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Diversity Jurisdiction under the American Law Institute Proposals: Its Purpose and Its Effect on State and Federal Courts

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DIVERSITY JURISDICTION UNDER THE AMERICAN LAW INSTITUTE PROPOSALS: ITS PURPOSE AND ITS EFFECT ON STATE AND FEDERAL COURTS

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This article has a twofold purpose: to outline the proposed changes in diversity jurisdiction recommended by the American Law Institute as well as the rationale advanced for these changes; and to evaluate the effect of the proposed changes on the state and federal courts.

THE ORIGIN OF THE ALI STUDY

On May 11, 1971, as Chairman of the Subcommittee on Improvements in Judicial Machinery, I introduced S. 1876, a bill entitled the Federal Court Jurisdiction Act of 1971. This bill is the result of a study made at the suggestion of then Chief Justice Earl Warren.

In proposing this study, Chief Justice Warren stated:

> It is essential that we achieve a proper jurisdictional balance between the Federal and State court systems, assigning to each system those cases most appropriate in light of the basic principles of federalism.[1]

Establishing a principled division of jurisdiction between state and federal courts was a problem with which the American Law Institute[2] struggled for 10 years. The result of their study is this

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The author also wishes to thank John Olson, a third-year law student at the University of North Dakota and a summer intern, who conducted valuable research on special problems regarding the jurisdiction of the federal courts.

1. Speech to the American Law Institute, May 20, 1959.

2. The American Law Institute is a body of distinguished judges, members (lawyers and legal scholars) of the bar, and law professors. They are responsible for the well known Restatement of the Law, as well as such legislation as the MODEL PENAL CODE and the UNIFORM COMMERCIAL CODE.

bill, a substantial revision of the chapters of title 28 of the United States Code, which delineate the jurisdiction of the federal district courts, the procedures for its invocation, and the limitations on its exercise. The draft legislation and commentary explaining the reasons for the changes were published in 1969.[3]

While we may not all agree on the fine points of this bill, those who study it will share my appreciation of the scholarship, craftsmanship, and objectivity of the Institute's work. As in all Institute projects, their draft proposals were systematically reviewed by the advisers and by the council at annual Institute meetings, a process that made an enormous contribution to the shaping of the final product.[4]

Before proceeding to the specific proposals of this bill it may be helpful to briefly outline the development of the federal court system.

ORGANIZATION OF THE FEDERAL COURTS

The Judiciary Act of 1789[5] laid out the basic framework of our judicial system. The jurisdiction presently vested in the federal courts is the result of statutes enacted at various times in our history with various specific purposes in mind.

The act of July 27, 1866[6] broadened removal in diversity cases—about one-sixth of all diversity cases now come to the federal bench by removal. The act of March 3, 1875[7] gave the lower federal courts, for the first time, jurisdiction in cases arising under the Constitution, laws, or treaties of the United States—the "federal question" jurisdiction, which accounted for 45 per cent of all civil cases filed in federal courts last year.

These jurisdictional grants increased the jurisdiction of the federal courts. To accommodate the increased work, the circuit courts of appeals were created in 1891,[8] and the "judges' bill" in 1925[9] made most review in the Supreme Court discretionary rather than a matter of right.

In light of increasing caseloads of *both* federal and state courts it is appropriate to examine the division of jurisdiction between the state and federal courts.[10]

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3. ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969). Hereafter referred to as ALI STUDY.

4. Study of the Division of Jurisdiction between State and Federal Courts. Tentative Draft No. 1 (1963); Tentative Draft No. 2 (1964); Tentative Draft No. 3 (1965); Tentative Draft No. 4 (1966); Tentative Draft No. 5 (1967), and Tentative Draft No. 6 (1968). There was also an Official Draft Part I (1965).

The discussion of the proposals is reported in 40-45 ALI PROCEEDINGS (1963-1968).

5. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

6. 28 U.S.C. § 1441 (1971).

7. 28 U.S.C. § 1331 (1971).

