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## The War on Diversity

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## THE WAR ON DIVERSITY†

John W. Reed\*

Over the past decade or more there have been strong pressures to abolish the diversity jurisdiction of the federal courts. With the strong backing of the prestigious American Law Institute and many scholars, and with the support of the Chief Justice, Senator Kennedy, and others, specific proposals have been introduced in Congress, have been discussed at enormous length, and have passed one or the other House but not both. At the moment, therefore, we still have diversity jurisdiction, and it is safe to predict that abolition of diversity will not occur during the present session of Congress. Nevertheless, the long-term pressure continues, and those who, as I, would retain diversity jurisdiction need to be continually alert. Moreover, we need to remind ourselves from time to time what the argument is all about, and we need to take into account any new information that may be relevant to one side of the argument or the other.

The Board of Governors of the Barristers Society has taken note of the status of the attacks on diversity, and has resolved to stay abreast of them and to marshal the Society's resources in opposition to abolition in the event that the movement picks up steam again.

My purpose here, then, is twofold: to review with you, and refresh your recollections about, the abolitionists' arguments and the appropriate responses to them; and to encourage you, if you agree with my assessments, to exert your influence on a sustained basis to assure the continued availability of diversity jurisdiction—influence both at the public level, explaining to the public whenever possible the importance to them of access to the federal courts in diversity cases, and, at the personal level, communicating, with whatever political clout you have, to your individual Congressmen the importance of diversity to their constituents, your clients.

### FEDERAL JURISDICTION GENERALLY

As you know, Article III of the United States Constitution states that the federal judicial power extends to controversies between citizens of different states. Since the early days of the republic, Congress has exercised that constitutional power by authorizing the federal courts to hear cases between citizens of different states, provided that the money in controversy meets a

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† Address delivered at the Annual Convention of the International Society of barristers, Marco Island, Florida, March 24, 1983.

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dollar value test—currently, \$10,000. Also, a case involving parties of diverse citizenship but begun in a state court may be removed to federal court if the defendant is not a citizen of that state.

The other great branch of federal court jurisdiction consists of those cases involving so-called federal questions. No one, of course, suggests that it is inappropriate to have federal questions tried in federal courts, although it may be noted that most kinds of federal question cases may be filed in state courts as well. Federal court jurisdiction is exclusive only with respect to certain specialized subject matter areas, such as admiralty, bankruptcy, and patent cases.

But where a case is in federal court because of diversity only, it concerns, by definition, a subject matter as to which the federal government has no substantive interest. Product liability, personal injury, medical malpractice, unpaid promissory note, breach of employment contract—these are illustrative of non-federal question cases that may wind up in federal court because of the citizenship of the parties to the action and for no other reason. What is the argument for drawing those cases into the federal system?

The easy, familiar rationale has been that diversity jurisdiction was created to protect out-of-state litigants against local prejudice. In the early days of the nation at least, it was thought to speed the economic growth of the country, to afford some measure of security to investors developing the South and West, and the like. It probably favored the Establishment, the Eastern money lenders, who might need to collect debts or foreclose mortgages. One interesting but seldom mentioned way in which diversity helped non-residents was that it gave litigants access to a court with lifetime, appointed judges, rather than elected judges more likely subject to local popular political influence.

#### OBJECTIONS TO DIVERSITY

The attack on diversity jurisdiction has its most distinguished formulation in a major study sponsored by the American Law Institute. That study has been the starting point for most debates on the subject in the years since its publication in 1969.

The argument for abolition is, at bottom, premised on two propositions: first, that local prejudice is not a significant factor in the late twentieth century; and second, that diversity cases congest the federal courts.

As to the first proposition, the claim is that local prejudice is no longer a significant factor in judicial proceedings. Modern communications, the mobility of our society, the diminution of state interests and loyalties in the light of the enormous growth of the federal government—all of these suggest that prejudice against out-of-state litigants is no longer, if it ever was, a significant basis for putting non-federal question cases in federal courts.

A subsidiary aspect of this argument is that there often are important prejudices having nothing to do with state lines and as to them there is no forum option; and since options are not available to *all* litigants, it is unfair to make them available to parties in the case of the one kind of prejudice.

