRIGHT.....	-	-	-	-	-	-	-	-	-
PATENT.....	-	-	-	-	-	-	-	-	-
TRADEMARK.....	-	-	-	-	-	-	-	-	-
SECURITIES, COMMODITIES, AND EXCHANGES.....	-	-	-	-	-	-	-	-	-
SOCIAL SECURITY LAWS:	-	-	-	-	-	-	-	-	-
BLACK LUNG CASES.....	-	-	-	-	-	-	-	-	-
UNEMPLOYMENT COMPENSATION.....	-	-	-	-	-	-	-	-	-
STATE REAPPOINTMENT SUITS.....	-	-	-	-	-	-	-	-	-
TAX SUITS.....	-	-	-	-	-	-	-	-	-
OTHER STATUTORY ACTIONS.....	-	-	-	-	-	-	-	-	-
OTHER ACTIONS, TOTAL.....	3	-	2	-	-	-	-	-	-
DOMESTIC RELATIONS:	-	-	-	-	-	-	-	-	-
INSANITY.....	-	-	-	-	-	-	-	-	-
PRONATE.....	-	-	-	-	-	-	-	-	-
SUITS INVOLVING LEGAL OFFICIALS.....	2	-	1	-	-	-	-	-	-
OTHER.....	1	-	-	-	-	-	-	-	-

TABLE 5 (Continued)
United States District Courts
Diversity Cases Filed Showing Nature of Suit
and Residence of Parties
July 1, 1977 - June 30, 1978

NATURE OF SUIT	Residence of Parties							
	3-1	3-2	3-3	3-4	4-1	4-2	4-3	4-4
ACTIONS UNDER STATUTES, CONTINUED								
DEPORTATION.....								
PRISONER PETITIONS:								
MOTIONS TO VACATE SENTENCE.....								
PAROLE BOARD REVIEW.....								
MOTION FOR RELEASE FROM PRISON.....								
PRISON OFFICIALS - HARASSMENT.....								
CIVIL RIGHTS.....								
FORFEITURE AND PENALTY:								
AGRICULTURAL ACTS.....								
FOOD AND DRUG ACT.....								
LABOR LAWS.....								
RAILROAD AND TRUCKING REGULATIONS.....								
AIR TRAFFIC REGULATIONS.....								
OCCUPATIONAL SAFETY AND HEALTH ACT.....								
OTHER FORFEITURE AND PENALTY SUITS.....								
LABOR AND EMPLOYMENT:								
LABOR STANDARDS ACT.....								
LABOR MANAGEMENT RELATIONS ACT.....								
LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT.....								
RAILWAY LABOR ACT.....								
OTHER LABOR LITIGATION.....								
PROTECTION OF PROPERTY RIGHTS:								
COPYRIGHT.....								
PATENT.....								
TRADEMARK.....								
SECURITIES, COMMODITIES, AND EXCHANGES.....								
SOCIAL SECURITY LAWS:								
DISABILITY BENEFITS.....								
OTHER.....								
STATE APPROPRIATION SUITS.....								
TAX SUITS.....								
OTHER STATUTORY ACTIONS.....								
OTHER ACTIONS, TOTAL.....	1							
DOMESTIC RELATIONS:								
INSANITY.....								
MARRIAGE.....								
SUIES INVOLVING LEVEL OFFICIALS.....								
OTHER.....	1							

[illegible]

TABLE 6 (Continued)
United States District Courts
Diversity Cases Filed Showing Nature of Suit
and Residence of Parties
July 1, 1977 - June 30, 1978
(Excluding Cases Removed from State Courts)

NATURE OF SUIT	Residence of Parties							
	3-1	3-2	3-3	3-4	4-1	4-2	4-3	4-4
TOTAL CASES	2,408	479	169	177	4,233	919	365	364
CONTRACT ACTIONS, TOTAL	1,781	415	136	124	1,022	216	81	93
INSURANCE	221	37	32	29	75	37	24	7
MARINE	-	-	-	-	-	-	-	-
RENTS	-	-	-	-	-	-	-	-
NEGOTIABLE INSTRUMENTS	198	19	1	6	98	2	4	3
RECOVERY OF OVERPAYMENTS AND ENFORCEMENT OF JUDGMENTS	33	0	-	1	35	1	-	-
OTHER CONTRACT ACTIONS	1,329	351	103	88	814	176	53	80
REAL PROPERTY ACTIONS, TOTAL	68	15	7	8	101	10	-	5
CONDEMNATION OF LAND	-	-	-	-	1	-	-	-
FORECLOSURE	30	5	1	4	9	-	-	-
RENT, LEASE, AND EJECTMENT	14	2	1	2	12	5	-	2
TORTS TO LAND	11	3	-	-	14	-	-	-
OTHER REAL PROPERTY ACTIONS	13	5	4	2	65	4	-	3
TORT ACTIONS, TOTAL	198	49	76	45	3,110	693	284	266
PERSONAL INJURY	3	3	-	3	65	109	67	5
AIRPLANE, HELICOPTER, AND SMALLER VEHICLES	7	-	2	2	117	17	12	6
EMPLOYERS' LIABILITY ACT	-	-	-	-	-	-	-	-
MACHINE	5	-	2	-	39	42	15	-
MOTOR VEHICLE	13	3	5	14	1,467	146	96	197
MEDICAL PRACTICE	3	1	-	-	21	-	-	-
OTHER PERSONAL INJURY	28	7	1	4	1,060	346	125	44
CONTRACT AND TORT ACTIONS	38	9	1	5	84	8	4	5
FRAUD INCLUDING TRUTH IN LENDING	61	25	15	17	87	21	5	2
OTHER PERSONAL PROPERTY DAMAGE	-	-	-	-	-	-	-	-
ACTIONS UNDER STATUTES, TOTAL	-	-	-	-	-	-	-	-
ANTITRUST	-	-	-	-	-	-	-	-
BANKRUPTCY SUITS	-	-	-	-	-	-	-	-
TRUSTS	-	-	-	-	-	-	-	-
TRANSFER (715B)	-	-	-	-	-	-	-	-
WARRANTS	-	-	-	-	-	-	-	-
BANKS AND BANKING	-	-	-	-	-	-	-	-
CIVIL RIGHTS	-	-	-	-	-	-	-	-
WRITING	-	-	-	-	-	-	-	-
JUDICIAL	-	-	-	-	-	-	-	-
ACCOMMODATIONS	-	-	-	-	-	-	-	-
OTHER	-	-	-	-	-	-	-	-
OTHER CIVIL RIGHTS	-	-	-	-	-	-	-	-
COMMERCE (ICC RATES, ETC.)	-	-	-	-	-	-	-	-
MARITIME	-	-	-	-	-	-	-	-
NARCOTIC ADDICT REHABILITATION ACT	-	-	-	-	-	-	-	-
ECONOMIC STABILIZATION ACT	-	-	-	-	-	-	-	-
ENVIRONMENTAL ACTS	-	-	-	-	-	-	-	-

TABLE 6 (Continued)
United States District Court
Diversity Cases Filed Showing Nature of Suit
and Residence of Parties
July 1, 1977 - June 30, 1978
(Including Cases Removed from State Courts)