8. 26 Stat. 826, ch. 517, 28 U.S.C. § 43 (1971).

9. 28 U.S.C. § 1254 (1971).

10. In 1970, a total of 127,280 civil and criminal actions were commenced in the U.S.

THE ALI PROPOSALS IN GENERAL

The conclusions of the ALI study, introduced as S. 1876, were presented in the form of a proposed revision of those sections of title 28 of the United States Code that now delineate the jurisdiction of the district courts in six major areas: 1) diversity jurisdiction;[11] 2) federal question jurisdiction;[12] 3) United States as a party;[13] 4) jurisdiction of three-judge courts;[14] 5) admiralty and maritime jurisdiction;[15] and 6) multiparty-multistate diversity.[16]

It would be beneficial before proceeding to a discussion of diversity jurisdiction to briefly summarize the changes in the present law which would be made by the ALI recommendation in the other major areas.

Outline of the ALI Proposals

I. *Federal Question Jurisdiction.* The bill would abolish the $10,000 jurisdictional amount presently required and original actions could be brought based upon the existence of a federally created right, regardless of the amount in controversy.[17] The same rationale would permit removal of a case from state to federal court, in certain cases, if a counterclaim based on a federal right is interposed.[18] But where the federal right is asserted as a defense, removal could not be had unless the amount in controversy met the $10,000 requirement.[19]

II. *United States as a Party.* The bill makes certain technical changes in this category of jurisdiction by clarifying the existing law relating to counterclaims and set-offs which can be asserted in an action brought by the United States.[20] It would increase from $10,000 to $50,000 the jurisdiction of the district courts in Tucker Act suits based on contract claims against the United States.[21] Jurisdiction is further clarified as to any action brought against an officer or employee of the United States arising out of performance of his official duties.[22]

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district courts, 13 percent more than fiscal year 1969. The 1970 increase in case filings was the steepest caseload jump for any year in the last decade. The caseload has grown immensely in the last decade. On June 30, 1970, there were 114,117 civil and criminal cases pending, 10 percent more than a year ago, and 66 percent greater than the 68,942 pending on June 30, 1960. The rise in state civil caseloads can be seen in Table 6.

11. S. 1876, 92d Cong., 1st Sess. §§ 1301-1307 (1971); *cf. generally* 28 U.S.C. §§ 1332, 1359, 1391, 1404, 1441 (1971).
12. *Id.* at §§ 1311-1315; *cf. generally* 28 U.S.C. §§ 1331, 1391, 1441 (1971).
13. *Id.* at §§ 1321-1327; *cf. generally* 28 U.S.C. §§ 1345, 1346, 1349, 1357, 1361, 1406, 1442 (1971).
14. *Id.* at §§ 1371-1376; *cf. generally* 28 U.S.C. §§ 2281, 2282, 2283, 2284 (1971).
15. *Id.* at §§ 1316-1319; *cf.* 28 U.S.C. § 1333 (1971).
16. *Id.* at §§ 2371-76; *cf.* 28 U.S.C. §§ 1332, 1441 (1971).
17. *Id.* at § 1331(a).
18. *Id.* at § 1312(a).
19. *Id.*
20. *Id.* at § 1321(b).
21. *Id.* at § 1322(a).
22. *Id.* at § 1323.

III. *Three-Judge Courts.* The bill would limit the occasions when a three-judge court would be required. None would be required if the issue is the constitutionality of an act of Congress.[23] Three judges would hear a case involving validity of a state statute, but only if requested by the state official being sued.[24] The circumstances when a federal court should abstain from passing upon the constitutionality of state legislation or actions is clarified.[25]

IV. *Admiralty and Maritime Jurisdiction of the Federal Courts.* Jurisdiction in this area is not significantly changed. Rather, the bill seeks to clarify existing statutory law and codify existing case law in admiralty cases. The bill does, however, clarify the right to a jury trial in admiralty cases [brought for] personal injuries or death.[26]

V. *Multiparty-Multistate Litigation.* It is proposed to extend the jurisdiction of federal courts to cover those few situations where necessary parties are not subject to the jurisdiction of any one court, but are scattered in several states, and there exists diversity of citizenship among adverse parties.[27]

There is one other area covered by the ALI proposals which remains the most controversial area of federal jurisdiction—diversity jurisdiction.