That is the first argument for abolition: There is little geographical prejudice, and, moreover, to provide a protective measure for any prejudice that there may be without making a similar protection available against other prejudices violates—in a kind of lay terminology—“equal protection.”

The second major argument for abolition is that diversity causes unacceptable congestion in the federal courts, that diversity cases are an unbearable additional burden when the federal courts are already jammed with the cases filed by a litigious society, and that, even granting some utility to diversity jurisdiction, it represents a luxury that we cannot afford.<sup>1</sup>

#### THE (UNCERTAIN) COSTS OF DIVERSITY

I shall speak of these arguments in reverse order and begin with the question of the costs of diversity jurisdiction to the federal system. Officials of the Justice Department, supporting bills to abolish diversity of citizenship jurisdiction, have on two occasions testified before Congressional committees that the abolition of diversity jurisdiction would save the federal government an estimated \$9 million a year. That figure is barely more than two percent of the expenditures for the entire federal judicial branch, which are themselves less than one-tenth of one percent of total federal expenditures. I calculate that to be a mere two-thousandths of one percent of total federal expenditures in the year in which the testimony was given. Recognizing that with those figures the financial argument thus carried no weight, the Administrative Office of the United States Courts recently came up with its own

1. Other arguments are sometimes offered, but they do not pick up much of a following. For example, one facile argument occasionally advanced seems to be a kind of “states’ rights” argument, theoretically addressing itself to the proper limits of federalism. The argument is that state cases should be in state courts, with only federal cases (that is, federal question cases) in the federal courts. Although the argument has a certain superficial attractiveness to it, it is interesting that none of the proponents would argue that *all* federal cases should be in federal courts. As I mentioned earlier, there are only a few subject matters as to which the federal courts have exclusive jurisdiction. Most federal question cases may be brought in the state courts as well. If the argument be that political theory calls for state cases to be in state courts—and state courts only—why should it not follow that federal cases should be in federal courts—and federal courts only? Were that to be followed to its logical, symmetrical conclusion, the load imposed on the federal courts (as federal question cases now filed in state courts were moved into the federal system) would largely offset, and might exceed, the reduction generated by transfer of diversity cases to the state courts.

Another argument in the area of limits on federalism is that since under *Erie v. Tompkins* the federal courts must apply state substantive law, it is inappropriate and even demeaning for the federal courts to be deciding diversity cases, applying—even announcing—what the court believes is, or should be, the law of the state—making the federal judge (in Jerome Frank’s colorful phrase) the “ventriloquist’s dummy to the courts of some particular state.” *Richardson v. C.I.R.*, 126 F.2d 562, 567 (2d Cir. 1942).

But I here limit my comments to the two major propositions urged by the abolitionists: (1) local prejudice is no longer a significant factor, and (2) granting any utility, nevertheless the diversity cases represent an unbearable additional burden on the federal courts.

figures, projecting savings of approximately \$30 million a year over the next five years if diversity were abolished, or a total of nearly \$160 million. Even with this larger figure (based on some questionable assumptions, as I shall mention in a moment) it is clear that the dollar cost of diversity jurisdiction is small absolutely, and de minimis relatively—something like six-thousandths of one percent of the federal budget. If diversity jurisdiction were of only marginal utility, it still might be justified at that small cost.

Moreover, the assumptions on which the cost calculations were made are unscientific and soft. In every instance they give evidence of a bias toward higher numbers than an impartial application of the raw data would support. A staff member of the Judiciary Committee of the House of Representatives has conceded that the figures are speculative, generated for use in the political context: "If a Representative wants cost estimates to be an issue, we will generate figures that seek to make cost an issue. Everyone knows these figures are not factual but are to be used only for political purposes. This is not a cost issue but a political contest."<sup>2</sup>

It is also unclear what particular savings would be produced by abolition of diversity cases. In terms of present operations, about all that would be saved would be the jury fees. No one is suggesting reducing the number of judges or courtrooms, and few reductions in support staff seem likely. The marginal costs of diversity jurisdiction initially would be small indeed—almost surely smaller than predicted by the Administrative Office. The argument may be, however, that the savings will be prospective—that with no more diversity cases, the increase in the number of filings will be reduced, thus reducing the need for more new judges, more new courtrooms, more new clerks, in the years ahead. Indeed, the Administrative Office and the Congressional Budget Office do in fact predict larger savings in the years ahead than in the immediate years.