NATURE OF SUIT	Residence of Parties							
	3-1	3-2	3-3	3-4	4-1	4-2	4-3	4-4
ACTIONS UNDER STATUTES, CONTINUED								
DEMOCRATIC PETITIONS.....	-	-	-	-	-	-	-	-
MOTIONS TO VACATE SENTENCE.....	-	-	-	-	-	-	-	-
APPEALS FROM SENTENCES.....	-	-	-	-	-	-	-	-
REVIEW OF PRISON DISCIPLINE.....	-	-	-	-	-	-	-	-
PRISON OFFICIALS - MANDAMUS, ETC.....	-	-	-	-	-	-	-	-
CIVIL RIGHTS.....	-	-	-	-	-	-	-	-
FORFEITURE AND PENALTY.....	-	-	-	-	-	-	-	-
ANTI-CORRUPTION ACT.....	-	-	-	-	-	-	-	-
SECURITY MATTERS.....	-	-	-	-	-	-	-	-
LIQUOR LAWS.....	-	-	-	-	-	-	-	-
RAILROAD AND TRUCKING REGULATIONS.....	-	-	-	-	-	-	-	-
AIR TRAFFIC REGULATIONS.....	-	-	-	-	-	-	-	-
OCCUPATIONAL SAFETY AND HEALTH ACT.....	-	-	-	-	-	-	-	-
REGULATIONS ON COMPETITORS AND PENALTY SUITS.....	-	-	-	-	-	-	-	-
LABOR LAWS.....	-	-	-	-	-	-	-	-
FEDERAL LABOR STANDARDS ACT.....	-	-	-	-	-	-	-	-
LABOR MANAGEMENT RELATIONS ACT.....	-	-	-	-	-	-	-	-
LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT.....	-	-	-	-	-	-	-	-
RAILWAY LABOR ACT.....	-	-	-	-	-	-	-	-
LABOR CONTRACTS.....	-	-	-	-	-	-	-	-
PROTECTED PROPERTY RIGHTS.....	-	-	-	-	-	-	-	-
COPYRIGHT.....	-	-	-	-	-	-	-	-
PATENT.....	-	-	-	-	-	-	-	-
TRADE MARK.....	-	-	-	-	-	-	-	-
SECURITY MATTERS, AND EXCHANGES.....	-	-	-	-	-	-	-	-
SOCIAL SECURITY LAWS.....	-	-	-	-	-	-	-	-
NALC LITIGATIONS.....	-	-	-	-	-	-	-	-
OTHER.....	-	-	-	-	-	-	-	-
STATE REAPPORTMENT SUITS.....	-	-	-	-	-	-	-	-
TAX SUITS.....	-	-	-	-	-	-	-	-
OTHER STATUTORY ACTIONS.....	-	-	-	-	-	-	-	-
OTHER ACTIONS, TOTAL.....	1	-	-	-	-	-	-	-
DOMESTIC RELATIONS								
MARRIAGE.....	-	-	-	-	-	-	-	-
PROBATE.....	-	-	-	-	-	-	-	-
SUITS INVOLVING LOCAL OFFICIALS.....	1	-	-	-	-	-	-	-
OTHER.....	-	-	-	-	-	-	-	-

TABLE 7
United States District Courts
Diversity Cases Filed Since Inception of Suit
and Amount Demanded
July 1, 1977 - June 30, 1978

SOURCE: ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS		AMOUNT OF DEMAND IN THOUSANDS						
Nature of Suit	TOTAL CASES FILED	NOT REPORTED	UNDER \$10					OVER \$25
			\$10-\$14	\$15-\$19	\$20-\$24	\$25-\$29		
TOTAL CASES.....	31,625	8,141	2,153	3,017	1,147	981	16,186	
CONTRACT ACTIONS, TOTAL.....								6,770
INSURANCE.....	15,224	4,483	728	1,676	865	702	6,770	
MARINE.....	3,153	1,324	128	322	118	131	1,130	
MILLER ACT.....	-	-	-	-	-	-	-	
NEGOTIABLE INSTRUMENTS.....	901	137	27	118	73	39	507	
RECOVERY OF DEPOSITS AND ENFORCEMENT OF JUDGMENTS	172	58	5	13	10	6	80	
OTHER CONTRACT ACTIONS.....	10,998	2,904	508	1,223	664	526	5,153	
REAL PROPERTY ACTIONS, TOTAL.....								371
COMPENSATION OF LAND.....	4	-	-	-	-	-	-	
FORECLOSURE.....	238	63	7	27	29	29	83	
RENT, LEASE, AND EJECTMENT.....	120	46	16	13	8	4	33	
TORTS TO LAND.....	234	50	25	17	5	9	116	
OTHER REAL PROPERTY ACTIONS.....	531	167	14	17	8	9	116	
TORT ACTIONS, TOTAL.....								9,045
PERSONAL INJURY.....	660	261	82	35	10	3	269	
ASSAULT, LIBEL, AND SLANDER.....	630	135	83	48	6	6	325	
EMPLOYERS' LIABILITY ACT.....	-	11	4	-	-	-	-	
MARINE.....	914	11	40	82	8	9	695	
NUISANCE.....	5,169	952	298	423	63	75	3,360	
MEDICAL MALPRACTICE.....	283	67	31	27	2	2	154	
OTHER PERSONAL INJURY.....	6,309	1,414	718	520	75	72	3,511	
PERSONAL PROPERTY DAMAGE.....	546	156	47	37	15	12	279	
PROPERTY DAMAGE IN LENDING.....	920	207	58	100	53	49	453	
OTHER PERSONAL PROPERTY DAMAGE.....	-	-	-	-	-	-	-	
ACTIONS UNDER STATUTES, TOTAL.....								-
ANTI-TRUST.....	-	-	-	-	-	-	-	
BANKRUPTCY SUITS.....	-	-	-	-	-	-	-	
TRUSTS.....	-	-	-	-	-	-	-	
TRANSFER (915B).....	-	-	-	-	-	-	-	
TRANSFER (915C).....	-	-	-	-	-	-	-	
BANKS AND BANKING.....	-	-	-	-	-	-	-	
CIVIL RIGHTS.....	-	-	-	-	-	-	-	
VOTING.....	-	-	-	-	-	-	-	
WELFARE.....	-	-	-	-	-	-	-	
WELFARE (FEDERAL).....	-	-	-	-	-	-	-	
WELFARE (STATE).....	-	-	-	-	-	-	-	
WELFARE (LOCAL).....	-	-	-	-	-	-	-	
OTHER CIVIL RIGHTS.....	-	-	-	-	-	-	-	
CONSUMER PROTECTION.....	-	-	-	-	-	-	-	
NARCOTIC ABUSE REHABILITATION ACT.....	-	-	-	-	-	-	-	
ECONOMIC STABILIZATION ACT.....	-	-	-	-	-	-	-	
TOTAL MATTERS.....	-	-	-	-	-	-	-	

TABLE 7 (Continued)
United States District Courts
District of Columbia
Diversity Cases, by Nature of Suit
and Amount Demanded
July 1, 1977 - June 30, 1978

SOURCE: ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Nature of Suit	TOTAL CASES FILED	AMOUNT OF DEMAND IN THOUSANDS				
		NOT REPORTED	UNDER \$10	\$10-\$14	\$15-\$19	\$20-\$24 OVER \$25
ACTIONS UNDER STATUTES, CONTINUED						
DEPORTATION.....	-	-	-	-	-	-
PRISONER PETITIONS:						
MOTIONS TO VACATE SENTENCE.....	-	-	-	-	-	-
PAROLE BOARD REVIEW.....	-	-	-	-	-	-
PRISON OFFICIALS - HABEAS CORPUS.....	-	-	-	-	-	-
PRISON OFFICIALS - MANDAMUS, ETC.....	-	-	-	-	-	-
CIVIL FIGHTS.....	-	-	-	-	-	-
FORFEITURE AND PENALTY:						
AGRICULTURAL ACTS.....	-	-	-	-	-	-
FOOD AND DRUG ACT.....	-	-	-	-	-	-
LAW ENFORCEMENT.....	-	-	-	-	-	-
RAILROAD TRAINING REGULATIONS.....	-	-	-	-	-	-
AIR TRAFFIC REGULATIONS.....	-	-	-	-	-	-
OCCUPATIONAL SAFETY AND HEALTH ACT.....	-	-	-	-	-	-
OTHER FORFEITURE AND PENALTY SUITS.....	-	-	-	-	-	-
LABOR LAWS:						
LABOR STANDARDS ACT.....	-	-	-	-	-	-
LABOR MANAGEMENT RELATIONS ACT.....	-	-	-	-	-	-
LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT.....	-	-	-	-	-	-
RAILWAY LABOR ACT.....	-	-	-	-	-	-
OTHER LABOR LITIGATION.....	-	-	-	-	-	-
PROTECTED PROPERTY RIGHTS:						
PATENT.....	-	-	-	-	-	-
TRADEMARK.....	-	-	-	-	-	-
SECURITIES, COMMODITIES, AND EXCHANGES.....	-	-	-	-	-	-
SOCIAL SECURITY LAWS:						
PUBLIC.....	-	-	-	-	-	-
OTHER LONG CASES.....	-	-	-	-	-	-
STATE REAPPORTIONMENT SUITS.....	-	-	-	-	-	-
TAX SUITS.....	-	-	-	-	-	-
OTHER STATUTORY ACTIONS.....	-	-	-	-	-	-
OTHER ACTIONS, TOTAL.....	3	1	-	2	-	-
DOMESTIC RELATIONS.....	-	-	-	-	-	-
INSANITY.....	-	-	-	-	-	-
PROBATE.....	-	-	-	-	-	-
SUITS INVOLVING LOCAL OFFICIALS.....	1	1	-	1	-	-
OTHER.....	-	-	-	-	-	-