The Rationale for Diversity Jurisdiction

The American Law Institute, after considerable study and deliberation, developed its jurisdictional proposals on the premise that, generally, it is preferable to have matters of state law decided by state courts and, correspondingly, matters of federal law by federal courts. With respect to diversity jurisdiction, the Institute reached the judgment that such jurisdiction should extend only to the purposes intended by the framers of the Constitution and the Congress that passed the Judiciary Act of 1789. That purpose was to provide travelers and strangers access to a federal court and to insure an even level of justice when outsiders were suing or being sued outside their home state. As stated by Charles Warren in his illuminating study of the passage of the Judiciary Act of 1789:

> The chief and only reason for this diverse citizenship jurisdiction was to afford a tribunal in which a foreigner or citizen of another State might have the law administered free from the local prejudices or passions which might prevail in

23. *Id.* at § 1374; *cf.* 28 U.S.C. § 2282 (1971). It believed that the federal government, unlike a state, should not be *unduly embarrassed* by the ruling of a single *federal* judge. When the federal government is the party, there is no separate sovereign.
24. *Id.* at § 1374.
25. *Id.* at § 1371(c).
26. *Id.* at § 1319.
27. *Id.* at §§ 2371-2376.

> a State Court against foreigners or non-citizens. The Federal Court was to secure a non-citizen the application of the same law which a State Court would give to its own citizens, and to see that within a state there should be no discrimination against non-citizens in the application of justice.[28]

Thus, the classic reason for the constitutional grant of diversity jurisdiction was the protection of non-residents against local prejudice or the apprehension of such prejudice in the state courts.

THE ALI DIVERSITY PROPOSALS

If the rationale for diversity jurisdiction is to assure an even level of justice to the traveler or visitor from another state, what amendments are suggested to the present scheme of diversity jurisdiction? The Institute has concluded that when a person's involvement with a state is such as to eliminate any real risk of prejudice against him as a stranger and to make it unreasonable to heed any objection he might make to the quality of its judicial system he should remain in a state court and not have the option of a federal forum.

The very heart of the present bill is the provision of section 1302 which would prevent a person from invoking diversity jurisdiction in a federal court in his home state simply because his opponent happens to be an out-of-stater.[29] It is the most far-reaching in terms of the number of cases involved.[30]

On a similar basis, a corporation or other business enterprise with a "local establishment" maintained for more than two years in a state would be prohibited from invoking, either originally or on removal, the diversity jurisdiction of a federal court in that state in any action arising out of the activities of that establishment.[31] Similarly, a "commuter" provision would bar a natural person from access to the federal court in the state where he had his principle place of business or employment.[32]

These provisions are in line with the policy of the present statute, regarding removal, which does not allow removal when the defendant is a citizen of the state in which such action is brought.[33] As stated by one commentator:

> This inconsistency between the treatment of an in-state plaintiff and an in-state defendant cannot be explained on any rational basis, even if we go back to the early days of

28. Warren, *New Light on the History of the Federal Judiciary Act of* 1789, 37 HARV. L. REV. 49, 83 (1923).
29. S. 1876, 92 Cong., 1st Sess. § 1302(a) (1971).
30. *See* Tables 1 and 2 *infra*.
31. S. 1876, 92d Cong., 1st Sess. § 1302(b).
32. *Id.* at § 1302(c).

> the Republic. No one has yet devised any satisfactory rationale as to why the Federal courts, conceived of as courts of limited jurisdiction under the Constitution, should provide a forum for local residents who, for some reason or another, do not wish to sue in the courts of their own state.[34]

What this bill does is to treat resident plaintiffs the same way resident defendants have always been treated—by denying them original diversity jurisdiction in the federal court in their *own* state.