What that argument adds up to, of course, is that diversity jurisdiction is responsible for a substantial part of the work of the courts, that it contributes significantly to the congestion with which we are all familiar, and that congestion will inevitably necessitate a continuing expansion of judicial services at some additional cost.

No one would argue that diversity jurisdiction imposes no additional costs on the federal judicial system or that it does not play some role in the congestion experienced by the federal courts. The extent of those costs and of that congestion, however, is far less certain, far more speculative, than we have been led to believe.

Diversity cases have grown at an irregular rate. On the whole they have

2. Statement of David Beier, Assistant Counsel, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Committee on the Judiciary, U.S. House of Representatives, in telephone interview with E. James Potchen, East Lansing, Michigan, January, 1983, in connection with preparation of the latter's unpublished study of the costs of diversity jurisdiction.

increased in number, but they have not increased as a percentage of total cases filed. There simply is no evidence that diversity cases are proportionately a larger part of the federal judicial burden.

In passing, two particular years are interesting to observe. In 1958, the amount in controversy requirement was raised from the old \$3,000 figure to \$10,000. Most of us have assumed that the jurisdictional minimum does not screen out many cases, certainly not cases in which damages are unliquidated. Yet cases filed under diversity in fiscal 1959 dropped from 26,000 the year before to 18,000, apparently in partial response to the increase in jurisdictional minimum from \$3,000 to \$10,000. There is a consensus that the \$10,000 figure adopted in 1958 ought now to be raised to \$25,000. Whether there would be another one-third drop in the case filings in response to such a change no one knows. But at least one might try that remedy as a cost and caseload control device before the more draconian remedy of abolition.

The other interesting year is 1979. The growth in diversity filings has been relatively steady—steadily slow, that is—over the past twenty years or so. But an interesting change took place in 1979. In fiscal 1979 the rate of growth in diversity filings increased substantially over the average rate of the preceding several years. What happened? That increase immediately followed the passage of the omnibus judgeship bill, which authorized some 117 new district judgeships. Whether there is a connection between these two facts is not clear. The increase in judges, however, was widely looked upon as a means to improve the handling of cases in the federal courts, and it is conceivable that the legal community responded by filing more cases in federal courts because of a perception of increased ease in getting them handled. In short, the system may be inelastic, with the caseload expanding to fill the available slots. (I am told there is a similar phenomenon in the field of medical care, where the addition of a physician to a group or a community has the effect of increasing the total physicians' caseload and increases the cost to the community, but no other health care indices change.)

One other set of data is intriguing in this context. Over the past several years, as filings have increased, a larger proportion—not a larger number only, but a larger proportion—of filed cases are being settled without trial, and two things have been decreasing: the proportion of jury trials and the time from filing to resolution.

To state it slightly differently: The percentage of cases filed that reach trial has decreased constantly over the past twelve years. While diversity cases have always had a higher proportion reaching trial than total civil cases, the rate of decline in this percentage has been even greater for diversity cases than for federal civil cases as a whole. These trends have a significant impact on future "workload" since trial activity is the most resource consumptive process in the federal court system.

There is a steep decline in the percentage of cases reaching trial and a gradual decline in the percentage of cases requiring the jury, and these result in one forecast that there will be fewer diversity cases with a jury trial in 1987 than in 1982, despite a 45% increase in the number of diversity cases filed.

I quickly concede that these figures are ambiguous, and they do not tell us what is cause and what is effect. What I would have you understand, however, is that the easy assertions and generalizations of those who would use cost and caseload figures as the basis for abolishing (or for that matter, retaining) diversity jurisdiction are deluding us and perhaps themselves. The reality is vastly more complicated. At a session of an institute on court management some years ago there was reported a study with respect to adding a judge to the then Fifth Circuit Court of Appeals, which concluded that the addition of a judge actually diminished available judge time in that large circuit. The processes of communication among the judges back and forth, and around and around, would take a bit more time of each judge in order to include the new member of the court; and in the aggregate, those bits of time added up to more judicial time than the new member would provide. What looked like a good thing—adding a judge—was not clearly helpful.