TABLE 8
United States District Courts,
Diversity Cases Filed Under the
Federal Rules of Civil Procedure,
July 1, 1977 - June 30, 1978
(Excluding Cases Removed From State Courts)

SOURCE: ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Nature of Suit	TOTAL CASES FILED	NOT REPORTED	AMOUNT OF DEMAND IN THOUSANDS				
			UNDER \$10	\$10-\$14	\$15-\$19	\$20-\$24	OVER \$25
TOTAL CASES.....	25,953	6,423	1,817	2,486	931	817	13,492
CONTRACT ACTIONS, TOTAL.....	12,143	3,453	578	1,357	726	592	5,437
INSURANCE.....	1,978	939	78	178	60	73	650
MARINE.....	-	-	-	-	-	-	-
MILLER ACT.....	-	-	-	-	-	-	-
NEGOTIABLE INSTRUMENTS.....	817	102	22	111	47	37	478
RECEIPTS, DEBENTURES, AND ENGAGEMENT OF JUDGMENTS	162	55	4	11	10	6	76
OTHER CONTRACT ACTIONS.....	9,186	2,357	474	1,057	589	476	4,233
REAL PROPERTY ACTIONS, TOTAL.....	710	230	53	55	44	44	284
CONDEMNATION OF LAND.....	4	-	-	-	-	-	4
FORECLOSURE.....	216	49	6	25	29	27	200
RENT, LEASE, AND EJECTMENT.....	128	15	15	10	6	4	78
RIGHTS OF WAY.....	134	31	22	6	9	5	69
OTHER REAL PROPERTY ACTIONS.....	238	116	12	14	6	8	82
TORT ACTIONS, TOTAL.....	13,094	2,736	1,186	1,073	161	181	7,761
PERSONAL INJURY:							
AIRPLANE.....	590	228	74	33	9	3	243
ASSAULT, LIBEL, AND SLANDER.....	468	92	63	39	-	-	284
FALSEHOODS.....	837	85	42	64	6	6	635
MARINE.....	4,446	818	204	377	42	55	2,890
MOTOR VEHICLE.....	277	66	30	27	2	2	180
MEDICAL MALPRACTICE.....	5,256	1,131	623	411	41	64	2,986
OTHER PERSONAL INJURY.....	490	141	46	33	14	11	245
PERSONAL PROPERTY DAMAGE.....	734	175	44	89	43	35	348
FRAUD INCLUDING TRUTH IN LENDING.....	-	-	-	-	-	-	-
OTHER PERSONAL PROPERTY DAMAGE.....	-	-	-	-	-	-	-
ACTIONS UNDER STATUTES, TOTAL.....	-	-	-	-	-	-	-
ANTI-TRUST.....	-	-	-	-	-	-	-
BANKRUPTCY.....	-	-	-	-	-	-	-
CONSUMER CREDIT.....	-	-	-	-	-	-	-
INTELLECTUAL PROPERTY.....	-	-	-	-	-	-	-
TRANSFERS (915B).....	-	-	-	-	-	-	-
APPEAL (901).....	-	-	-	-	-	-	-
BANKS AND BANKING.....	-	-	-	-	-	-	-
CIVIL RIGHTS.....	-	-	-	-	-	-	-
JOBES.....	-	-	-	-	-	-	-
LABOR.....	-	-	-	-	-	-	-
ACCOMMODATIONS.....	-	-	-	-	-	-	-
OTHER CIVIL RIGHTS.....	-	-	-	-	-	-	-
COMMERCE (ICC RATES, ETC.).....	-	-	-	-	-	-	-
MACROBIC ADULT REHABILITATION ACT.....	-	-	-	-	-	-	-
UNEMPLOYMENT COMPENSATION.....	-	-	-	-	-	-	-
ENVIRONMENTAL MATTERS.....	-	-	-	-	-	-	-

TABLE 8 (Continued)
 United States District Courts
 Diversity Cases Filed Showing Nature of Suit
 and Amount Demanded
 July 1, 1977 - June 30, 1978
 (Excluding Cases Removed From State Courts)

SOURCE: ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Nature of Suit	TOTAL CASES FILED	AMOUNT OF DEMAND IN THOUSANDS				
		NOT REPORTED	UNDER \$10	\$10-\$14	\$15-\$19	\$20-\$24 OVER \$25
ACTIONS UNDER STATUTES, CONTINUED						
DEPORTATION.....	-	-	-	-	-	-
PRISONER PETITIONS:						
MOTIONS TO VACATE SENTENCE.....	-	-	-	-	-	-
PAROLE BOARD REVIEW.....	-	-	-	-	-	-
PRISON OFFICIALS - HABEAS CORPUS.....	-	-	-	-	-	-
PRISON OFFICIALS - MANDAMUS, ETC.....	-	-	-	-	-	-
CIVIL RIGHTS.....	-	-	-	-	-	-
FORFEITURE AND PENALTY:						
AGRICULTURAL ACTS.....	-	-	-	-	-	-
FOOD AND DRUG ACT.....	-	-	-	-	-	-
LIQUEUR LAWS.....	-	-	-	-	-	-
RAILROAD AND TRUCKING REGULATIONS.....	-	-	-	-	-	-
AIR TRAFFIC REGULATIONS.....	-	-	-	-	-	-
OCCUPATIONAL SAFETY AND HEALTH ACT.....	-	-	-	-	-	-
OTHER FORFEITURE AND PENALTY SUITS.....	-	-	-	-	-	-
LABOR LAWS:						
FAIR LABOR STANDARDS ACT.....	-	-	-	-	-	-
LABOR MANAGEMENT RELATIONS ACT.....	-	-	-	-	-	-
LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT.....	-	-	-	-	-	-
RAILWAY LABOR ACT.....	-	-	-	-	-	-
OTHER LABOR LITIGATION.....	-	-	-	-	-	-
PROTECTED PROPERTY RIGHTS:						
COPYRIGHT.....	-	-	-	-	-	-
PATENT.....	-	-	-	-	-	-
TRADEMARK.....	-	-	-	-	-	-
SECURITIES, COMMODITIES, AND EXCHANGES:						
SOCIAL SECURITY LAWS:						
BLACK LUNG CASES.....	-	-	-	-	-	-
OTHER.....	-	-	-	-	-	-
STATE REAPPORTIONMENT SUITS.....	-	-	-	-	-	-
TAX SUITS.....	-	-	-	-	-	-
OTHER STATUTORY ACTIONS.....	-	-	-	-	-	-
OTHER ACTIONS, TOTAL.....	2	1	1	1	1	1
DOMESTIC RELATIONS.....	-	-	-	-	-	-
INSANITY.....	-	-	-	-	-	-
PROBATE.....	-	-	-	-	-	-
SUIES INVOLVING LOCAL OFFICIALS.....	2	1	1	1	1	1
OTHER.....	-	-	-	-	-	-

January 22, 1979

Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts, Civil
Liberties, and the Administration of Justice
2137 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

Mr. Foley has asked me to reply to your January 15 letter requesting a "cost-benefit analysis" of your bill to abolish diversity of citizenship jurisdiction. We welcome your request and will immediately proceed to prepare the analysis.

Statistics upon which the analysis will be based are now being assembled. Our Financial Management office will use that data to estimate a "cost-benefit" dollar figure for your subcommittee's use. Unless we encounter problems not now anticipated, our analysis should be forwarded to you within the next three to four weeks. I apologize for being unable to fill your request more expeditiously: this type of analysis, however, has never before been conducted, and we would like to review any preliminary assessments with special care to avoid filing misleading or confusing information with your office.

Sincerely,

William James Weller
Legislative Liaison Officer

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

Department of Justice
Washington, D.C. 20530

MAR 29 1979

Honorable Edward M. Kennedy
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

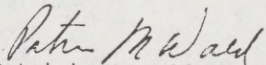
Dear Senator Kennedy:

In a January 15, 1979, letter, Congressman Robert W. Kastenmeier, Chairman of the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice requested that the Department of Justice estimate "the cost of diversity cases to the Federal judicial system and the amount of time expended in these cases".