The policy goal with regard to commuters and corporations is equal treatment with natural persons: when they are strongly established in the state, their case as plaintiff or defendant can be heard in state court without fear of local bias.

Other provisions are designed to reinforce the prohibition against the artificial creation or destruction of diversity either by assignment or the appointment of a fiduciary.[35]

Provisions Expanding Diversity Jurisdiction

Much attention in regard to the Institute's proposals have centered on those provisions reducing diversity jurisdiction. However, it should not be overlooked that a number of important changes recognize the functional necessity in a particular case for granting to a party the option of a federal hearing on his claim.

An important change in light of the number of cases involved would allow an out-of-state defendant to remove an action to the federal court even though complete diversity is lacking because his co-defendants are ineligible or unwilling to remove.[36] This is a commendable provision since a non-resident should not be barred from the federal courts, which often happens under present law,[37] *simply* because he is joined with a local defendant or any other defendant who is unable or unwilling to remove. As an outsider there may be potential bias towards him as against local defendants especially with regard to the determination of joint and several liability.

Diversity jurisdiction is also extended by section 1301(e) which would cover a situation where one member of a family commences a diversity action and other members of the family have claims against the same defendant and arising out of the same transaction or occurrence. These related claims can be joined in the same action even though they are not sufficient to meet the requirement as to amount in controversy.

A third expansion takes place under sections 2371-2376 which would give the district courts nationwide jurisdiction over all dis-

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33. 28 U.S.C. § 1441 (1971).
34. Testimony of Attorney Orison S. Marden in hearings on S. 1876 before the Senate Subcommittee on Improvements in Judicial Machinery, September 28, 1971.
35. S. 1876, 92d Cong., 1st Sess. § 1307 and § 1301(b)(4).

persed parties whose presence is necessary for a just adjudication of the plaintiff's claim, but who are not all amenable to the process of any one court, federal or state. This so-called "multiparty-multistate" diversity jurisdiction is a change required by our mobile society and complex economy.

While the number of cases affected would be slight, further expansion results from provisions relating to citizenship of unincorporated associations[38] to removal based on a counterclaim asserted in a state court action[39] and a prohibition against use of an assignment to defeat diversity jurisdiction.[40]

EFFECT ON THE COURTS

Critics of the ALI proposal have suggested that its effect will be to shift cases to congested state courts. This was a matter touched on by Chief Justice Warren in his address, to the American Law Institute, commencing this study. He cautioned that revision of jurisdiction should not be made without due regard for its effect upon state courts.[41] As chairman of the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee I share this concern. Unless improvements are made in the administration of justice in *both* the federal and state court systems, neither one alone is likely to make any improvement in the problem we face in achieving just, efficient and timely resolution of controversies brought before our courts. The remaining portion of this article will be directed to a study of the impact of S. 1876 upon our courts.

The Effect On Federal Courts

As I have stated, of particular concern to me is the effect of this legislation upon the court systems of our respective states. However, it is first necessary to examine the effect of the diversity provision of S. 1876 upon the federal district courts. For purposes of illustration, Tables have been included within the text.

In making its proposal, the American Law Institute studied the effect upon the federal court system for the years 1964 and 1968. It reported that for fiscal year 1964 out of 20,174 total civil diversity cases, 11,543 would have been shifted from federal courts to state

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36. *Id.* at § 1304(b).

37. 28 U.S.C. § 1441. This section requires complete diversity of all parties and is apparently based on the belief that such a rule is required [Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806)]. The Institute concluded that complete diversity was not constitutionally required and this judgment was accepted by the Supreme Court [State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530-531 (1967)].

38. S. 1876, 92d Cong., 1st Sess. § 1301(b)(2).

39. *Id.* at § 1304(c).

40. *Id.* at § 1307.