In short, we do not yet have enough knowledge about the effects of case filings, jury trial elections, the availability of more judges and judicial facilities, and the like, to be able to make secure assertions as to what these things do to the functioning of the system. Without more sophisticated understanding, we would be well advised to conclude that, at two percent—or six percent—of the judicial budget, the dollar costs are not controlling, and make the decision as to the wisdom of diversity jurisdiction on its substantive values, not on highly debatable, pseudo-exact arithmetic and fiscal calculations.

#### THE (DOUBTFUL) CAPACITY OF STATE COURTS TO ABSORB DIVERSITY CASES

It is argued 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. And the Conference of Chief Justices has stated that the state court systems are "able and willing" to assume all or part of the diversity jurisdiction currently exercised by the federal courts. That's very attractive: Send cases out, reduce congestion, save money, and create no problems for the states.

Despite the brave statements of the chief justices, the ability of the state systems to absorb diversity cases is suspect. No one really knows what the actual impact of transferring the diversity cases would be on the state courts. The evidence consists primarily of an exercise in long division, showing that the number of diversity cases divided by the number of state trial judges yields an apparently reasonable quotient. But the "average caseload" 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 tend to be more complex. Metropolitan area state courts tend to be just as crowded if not more crowded than federal courts (which are, by and large, also in larger cities).

Moreover, 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 "able and willing" to handle diversity cases; and the conference insists that the funds should have no strings attached lest the independence of the state court systems be compromised.

About three years ago the National Center for State Courts studied the status of dockets and the pace of litigation, and it compared the median disposition time (that is, from filing to judgment or other disposition) in state and federal courts in some seventeen urban centers. In sixteen of these seventeen, the median disposition time for state courts exceeded that for the federal court. Let me offer three striking illustrations: the median disposition times for

Detroit—state: 788 days; federal: 274 days

Pittsburgh—state: 583 days; Federal: 214 days

Miami—state: 331 days; federal: 122 days

Last fall the National Law Journal reported that the Supreme Court of Alabama had requested of the state's trial courts a two-week moratorium on civil and criminal jury trials. Although the measure was a response to an Alabama budget crisis and was simply designed to save jury costs, it provides an interesting and timely counterpoint to the glib assertion by the Conference of Chief Justices that the state courts are "able and willing" to take on all the diversity cases.

#### THE UTILITY OF DIVERSITY

Because the cost of diversity to the federal system is relatively uncontrollable, the relationship between the existence of diversity and court congestion far from clear, and the ability of state courts to absorb diversity cases without spending at least as much money as the federal system might save doubtful, it becomes apparent that the real question is not cost, but whether there is an important utility in maintaining diversity jurisdiction.

In short, what is the current justification, if any, for making federal courts available to litigants who could just as well bring their cases in the state courts? I submit that there are values in diversity jurisdiction which justify its continuance even if the cost were high, which it is not.



*Avoiding Prejudice through an Alternative Forum*

As I said, diversity jurisdiction probably was created to provide out-of-state litigants the opportunity to avoid in-state bias or prejudice. The critics argue that, however valid the point may have been two hundred years ago, there is no longer any significant prejudice in state courts against out-of-state litigants. The trial lawyers of the nation, and the trial judges, know better: there *is* local prejudice. Said a Texas federal district judge:

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, whether he be a plaintiff or a defendant.<sup>3</sup>

Additionally, there is difficulty in isolating the home state prejudice from other prejudices which may be harbored by those in the locale of the court. Take the Texas example: Is 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?<sup>4</sup>

Diversity jurisdiction has evolved to the point where it now offers its protection to those who might otherwise suffer from many kinds of prejudice. Although the problem is more often one for the out-of-state plaintiff or defendant, there may be an "injustice factor" pressing on an in-state plaintiff. For example, Robert Begam, to whom I am indebted for a number of these ideas, offers the illustration of a Navajo couple killed in a northern Arizona highway accident with an interstate tractor-trailer registered in Texas. The surviving minor children have a choice, with diversity jurisdiction, between a state court action in Holbrook, Arizona, with an all-white rural jury, and a federal action in Phoenix with a state-wide jury. The implications for the plaintiffs are obvious.