The Department's Office for Improvements in the Administration of Justice has prepared a report in response to that request. Assistant Attorney General Daniel J. Meador noted before your Committee on March 21, 1979, during testimony in support of S. 679, that we would be submitting a copy of the report when it was completed. I have enclosed a copy of the completed report and I request that it be made a part of the record on S. 679.

If I can be of any further assistance, please do not hesitate to contact me.

Sincerely,


Patricia M. Wald
Assistant Attorney General



United States Department of Justice

OFFICE FOR IMPROVEMENTS IN THE
ADMINISTRATION OF JUSTICE

WASHINGTON, D.C. 20530

March 26, 1979

An Analysis of the Resources of the Federal Court System
Consumed by Diversity of Citizenship Cases

At the request of Representative Robert W. Kastenmeier, Chairman of the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, the Department of Justice has attempted to determine with some degree of specificity "the cost of diversity cases to the Federal judicial system and the amount of time expended in these cases." ^{1/} This report is the product of our investigation in response to that request.

Initially, the report sets forth the general characteristics of diversity cases in the context of the total civil caseload. This discussion, while not directly related to resource consumption, provides some insight into the relationship of diversity cases to the entire civil caseload. Next, the report defines the cost of diversity cases in two ways: first, in terms of the time expended by the federal courts in processing and disposing of diversity cases; and second, in terms of actual financial expenditures for juries, supporting personnel, travel and miscellaneous items.

^{1/} Letter to Patricia Wald, Assistant Attorney General, Office of Legislative Affairs, from Representative Robert W. Kastenmeier, Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, January 15, 1979.

The cost in processing time is estimated on the basis of information concerning caseloads and case dispositions in federal district courts and courts of appeals. An examination of caseload data reveals the proportion of civil filings and civil appeals that are diversity cases. Case disposition data, on the other hand, provide information concerning diversity cases as a percent of cases that are terminated at various stages of the proceedings: without court action; before pretrial; during or after pretrial; or by trial. Case disposition data also allow us to establish the proportion of diversity cases that reach trial and are terminated by a jury or a non-jury trial. Using both type of data, we estimated the financial costs attributable to diversity cases. Finally, the report closes with a brief discussion of the effect abolition of diversity jurisdiction will have upon the state court systems.

A. The Diversity Caseload

The data in Table 1 indicate that nearly 23 percent of the total civil filings in fiscal year 1978 were diversity cases. During the same period, diversity cases constituted 24 percent of all terminated civil cases. Thus, diversity cases accounted for approximately one-fourth of the total civil caseload of the Federal district courts.

Table 1: U.S. District Courts Civil Filings Commenced and Terminated in the period ending June 30, 1978 ^{2/}

		<u>U.S. District courts</u>	
		<u>Commenced</u>	<u>Terminated</u>
All civil cases		138,770	125,914
U.S. civil cases		46,811	39,399
Private civil		91,959	86,515
Diversity jurisdiction		31,625	30,496
		<u>Commenced</u>	<u>Terminated</u>
Diversity cases	$= \frac{31,625}{138,770} = .2279 = 23\%$		$\frac{30,496}{125,914} = .2422 = 24\%$
Total civil cases			
Diversity cases	$= \frac{31,625}{91,959} = .3439 = 34\%$		$\frac{30,496}{86,515} = .3525 = 35\%$
Private civil			

The data in Table 2 reflect the trend in diversity case terminations during recent years. Between 1956 and 1958 the number of terminations increased rapidly. Following the 1958 amendment increasing the jurisdictional amount from \$3,000 to \$10,000, the number of terminations dropped sharply. Since 1962, however, the number of diversity cases has gradually and steadily increased.

^{2/}

Administrative Office of the United States Courts, 1978 Annual Report of the Director, Table C-1 (1978).

Table 2: U.S. District Courts ^{3/}
Diversity Cases Terminated

	1956	-	1978	
	<u>Number of Cases</u>		<u>Percent of Total</u>	
1956	20,557		37	
1958	21,805		42	
1960	18,120		37	
1962	17,498		32	
1964	18,368		31	
1966	19,145		30	
1968	20,403		30	
1970	21,633		27	
1972	25,382		27	
1974	25,990		27	
1976	28,225		26	
1978	30,496		25	

In Table 3 diversity case filings are identified on the basis of the residence of the plaintiff. Nearly 60 percent of all diversity cases filed or removed to the federal courts during fiscal year 1978 involved a plaintiff who was a resident of the state where the court was located. Another 11 percent of the cases involved a plaintiff who was a non-resident corporation doing business in the state. Thus, in over 70 percent of the diversity cases initially filed or removed to the federal district courts, the plaintiff was either a resident of the state or a corporation doing business in the state.

The third and fourth columns of Table 3 list the number of diversity cases originally filed in the district court --

^{3/} Administrative Office of the United States Courts, Annual Report of the Director, Table C-4 (1956-1978).

removals are not included. These data show that 54 percent of the diversity case filings were made by residents of the state. Another 12 percent of the filings were made by non-resident corporations doing business in the state. Thus, nearly two-thirds of the original filings were either by residents of the state or by non-residents doing business in the state. Stated in the obverse: of the diversity cases originally filed in the federal courts, only 33.6 percent were brought by plaintiffs who had no ties to the state.

Table 3: United States District Courts ^{4/}
Diversity Cases Filed Showing Residence of Plaintiff
July 1, 1977 - June 30, 1978

Residence of Plaintiff	All Diversity Cases		Diversity Cases Less Removals from State Courts	
	No. of Cases	Percentages	No. of Cases	Percentage
Total	31,625	100.00	25,953	100.00
Resident of the state	18,951	59.9	14,098	54.3
Non-resident company doing business in the state	3,489	11.0	3,141	12.1
Non-resident company not doing business in the state ..	2,974	9.4	2,833	10.9
Other non- resident	6,211	19.7	5,881	22.7

^{4/} Prepared by the Statistical Analysis and Reports Division,
Administrative Office of the United States Courts, Washington,
D.C. (1979).

Table 4 sets forth the number of civil appeals for each of the past ten years. During that period, the total number of such appeals has increased by 85 percent. Federal question cases have increased at a slightly greater rate (96%). Diversity appeals, on the other hand, have increased by 48 percent.

During the past fiscal year, however, civil appeals did not follow this pattern. The increase in total appeals was only 1.7 percent. The trend of an increased number of appeals in federal question cases reversed itself -- the number of such appeals actually decreased by 3.7 percent. At the same time, diversity appeals increased by 4.8 percent over the previous year. It is difficult to assess whether these figures are indicative of a new trend, or simply a shift in growth patterns peculiar to the period.

Table 4: United States Courts of Appeals
Nature of Suit or Offense of Appeals Arising
from the U.S. District Courts ^{5/}

Fiscal Year	Total Civil	% Change to 69/70 77/78	Federal Question	% Change	Diversity Cases	% Change
1969	6,020	16.3%	2,750	22.9%	1,215	2.3%
1970	7,001	8.6	3,379	9.4	1,233	4.3
1971	7,601	10.5	3,697	9.6	1,286	16.6
1972	8,399	5.7	4,053	10.6	1,499	-2.2
1973	8,876	6.2	4,483	0.8	1,468	4.0
1974	9,424	.7	4,521	3.4	1,527	14.3
1975	9,492	.1	4,267	12.6	1,745	-1.7
1976	10,404	5.5	5,267	6.1	1,714	-6
1977	10,980	1.7	5,589	-3.7	1,713	4.8
1978	11,162		5,383		1,796	

^{5/} Administrative Office of the United States Courts, 1978 Annual Report of the Director, Table B 7 (1978).

In summary, the civil caseload in the federal courts has increased dramatically during the past decade and a half. There is no indication that this trend will change in future years. The bulk of the increase is attributable to federal question cases; however, diversity cases have also increased substantially. During the last few years, diversity cases have constituted a fairly constant 25 percent of the district court civil caseload, and all indications are that this percentage will continue, absent changes in the law.