41. Speech of Chief Justice Earl Warren to the American Law Institute, May 20, 1959.

TABLE 1

RESIDENCES OF PARTIES IN DIVERSITY OF CITIZENSHIP CASES COMMENCED IN THE UNITED STATES DISTRICT COURTS, FISCAL YEAR 1970

Class	Plaintiff	Defendant	Original	Removed	Total
1.	Resident	Non res. corp. doing business in state	5,901a	1,775a	7,676
2.	Resident	Non res. corp. not doing business in state	1,046a	283	1,329
3.	Resident	Other non resident	2,832a	831	3,663
4.	Non res. corp. doing business in state	Resident	1,867a	78b	1,945
5.	Non res. corp. not doing business in state	Resident	724	18b	742
6.	Other non resident	Resident	5,026	95b	5,121
7.	Non res. corp. doing business in state	Non res. corp. doing business in state	265a	54a	319
8.	Non res. corp. doing business in state	Non res. corp. not doing business in state	71a	14	85
9.	Non res. corp. doing business in state	Other non resident	99a	12	111
10.	Non res. corp. not doing business in state	Non res. corp. doing business in state	88	10a	98
11.	Other non resident	Non res. corp. doing business in state	883	70a	953
12.	Non res. corp. not doing business in state	Non res. corp. not doing business in state	31	2	33

13. Non res. corp. not doing business in state	Other non resident	31	4	35
14. Other non resident	Non res. corp. not doing business in state	96	14	110
15. Other non resident	Other non resident	427	56	483
16. Resident	Resident	119a	24	143
17. Unknown		4	4	8
Total Cases		19,510	3,344	22,854

a Shifted by S.1876 to state courts. These cases total 14,109. See Table 2 for further analysis.

b These cases are not counted as shifted because it is assumed there is a non resident defendant properly joined.

Source: Administrative Office of the United States Courts.

courts under these proposals. For fiscal year 1968, 12,367 out of 21,009 diversity cases would have been so affected.[42]

In fiscal year 1970, the United States district courts had a total of 127,280 new case filings, both civil and criminal. Civil cases amounted to 81,107 cases. Included in this total of civil cases were 22,854 cases in which the basis of federal jurisdiction was diversity of citizenship.

Table 1 furnishes a breakdown of these diversity cases by residence of the party plaintiff and of the party defendant. In preparing Table 1 certain basic assumptions were made: 1) In all cases involving non-resident corporations doing business in a state, "doing business" is the equivalent of having "a local establishment" and that these cases have arisen from the local activities of that organization[43] and 2) No account is taken of the commuter provision. The effect of the commuter provision will vary depending on the location of urban centers within the state. Accurate data can be obtained only if docket studies are conducted. Such a study was conducted in the Eastern District of Pennsylvania which encompasses Philadelphia, an area of high commuter activity, and it showed that 7.6 per cent of all original diversity cases in that district court would have been eliminated by the commuter proposal.[44] A state which has a comparable interstate commuter area would have a small, additional number of cases transferred to its courts.

The 1970 data in Table 1 shows a total of 19,510 diversity actions originally commenced in federal court and 3,344 removed from a state court. The classes marked by the letter (a) in Table 1 represent cases brought originally by resident plaintiffs and those brought or removed by a non-resident corporation doing business in a state which would be shifted to state courts under S. 1876. They total 14,109 cases, original and removed. These cases are assembled for further analysis in Table 2.

TABLE 2

DIVERSITY CASES EXCLUDED FROM FEDERAL JURISDICTION UNDER THE ALI PROPOSAL (1970)

Class of Parties Affected By The ALI Proposal/a	Cases Shifted But Removable/b	Cases Excluded	Total
Resident Plaintiff Versus:			

42. ALI STUDY, 466-468. Of these totals, 2,723 cases in 1964 and 3,365 cases in 1968, although excluded from Federal Court as original actions, nevertheless would have been removable to Federal Court by a non-resident defendant.