The heart of the matter is that the availability of an alternative forum is often a necessary "condition of justice," well worth its minor costs. 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

3. Quoted by Robert Begam, Fellow of the International Society of Barristers, in *Hearings on S. 679 Before the Senate Committee on the Judiciary*, 96th Cong., 1st Sess. 171 (1979).

4. *Id.* at 171-72.

district-wide (often state-wide) panels in the federal courts. A fair result often depends on the ability to avoid a narrow local bias, as in the suit by the Navajos mentioned earlier; and one could multiply the examples.

To the objection that this is "forum shopping," I say, what's so wrong about forum shopping? All of us know that arguably meritorious claims and defenses may be greatly jeopardized by procedural quirks, judicial prejudice or inadequacy, local (not just interstate) prejudice, docket backlogs, and the like. It may be that I am arguing for a kind of free enterprise in the selection of forums; and the argument should not be carried too far, of course. But the history of our law is one of development through competition among the courts. A significant portion of the remedies that we now take for granted came into existence because parties had the freedom to move from King's Bench to Common Pleas, from law to chancery, from Exchequer to King's Bench, and the like. I believe that the possession of options in the litigation process is a "condition of justice."

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.

### *Federal and State Courts as Working Partners*

It is perhaps another way of saying the same thing to state 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 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 state courts are working partners with the federal courts in the enforcement of many rights arising under federal law. The concurrent 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 inevitably impede this useful process if we 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 will have much less occasion to be in both, and the flow of ideas in each direction will materially diminish.

*Attractiveness of Federal Judicial Service*

Another familiar justification for diversity jurisdiction is that it makes federal judicial service more attractive to the best and wisest legal minds. Already it is hard to recruit (and lately, to keep) excellent federal judges. 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—even boring—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 gruel is likely to be lower.

## ALTERNATIVES TO ABOLISHING DIVERSITY

The base problem which must be addressed is, roughly stated, court congestion. It is not the disproportionate fault of diversity jurisdiction, however, that many federal courts are crowded. Lawyers and their clients have not increased their reliance on diversity. Indeed the diversity percentage of total caseload in the federal courts has not increased. The congestion 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, from the growth of complex controversies, and not least, from the increasing litigiousness of the American public and their government.

The solution is not 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. What are possible solutions or, at least, ameliorative measures?

*Additional Judgeships*

An obvious possibility is to increase further the capacity of the system as the 95th Congress did in authorizing additional judgeships. That that measure is suspect is suggested by the fact, mentioned earlier, that the most recent appointment of new judges was followed by a significant increase in the rate of growth in case filings. Whether those are cause and effect we do not yet know; but if it is not mere coincidence, then it is at least doubtful that additional judgeships would be the major element of any solution.

*Procedural Improvements*

Another element of a possible solution is a continuation of efforts to improve the efficiency of the system, such as experimentation with compulsory arbitration for certain kinds of cases, enlargement of magistrates' juris-

diction, reduction of the abuse of civil discovery procedures, and the like. Systems of alternatives, such as mediation, conciliation, summary jury trials, and mini-trials, need careful consideration. I am fully aware that each of these has its own problems and is in its own way debatable. Indeed, this Society generally opposes the adoption of alternative modes of dispute resolution whenever they appear to diminish individual rights. But certainly a study of these various possibilities must continue, and, even with some disadvantages, particular changes may be preferable to the flawed version of theoretical rights in a system of justice delayed or overpriced.<sup>5</sup>

*Limiting, but Not Abolishing, Diversity*

There are two proposals afoot to limit current diversity jurisdiction that offer some promise of reduction in federal court caseloads while leaving intact a large part of that jurisdiction's utility. One of them is clearly desirable and will surely be adopted if it can be separated from the abolition movement. The second seems to me to be undesirable and should be resisted.