B. Processing Diversity Cases

While diversity cases comprise 24 percent of all civil case terminations in the district courts, they are disproportionately over-represented in certain categories of terminations and under-represented in others. For example, of the civil cases terminated, after pretrial, 43 percent (instead of the 24 percent that would be expected if diversity cases were proportionally represented) were based on diversity jurisdiction (Table 5). Thirty-nine percent of the civil cases that went to trial were diversity cases. Furthermore, 64 percent of civil jury trials were diversity cases. Thus, diversity cases were two and a half times more likely to be disposed of by jury trial than would be expected, given their proportion of civil caseload. Indeed, twelve percent of all diversity cases are terminated by a trial -- a rate twice that for all other civil cases. Of all private civil cases, diversity motor vehicle personal injury cases (14.3%) and civil rights cases (15.1%) had the highest percent of cases reaching trial. Other types of diversity cases, such as marine personal injury, "other personal

injury," and "other tort," also exceeded the average rate of cases terminated by trial.

On the other hand, diversity cases constituted only 13 percent of cases terminated before pretrial. Clearly, fewer diversity cases than would be anticipated are terminated during this stage of the proceeding.

Table 5: Civil Cases Terminated: U.S. District Courts ^{6/}

	Court Action							
	Total	No Court Action	Total	Before Pretrial	During/ After Pre- trial	Total	Non Jury	Rea- ing Jury Tri
Total civil	123,153	45,336	77,817	48,719	19,725	9,373	5,842	3,531
U.S. civil	36,684	14,350	22,334	18,173	2,706	1,455	1,305	150
Private civil	86,496	30,986	55,483	30,546	17,019	7,918	4,537	3,381
Diversity Cases	30,496	12,239	18,257	6,220	8,388	3,649	1,374	2,275
Marine p.i.	1,177	409	768	99	521	148	59	89
Motor Vehicle p.i.	5,333	2,086	3,247	724	1,760	763	105	658
Other p.i.	7,128	2,354	4,774	1,506	2,293	975	136	839
Other torts	1,294	515	779	278	334	167	65	102
All other Diversity	7	3	4	3		1	1	1
Diversity Total civil	25%	27%	23%	13%	43%	39%	24%	64%
diversity Private civil	35%	39%	33%	20%	49%	46%	30%	67%

6/

Administrative Office of the United States Courts, 1978 Annual Report of the Director, Table C-4 (1978).

These figures suggest that diversity of citizenship cases occupy the time and resources of the federal judiciary out of proportion to their number. Not only are fewer diversity cases disposed of prior to trial, but also they constitute almost two-thirds of all civil jury trials -- and jury trials, typically, are longer than bench trials.

C. Cost Savings Upon Abolition of Diversity Jurisdiction

Elimination of diversity cases from the federal courts will considerably reduce the amount of fees paid to jurors. The Budgetary Impact of Diversity Cases Report prepared by the Financial Management Division of the Administrative Office of United States Courts determined that in fiscal year 1978, there were 1,946 trials in diversity cases ^{7/} and that these trials occupied a total of 7,554 days. ^{8/} The estimated cost of these trials is four and one half million dollars per annum. The process used to determine this amount is set forth in Table 6.

^{7/} The Administrative Office advises that there were 1946 diversity trials conducted in the federal courts during the period July 1, 1977 to June 30, 1978. That figure differs from the number reported in Table infra. That table reports the number of diversity cases terminated during the same period in which there was a jury trial. Some cases finally terminated during that period were actually tried during the previous year and accordingly would be reflected in the data compiled for that year.

^{8/} During the period July 1, 1977 to June 30, 1978 a total of 12,689 days were devoted to civil jury trials. Administrative Office of the United States Courts, 1978 Annual Report of the Director, Table C-8 (1978). That number 7,554 days (59.5%) were spent trying diversity cases.

Table 6: Elimination of Diversity Cases Cost Savings for:
 "Fees of Jurors and Land Commissioners" ^{9/}

A. Number of Diversity Trials (July 1, 1977 - June 30, 1978)...		<u>1,946</u>
B. Length of Jury Trials:		
(1)	350 trials for one day	305
(2)	580 trials for two days	1,160
(3)	437 trials for three days	1,311
(4)	550 trials for four to nine days; average, six and one-half days	3,575
(5)	64 trials for 10 to 19 days; average, 14.5 days	928
(6)	10 trials for 20 days and over; average five trials for 25 days, 5 trials for 30 days.....	<u>275</u>
Total trials 1,946 and trial days		7,554
C. It is estimated that civil trials cost about \$600 per day.		<u>x 600</u>
Rounded		<u>\$4,500,000</u>

In addition to the reduced costs for jurors, other savings can be expected. Since diversity abolition will substantially reduce case filings, it is anticipated that the staffs of the clerks' offices in the federal courts can be reduced. The Financial Management Division of the Administrative Office estimates that some 240 positions can be eliminated. Based upon this estimate, a savings of 4.3 million dollars each year will be realized, calculated as follows: ^{10/}

^{9/} Administrative Office of the United States Courts, Financial Management Division, Budgetary Impact of Diversity Cases Report (1979).

^{10/} Id.

a. Salaries of Supporting Personnel:

240 positions	\$3,200,000
Benefits	300,000

b. Travel and Miscellaneous Expenses:

240 positions at \$1,600 (recurring expenses)	390,000
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c. Space and Facilities:

200 sq. ft. each at \$1,700 x 240	<u>410,000</u>
-----------------------------------	----------------

TOTAL	<u>\$4,300,000</u>
-------	--------------------

Thus a total annual saving of 8.8 million dollars can be expected (\$4,300,000 for supporting staff and \$4,500,000 for juror fees).

It is not anticipated that this saving will be realized immediately, since there will be approximately 30,000 diversity cases pending on the date the legislation goes into effect. The Administrative Office estimates that these cases can be disposed of over a three year period. The phase-out of these cases and the attendant cost is illustrated in Table 7.

Table 7: Recapitulation of Savings by Fiscal Year:
United States District Courts 11/

<u>Fiscal Year</u>	<u>Manpower and Expenses</u>	<u>Fees of Juror</u>	<u>Total</u>
1981	\$2,150,000	\$2,250,000	\$4,400,000
1982	1,433,000	1,500,000	2,933,000
1983	<u>717,000</u>	<u>750,000</u>	<u>1,467,000</u>
TOTAL	\$4,300,000	\$4,500,000	\$8,800,000

11/

Id.

These data are based upon the expectation that 50 percent of the cases will be terminated during the first year, 33 percent during the second year, and the remaining 17 percent in the third year. Thus, the projected annual savings will be reduced each year by the amount that it will cost to process the pending cases, with the actual savings increasing each year. By the end of the third year, it is expected that the backlog of pending diversity cases will have been eliminated, and the projected savings of 8.8 million dollars will be realized each year thereafter.

Thus, there will definitely be some savings in terms of manpower and juror expenses as soon as fiscal year 1980, and we can look forward to greater savings once the presently pending diversity cases have totally cleared the system. (It is worth noting that these estimates of projected savings are fairly conservative and the actual savings may be even greater.)

D. Impact of Abolition Upon State Courts

Some concern has been expressed about the impact of diversity cases on state trial courts. Will the additional cases create an unbearable burden to the state courts, or can these cases readily be absorbed by them?

A study conducted by the National Center for State Courts revealed that the impact of diversity cases on state courts

will increase the caseload in state courts by an average of 1.03 percent. ^{12/} The transfer of diversity cases, however, will not affect all states equally. The findings demonstrate that, on the basis of 1975 figures, the abolition of general diversity of citizenship cases would result in increased caseloads in the state courts that would range from a low of 0.14 percent in the least affected court to a high of 3.58 percent in the most affected court.

The study also calculated the range of additional state court judges needed for handling the diversity cases transferred to those courts. In the states in which the impact of diversity cases is disproportionately high, the number of additional judges that will be needed is somewhat higher than for other states. States with larger caseloads may require several additional judges, while less congested states would require fewer judges.

On the other hand, a majority of the states will be capable of handling the diversity cases without additional judges. In some states the report noted that, "although the impact of the transfer of diversity cases would be disproportionately high ... the court system in these states should be able to handle the extra filings without the addition of new judges." ^{13/}

^{12/} Flango and Blair, The Relative Impact of Diversity Cases on State Trial Courts, State Court Journal 20, 23 (Summer 1978).

^{13/} Id.

The study's conclusions are in agreement with those reached by Minnesota Chief Justice Robert J. Sheran. He remarked in the 1976-77 Minnesota State Court Report that:

While the transfer of the cases would add materially to the burdens of state courts in some areas which have serious backlogs of their own, they could be handled in most instances without major additions to state judicial resources. 14/

Further support for the view that the state courts will not be adversely affected by the abolition of diversity jurisdiction can be found in a resolution adopted by the Conference of Chief Justices (of the state courts) in August 1977. That resolution noted that the state courts "are able and willing ... [to assume] all or part of the diversity jurisdiction presently exercised by the federal courts."

E. Conclusion

In summary, it seems clear that diversity cases consume a disproportionate amount of the time and resources of the federal courts. Abolition of diversity is expected to result in savings of 8.8 million dollars each year once the pending cases are terminated. Finally, although some state court systems may have to increase judicial resources to accommodate the new cases, the majority of state court systems will be able to absorb these cases with little or no difficulty.

14/
Id. at 24.

LETTER FROM THOMAS D. ROWE, JR., AND ATTACHMENTS

GEORGETOWN UNIVERSITY LAW CENTER

600 NEW JERSEY AVENUE, N.W.

WASHINGTON, D.C. 20001

Thursday 7 June 1979

WRITER'S DIRECT DIAL NUMBER
(202) 624-8000

Hon. Edward M. Kennedy, Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Kennedy:

Thank you for the opportunity to comment for your Committee's record on the proposal to abolish the general diversity jurisdiction of the United States District Courts. I have recently completed a study trying to identify and evaluate the non-obvious effects of abolishing diversity jurisdiction, and I hope the results of my work can be helpful to the Committee. To summarize my conclusions before going into any further discussion, I believe that the previously little-noticed side effects of abolition would be significant and, virtually without exception, highly beneficial.

I have tried to give a concise explanation of the results of my work in a statement prepared a few months ago for the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice. Rather than repeat that presentation in this letter, I am enclosing a copy of the statement, which you might wish to include in your Committee's hearing record. I am also enclosing a copy of the article that resulted from my research, which appeared in the March issue of the Harvard Law Review and which you are welcome to reproduce in the record if you like.

Burton Wides of the Committee's staff has asked me to address an argument made by Professor David Shapiro, that one reason to retain diversity jurisdiction is that state courts are less well equipped than federal courts to handle various interstate and international problems. It is true that some state courts lack adequate provision for such things as interstate and international discovery and subpoenas, but many state systems are fully capable of handling such matters; moreover, state systems lacking such facilities can readily acquire them by changes in state statutes or court rules. In my article I discuss this point in somewhat greater detail at pages 983-84, giving citations to several sample state provisions on such subjects as service of process in foreign countries, taking discovery in other states or foreign countries, taking discovery for use in other states, and interstate enforcement of judgments.

Furthermore, to the extent that diversity jurisdiction makes available benefits not found in state court systems, it does so irregularly and without regard to litigants' need for interstate or international facilities. Just because you cannot take advantage of diversity jurisdiction now does not mean you can have no legitimate need for, say, interstate discovery or enforcement of judgments. Litigants from the same state are ineligible for federal diversity jurisdiction, yet they can readily be involved in multistate transactions that require interstate devices for the litigation.

Hon. Edward M. Kennedy
7 June 1979

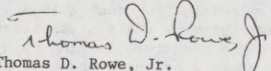
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Finally, focusing on the limited number of situations in which abolishing diversity would mean that litigants formerly eligible for diversity jurisdiction would find themselves in court systems with inadequate interstate and international facilities seems to be somewhat beside the point. It makes much out of the availability of a federal forum, while the real concern is the availability of needed interstate and international procedural devices. And the issue, it seems to me, is what is the best way of providing those devices. Since the states can and very often do provide them, arguing for the retention of diversity because some states do not seems like putting the cart before the horse. We should decide what cases belong in what forums and then provide the devices they need there, rather than looking at what devices various systems have chosen and then deciding what their jurisdictions ought to be in part because of the facilities they have. Indeed, the diversion of diversity cases to state courts should be an added incentive for needed improvement in state procedures, much as the diversion of class actions from federal to state courts as a result of restrictive Supreme Court decisions on federal class action jurisdiction seems to have led to modernization of state class action procedures.

Professor Shapiro has also suggested, as a possible alternative to abolishing diversity, a local option approach under which federal district courts could choose individually whether or not to allow diversity cases to be brought in the district. For several reasons, the proposal seems quite ill-advised. First, it would lead to few if any of the benefits that my study has identified, since those benefits mostly depend on total abolition. Second, whatever the theory of the proposal, it would likely be quite complicated in operation. One of the points my study discussed, for example, was how the existence of diversity jurisdiction had exerted a confusing influence on some aspects of federal procedural law, an influence which could be all the more confounding if diversity existed in some places and not others. Third, the lack of uniformity among districts would probably serve to defeat part of the original idea of the proposal; litigants shut out of one district would often resort not to state court there but federal court elsewhere, which might force districts otherwise inclined to keep diversity jurisdiction to shut their doors to diversity cases in self-defense.

If I can be of any further assistance, please feel free to call on me.

Sincerely yours,


Thomas D. Rowe, Jr.
Visiting Professor of Law

Enclosures

STATEMENT OF
ASSOCIATE PROFESSOR THOMAS D. ROWE, JR.
DUKE UNIVERSITY SCHOOL OF LAW

before the
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
of the
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

March 1, 1979

My name is Thomas D. Rowe, Jr., and I am an Associate Professor of Law at Duke University in Durham, North Carolina. I have received a B.A. in political science and economics from Yale University, a B.Phil. in comparative literature from Oxford University, and a J.D. from Harvard Law School. I served as a law clerk to Associate Justice Potter Stewart in 1970-71 and then was a staff attorney for a subcommittee of the Senate Judiciary Committee. I practiced law here in Washington for two and a half years before going into teaching at Duke in 1975. My teaching and writing have been in the areas of civil procedure and constitutional law.

As this body has been considering the abolition of diversity jurisdiction, I have tried to identify what the effects of such a step would be beyond those usually mentioned. The Office for Improvements in the Administration of Justice of the United States Department of Justice has provided a grant to support this work, and I have completed a study entitled "Significant Nonobvious Effects of the Abolition of the General Diversity Jurisdiction" for the Department. The views I express in the study and today are, of course, my own. I have also completed an article entitled "Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms," which is to appear in this month's issue of the Harvard Law Review.

The points that tend to receive the most attention in the debate over abolition are such matters as how much prejudice against out-of-state litigants survives in state courts, how much reduction there would be in federal court caseloads, and how desirable it would be to transfer the state law determinations involved in diversity cases to the state courts. On these issues

my views are generally in accord with those expressed by witnesses you have heard in the past supporting abolition, such as Judge Friendly and Professor Wright.

On those questions, however, I feel I have little to add. What I hope can be useful to this Subcommittee and to the Congress in considering the abolition proposal is the results of the work I have been doing on other effects of the measure. To summarize my conclusions before getting into further explanation, the previously little-noticed side effects of abolition would be significant and, virtually without exception, highly beneficial. Moreover, most of the benefits I have been able to identify would not come about from measures short of abolition, such as limiting diversity jurisdiction to out-of-state plaintiffs as the American Law Institute proposed several years ago.

To talk about the effects I have mentioned, I need to offer some background explanation. You may have memories from law school or practice--possibly unpleasant ones--of something called the "complete diversity" rule. That rule, established in Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806), requires that for federal diversity jurisdiction all plaintiffs must be of different state citizenship from all defendants. A few diagrams may be useful to illustrate the working of the rule:

[\$10,000 in controversy assumed throughout]

1) No diversity--no federal diversity jurisdiction:

Plaintiff (Illinois) v. Defendant (Illinois)

2) "Incomplete" or "minimal" diversity--also no federal diversity jurisdiction:

Plaintiff (Illinois) v. Defendant (Wisconsin)

and

/ Defendant (Illinois)

3) "Complete" diversity--federal diversity jurisdiction:

a) Plaintiff (Illinois) v. Defendant (Wisconsin)

or

b) Plaintiff (Illinois) v. Defendant (Wisconsin)

and

Defendant (Indiana)

That may not look too complicated, and applying the complete diversity requirement to a plaintiff's original complaint is in fact not usually a problem. But the rule starts presenting extraordinarily difficult questions when it has to be applied to cases involving the later joinder of additional parties, which the modern approach of the Federal Rules of Civil Procedure encourages through such devices as third-party complaints and intervention.