*Raising the amount in controversy.* The first, of course, is an increase in the amount in controversy requirement, from the present \$10,000 to \$25,000. The amount has not been changed since 1958, and the change in the value of the dollar justifies an increase in the floor to at least \$25,000. There is no significant opposition to that change.

*Excluding the resident plaintiff.* A second proposal is to curtail diversity jurisdiction by denying a plaintiff access to any federal district court in the state of which *he* is a citizen. The argument is that a plaintiff suing in his own state cannot be said to need a federal court for the purpose of avoiding local prejudice. But such a change would deny federal court access to the Navajo plaintiffs, mentioned above, with likely adverse effects. It would also 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. Surely that is something we deplore.

John Shepherd made this point in a delightful way, speaking to the political interests of those legislators who would abolish or curtail diversity jurisdic-

5. See Olson, *Alternative Means of Dispute Resolution*, 17 INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY 373 (1982).

tion. Testifying before the Judiciary Committee of the Senate, he objected to the proposal to deny jurisdiction when an in-state plaintiff sues an out-of-state defendant, saying:

I suggest to you, Senator [Metzenbaum], 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 Federal courthouse to the working people of this country is a very serious thing. It is far more serious than just the lawyers.<sup>6</sup>

#### THE TRIAL BAR'S SUPPORT FOR DIVERSITY JURISDICTION

It is significant that support of diversity jurisdiction is almost unanimous among the trial bar, on both sides of the table. Congressman Kastenmeier and others have charged that the profession's position is one of self-interest. Lawyers, they say, simply want to maintain all their options in the "litigation game." 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 acting for the client. It will not wash to charge the legal profession with purely, or even predominantly, self-interest. That indeed is what John Shepherd had in mind when he said, "It is far more serious than just the lawyers."

It is 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.

Professor James William Moore, the dean of authorities on federal courts, procedure, and jurisdiction, has written:

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 surrendering 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.<sup>7</sup>

The present system of coordinate federal and state jurisdiction has been an

6. Hearings, *op. cit. supra* n. 3, 161.

7. 1 MOORE FEDERAL PRACTICE ¶0.71[3.-2] (2d ed. 1978).

important part of our federalism that we should not lightly abandon. Bills to abolish diversity jurisdiction have been passed by the House twice in recent years, but both times died in the Senate. In 1982, the House Judiciary Committee once again approved a bill to abolish diversity, by a 16 to 10 vote, but the House did not pass the bill. Political support for the abolition of diversity has markedly decreased since the high point of the push for diversity abolition in 1978. Recent votes have been much closer than the overwhelming support voted in that year. Even the 1982 Committee vote of 16 to 10 apparently would have been 16 to 12 if all the Representatives had been present for the vote.

Although the American Law Institute, the Carter Justice Department, and the Reagan Justice Department have all supported diversity abolition, and the Reagan Justice Department still supports it, virtually every national bar group—the American Bar Association and all the societies and colleges and academies and associations of trial lawyers—and virtually every state bar association is on record in opposition to the abolition of diversity; and most of them oppose also the curtailment of diversity in the case of the in-state plaintiff. This counter-movement by the profession is thought by some to have effectively eliminated political support for any diversity legislation (other than amount in controversy) in the near future.

On the occasions when I have spoken to Congressmen about diversity abolition, I have found them remarkably sympathetic to the position that diversity jurisdiction should be maintained. One Congressman, not a member of the Judiciary Committee, said to me that when he voted for the abolition bill he had no idea that the profession generally opposed it. Indeed, he had been given the impression that it was an uncontroversial, obviously benign reform urgently needed by the system. The facts simply do not bear that out, and legislators are quite persuadable, possibly by means of information but certainly by means of legitimate political influence. Their views change abruptly when they learn that the bar is overwhelmingly opposed to abolition.

As I say, the steam seems to have left the abolition drive. Yet the proposals keep appearing. The American Law Institute and some of my colleagues in the academic world undoubtedly will keep writing and promoting. Continuing vigilance will be required to preserve this important attribute of our justice system—this “condition of justice.” I hope you will keep yourselves informed. The Barristers Society, through the actions of its Board of Governors and its publications, will seek to assist you in that regard. I hope also that you will, whenever you have the opportunity, remind your Congressman of your views.