Many of the benefits I foresee from abolition would come about simply because without diversity jurisdiction, courts and litigants would not have to face the many complex problems that the complete diversity rule engenders. You may wonder whether it would not be more sensible simply to overrule the complete diversity rule, which Congress may do by legislation since the Supreme Court has made it clear that the rule is merely an interpretation of the diversity jurisdiction statute. But keeping diversity jurisdiction while overruling the Strawbridge requirement would probably increase the federal courts' diversity case-

load greatly, which would add to a good many other present difficulties rather than reducing them.

Moreover, the non-obvious benefits of abolition would not be only those of getting rid of the complete diversity rule. In brief, the effects my study has identified are of three main kinds: sheer reduction in the incidence of difficult jurisdictional and procedural issues mostly connected with, or unique to, diversity jurisdiction and the complete diversity requirement; facilitation of judicial rethinking of some areas of federal pendent and ancillary jurisdiction that have often been confined and confused by diversity problems; and paving the way for some possible further statutory and rule reforms in federal practice and procedure. In other words, there would be some problems that courts and litigants simply would not have to face any more; some case law that the courts might profitably rethink because of the influence that diversity problems have had; and some measures that the Congress or the rulesmakers might like to adopt that would be easier after abolition.

In the first category of problems that would have to be faced much less or not at all, an obvious example is the determination of just what state a party is a citizen of. Much of the time that determination is an easy one, but with mobile people and multi-state corporations it can get quite complex and time-consuming; furthermore, if it turns out later to have been mistaken, it can result in an otherwise valid decision's being thrown out and sent to state court for an entire new trial. Another determination that should much less often be seriously contested if diversity

were abolished is that of realignment; presently, litigants sometimes contest whether a party should be aligned as a plaintiff or a defendant. Usually, the only reason why alignment is worth caring about is that it would preserve or destroy federal jurisdiction based on diversity; after abolition, there would be many fewer occasions when parties would have any reason to invest their own time and that of federal judges in this issue.

A somewhat more complex problem is that of collusion to invoke federal jurisdiction, which is a concern unique to diversity jurisdiction because of the opportunity to create diversity by, say, assigning your claim against your own co-citizen to an out-of-stater. Congress has told the federal courts, in section 1359 of the Judicial Code, not to let this happen, which is sensible enough given that it would otherwise be much too easy to get into federal court; but the determination whether some tactic that creates diversity or otherwise seeks to evade restrictions on federal diversity jurisdiction is improperly collusive is often a difficult one, and one that would be unnecessary after abolition.

These are not the only examples of the first general type of beneficial side effect I have mentioned, reducing or eliminating several difficult determinations necessary because of the requirements for federal diversity jurisdiction. In fact, the examples are the less complicated ones among effects of this type I have identified. However it may appear, I have not been trying to illustrate confusion by creating it; the point is that diversity jurisdiction forces these and much more complex problems on federal judges and practitioners, and all of them have little or

nothing to do with the merits of the dispute the parties are trying to have adjudicated. Abolishing diversity, finally, would not transfer these problems to the state courts, because the difficulties are all the result of basing federal jurisdiction on the citizenships of the parties; since state courts do not usually have to look to parties' citizenships to determine whether they have jurisdiction, they would not inherit these difficulties that the federal courts face now.

The second general type of effect would be the probable elimination of some confused and restrictive case law on procedural problems in the federal courts that has been influenced by diversity considerations. The Federal Rules of Civil Procedure, in an effort to promote economy and convenience for courts and litigants, have quite liberal provisions for adding related claims and parties after a dispute is already in federal court; the idea is to allow the settling of related matters in one litigation. One such provision is "impleader" under Rule 14, which lets a defendant join a third party who may be liable to him for the plaintiff's claim. In other words, someone--like an insurance policy holder--can bring in a party who may have to indemnify him--like his insurance company, in effect saying that if I owe the plaintiff then you owe me. The rule lets all that be settled in one trial rather than two.

The rule also lets the plaintiff and the third-party defendant claim against each other directly if they have such claims, and this is where diversity jurisdiction has caused problems. To resort to a diagram again, say that an Illinois plaintiff

brings a proper diversity suit in federal court against a Wisconsin defendant. The Wisconsin defendant impleads a third-party defendant who may be liable to him, and that party happens to be from Illinois:

Plaintiff (Illinois)

v. Defendant (Wisconsin)

v.

Third-party defendant (Illinois)

If the federal court lets the plaintiff do what the rule permits and add his claim against the third-party defendant, then the plaintiff has accomplished precisely what the complete diversity rule says he may not do--bring a federal diversity action against two defendants, one of whom is from his home state. Just last year, the Supreme Court settled that such claims, when there is no other basis of federal jurisdiction such as a federal question, cannot be included in a diversity case. (Owen Equipment and Erection Co. v. Kroger, 437 U.S. 365 (1978).)

This much does not seem to be all that problematic. The trouble has been that the lower federal courts have not always considered whether it makes sense to apply such restrictions beyond the diversity situations in and for which they were evolved. And in some cases, courts handling federal question cases have relied uncritically on language from diversity actions, frustrating efforts at joinder on the basis of rules developed in diversity litigation to deal with problems created by the Strawbridge complete diversity rule. What abolition would eliminate is the basis for this sort of muddled carryover effect, making it easier for the federal courts to consider on its own merits the question

whether such joinder should be permitted in federal question cases.

The third type of effect would be the elimination of certain obstacles diversity jurisdiction now poses for some possibly desirable reforms in federal court jurisdiction and procedure. To

give just one example, [it might be useful if the federal courts could have a single uniform provision for nationwide service of process to bring parties before them.] Instead, what we have is

a patchwork of statutes providing for nationwide service in particular types of cases, [plus] a general provision that for the

most part limits federal courts' process in other cases to the long-arm authority of the state in which the federal court is sitting. A problem that arises mostly in diversity cases seems

to be the main reason for this restriction. Under prevailing rules for choice of law by the federal courts, a federal court in a diversity case must follow the conflicts law of the state in which it sits. Nationwide service going beyond the state's

long-arm provision might bring before a federal court a party who could not have been sued in the courts of the same state; the conflicts practice might then subject that party to a rule of substantive law that could otherwise not have governed his conduct, and that is generally regarded as unfair. Abolishing diversity would eliminate most of the situations in which this problem could arise, which might make a uniform nationwide service provision much more attractive.

What all these effects suggest is that there is an additional, major set of considerations in favor of abolishing diversity jurisdiction--the simplification of federal practice by reducing

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or eliminating some of the thorniest procedural difficulties that federal courts and practitioners in them must face, plus the creation of opportunities for further improvements. None of this is to deny that the supposed benefits of having diversity jurisdiction are genuine ones, but any such benefits do appear to come at an even higher cost than we had realized. (The complete diversity rule, incidentally, means that your ability to take advantage of the diversity jurisdiction often depends on what may be a fluke--whether citizens of the same state happen to get involved on both sides of a dispute, which may have nothing to do with whether there is local bias against an out-of-stater who is also involved.)

Sometimes there is debate over whether it is the proponents of abolishing diversity, or those who would keep it, who should have the burden on the issue. John Frank argued to you in the last Congress that before abolishing diversity, we should be able to see "clear-cut good in it." What I think I can fairly conclude from my work is that there is such a good, and that even if the burden is on the abolitionists it is one they can satisfy.

As the foregoing reflects, in my judgment the diversity jurisdiction should be abolished; and the bill reported out by this Subcommittee and passed by the House in the last Congress, H.R. 9622, is a good bill. There is, however, one change that could make it even better. H.R. 9622, while abolishing the "general" diversity jurisdiction for cases between citizens of different states, retained the "alienage" jurisdiction of the federal courts over disputes between citizens and aliens. My concern is not with

whether you should keep this type of jurisdiction; it is that if you do keep it while reporting out a bill abolishing general diversity, I would strongly urge you to include a provision overruling the complete diversity requirement for alienage cases.

Instead, it should be enough for there to be "minimal" diversity--when of any two adverse parties one is a citizen of an American state and another is an alien, without regard to other litigants and their alignment.

The federal courts have held the complete diversity rule applicable to alienage cases as well as to those within the general diversity jurisdiction; but the Supreme Court has made it clear that the rule is purely a matter of statutory interpretation and subject to change by Congress. (E.g., Owen Equipment and Erection Co. v. Kroger, 437 U.S. 365, 373 n.13 (1978).) As troublesome as the complete diversity rule is in cases between citizens, its effects are even worse in the alienage jurisdiction. To begin with, it produces an irrational and complicated crazy quilt pattern for cases involving citizens opposing aliens. As applied in alienage cases, either state co-citizens or co-aliens as adversaries destroy complete diversity and thus federal alienage jurisdiction. Thus, if an alien or aliens oppose a citizen or citizens, with no other parties involved, there is jurisdiction:

1) Complete diversity--federal alienage jurisdiction:

Plaintiff (England) v. Defendant (New York)

or

Plaintiff (New York) v. Defendant (England)

Similarly, if citizens of complete diverse citizenship oppose each

other and an alien or aliens are also involved on just one side, the federal courts have jurisdiction:

2) Complete diversity--federal jurisdiction:

Plaintiff (New Jersey) v. Defendant (New York)

and

Plaintiff (England)

But because of the complete diversity rule, if there are aliens on both sides and citizens on only one, there is no federal alienage jurisdiction:

3) Incomplete diversity--no federal alienage jurisdiction:

Plaintiff (Massachusetts) v. Defendant (England)

and

Plaintiff (Ireland)

Also, if there are aliens on one side but incomplete diversity between citizen adversaries who are also involved, there is no federal alienage or diversity jurisdiction:

4) Incomplete diversity--no federal alienage or diversity jurisdiction:

Plaintiff (Massachusetts) v. Defendant (Connecticut)

and

and

Plaintiff (Ireland)

Defendant (Massachusetts)

Just by itself, this pattern is confusing and arbitrary enough. What is worse is that it excludes from federal court cases that should be there according to what are commonly accepted as the reasons for having the alienage jurisdiction. There seem to be two such reasons: the concern about state court bias against outsiders that also applies to general diversity jurisdiction, and

the possibility of affecting United States foreign relations by the treatment of aliens in our courts. Under the crazy quilt pattern outlined above, the complete diversity rule excludes from federal court some cases that might affect our foreign relations just as much as cases allowed in. Moreover, the rule gives a citizen plaintiff the ability to manipulate his suit to block an alien defendant from all access to the federal courts, whatever the possible bias against the alien or the foreign relations repercussions, if the plaintiff can find a citizen of his own state who would be a proper co-defendant. Finally, keeping the complete diversity rule for alienage cases would preserve in miniature the many complex and difficult problems that it raises now. The rule, in sum, is an egregiously bad one for alienage cases.

If the Subcommittee decides to report out a bill abolishing general diversity but keeping the alienage jurisdiction, it could make that jurisdiction fulfill its purposes and eliminate many of the present problems by overruling the complete diversity requirement. Such a measure should not threaten any large increase in federal dockets because the alienage caseload is small. If the Subcommittee is inclined to adopt this suggestion, one way of drafting such a provision would be to replace the present 28 U.S.C. § 1332(a) (1976) with the following:

The district courts shall have original jurisdiction of all civil actions in which the matter in controversy exceeds the sum or value of \$XX,XXX, exclusive of interest and costs, and--

(1) one of any two adverse parties is a citizen of a State and the other is a citizen or subject of a foreign state; or

(2) is between a foreign state, as defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(Subsection (2) is to preserve the present 28 U.S.C. § 1332(a) (4) (1976), recently enacted to provide jurisdiction in cases involving foreign states as plaintiffs in American courts.)

There may be good reasons for not proceeding with this amendment at the moment, and I definitely am not implying that there should be no abolition of general diversity jurisdiction if you do not also overrule the complete diversity requirement for alienage cases. Very much to the contrary, I think H.R. 9622 as passed by the House in the last Congress was a good bill and endorse it wholeheartedly. This suggestion is simply to propose a modest way in which good legislation might be made significantly better.

RESPONSE OF HOUSE AND SENATE JUDICIARY STAFFS TO SENATOR METZENBAUM'S OPENING STATEMENT

In 1978 the National Center for State Courts published a study of delay in twenty-one State judicial districts whose population ranged from a low of 457,000 (St. Paul) to a high of 2.5 million (Detroit). Based on 1976 data, the researchers were able to measure, for some of the jurisdictions, the median time from filing to disposition in all civil cases. The same data is available in the annual report of the Administrative Office of U.S. Courts for the judicial districts which include the State districts measured. The comparisons are as follows (in days):

	STATE	FEDERAL
Atlanta	317	270 (N.D. Ga.)
Boston	394	690 (D. Mass.)
Cleveland	378	210 (N.D. Ohio)
Dallas	210	300 (N.D. Tex.)
Detroit	735	270 (E.D. Mich.)
Ft. Lauderdale	189	120 (S.D. Fla.)
Houston	490	330 (S.D. Tex.)
Miami	236	120 (S.D. Fla.)
New Orleans	259	300 (E.D. La.)
Newark	608	360 (D. N.J.)
Oakland	295	270 (N.D. Cal.)
Phoenix	196	240 (D. Ariz.)
Pontiac	364	270 (E.D. Mich.)
Portland	275	270 (D. Ore.)
San Diego	362	270 (S.D. Cal.)
Seattle	217	300 (W.D. Wash.)

Of the sixteen jurisdictions, for which data is available, the delay in Federal court is greater in only six. The State delay is significantly greater in Detroit and Newark while the Federal delay is significantly greater in Boston.

The above is based upon 1976 data. Delays in the Federal courts have increased a small amount since that time, however, no information is available concerning present delays in the State systems.

Response of Justice Department to Senator
Metzenbaum's Opening Statement
BUDGETARY IMPACT OF DIVERSITY CASES

1. Assumptions

- a. Legislation will become effective October 1, 1979, and that approximately 30,000 civil filings will be diverted to State Courts in fiscal year 1980.
- b. As of October 1, 1979, there will be approximately 30,000 pending cases that will have to be disposed of by the Federal Courts.
- c. That the disposition of pending caseload will take approximately three years and that full potential savings will not be realized until fiscal year 1983.

2. Projected Annual Savings

Based on an 80:1 ratio of filings to deputy clerks, a savings equivalent to approximately 240 positions will be realized.

a.	Salaries of Supporting Personnel:		
	240 positions @ JSP7/3.....	\$3,200,000*	
	Benefits.....	<u>300,000</u>	
			\$3,500,000
b.	Travel and Miscellaneous Expenses:		
	240 positions @ \$1,600 (recurring expenses)....		390,000
c.	Space and Facilities:		
	200 sq. ft. each @ \$1,700 x 240.....		410,000
d.	Fees of Jurors and Land Commissioners:		
	7,554 trial days @ \$600.....	<u>4,500,000</u>	
	TOTAL ANNUAL SAVINGS.....		<u>\$8,800,000</u>

3. Recapitulation of Savings by Fiscal Year:

<u>Fiscal Year</u>	<u>Manpower and Expenses</u>	<u>Fees of Jurors</u>	<u>Total</u>
1981	\$2,150,000	\$2,250,000	\$4,400,000
1982	1,433,000	1,500,000	2,933,000
1983	<u>717,000</u>	<u>750,000</u>	<u>1,467,000</u>
TOTAL	<u>\$4,300,000</u>	<u>\$4,500,000</u>	<u>\$8,800,000</u>

There will be some savings in terms of manpower and juror expenses in fiscal year 1980. These savings have been included in the projected savings for fiscal year 1981.

NOTE: Savings may be offset by increases in Federal Question and other civil and criminal filings.

*Includes normal lapses.

Elimination of Diversity Cases
Cost Savings for: "Fees of Jurors and Land Commissioners"

A.	Number of Diversity Trials (July 1, 1977 - June 30, 1978)...	<u>1,946</u>
B.	Length of Jury Trials:	
	(1) 305 trials for one day.....	305
	(2) 580 trials for two days.....	1,160
	(3) 437 trials for three days.....	1,311
	(4) 550 trials for four to nine days; average, six and one-half days.....	3,575
	(5) 64 trials for 10 to 19 days; average, 14.5 days.....	928
	(6) 10 trials for 20 days and over; average, five trials for 25 days, five trials for 30 days.....	<u>275</u>
	Total trials 1,946 and Trial days	7,554
C.	It is estimated that civil trials cost about \$600 per day.	<u>x 600</u>
		<u>\$4,500,000</u>
	Rounded	

Prepared by Financial Management Division
Administrative Office, United States Courts
February 27, 1979



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