43. Factually, these two concepts may not be equivalents. *See* ALI STUDY 466. Therefore, the actual number of "local establishment" cases transferred to the State Courts under this provision will be somewhat less than indicated in the classes of cases involving corporate parties "doing business" as shown in Table 1.

44. *See* ALI STUDY 469-79.

(1)/c	Non res. corp. doing business in state		7,676	
(2)	Non res. corp. not doing business in state	1,046		
(3)	Other non resident	2,832		
(16)	Resident		119	
	Total	3,878	7,795	11,673
Non Resident Corporate Plaintiff Doing Business in State Versus:				
(4)	Resident		1,867	
(7)	Non res. corp. doing business in state		319	
(8)	Non res. corp. not doing business in state	71		
(9)	Other non resident	99		
	Total	170	2,186	2,356
Cases Removed by Non Resident Corporate Defendants Doing Business in State Sued By				
(10)	Non res. corp. not doing business in state		10	
(11)	Other non resident		70	
	Total		80	80
TOTAL ALL CASES		4,048	10,061	14,109

a/ This table, as all others in this paper, does not include the effect of the commuter provisions, S. 1876, 92d Cong. 1st Sess. § 1302(c) (1971)—which would increase the cases shifted. It also assumes that all cases involving a corporation doing business arise out of the activities of a local establishment which, by approximation, exceeds the actual number of cases affected.

b/ Removed cases in classes (4), (5), (6), and (16)—involving removal by resident defendants—are treated as not affected by the proposal. It can be assumed that removal was requested by a properly joined non-resident defendant 28 U.S.C. § 1441 (c) (1971). *See* Twentieth Century Fox Film Corp. v. Taylor, 239 F. Supp. 913 (S.D.N.Y. 1965). S. 1876, 92d Cong., 1st Sess. § 1304(6) (1971) would both expand and clarify removal in this situation.

c/ The numbers in parentheses refer to the party alignments shown in Table 1.

Table 2 shows that a *maximum* of 14,109 diversity cases would be shifted from the federal courts to the state courts by the diversity jurisdiction provisions of the ALI proposal. Of this total 11,673 are cases commenced by residents[45] and 2,356 are cases commenced by non-resident corporations doing business in a state.

While 14,109 is the maximum number of cases affected by S. 1876,

45. "Residents" include both individuals and domestic corporations because the statistical reports of the U.S. Courts do not differentiate between these types of residents.

the actual number of cases which will be transferred to state courts will be less. One should note from Table 2 that of the total cases, only 10,061 are excluded from the jurisdiction of federal courts by the bill. The other 4,048 cases are those brought by a resident (individual or corporate) against a non-resident (individual or corporation not having a "local establishment"). These cases will have to be commenced in the state courts but they will be removable to federal court under section 1304 of the ALI proposal, just as they are removable under existing law. It seems likely that a large number of these 4,048 non-resident defendants will remove cases to the federal courts. Thus, the actual number of cases shifted to state courts will be somewhere between 10,000 and 14,000.

TABLE 3

ANALYSIS OF FEDERAL COURT CIVIL CASELOAD (1970) AND INCIDENCE BY STATES OF ALI PROPOSED CHANGES IN DIVERSITY JURISDICTIONS

States	Total Civil Cases Commenced	Total Diversity Cases	Total Diversity Cases Shifted By S. 1876
1st CIRCUIT			
Maine	198	60	34
Massachusetts	1,617	350	264
N. Hampshire	148	93	40
Rhode Island	219	78	26
Puerto Rico	978	385	295
2nd CIRCUIT			
Connecticut	720	193	83
New York	8,599	1,947	1,132
Vermont	333	261	107
3rd CIRCUIT			
Delaware	192	66	19
New Jersey	1,687	555	255
Pennsylvania	5,891	2,078	1,368
4th CIRCUIT			
Maryland	1,505	334	193
N. Carolina	1,188	337	193
S. Carolina	1,111	518	360
Virginia	2,639	718	442
W. Virginia	849	319	178
5th CIRCUIT			
Alabama	1,817	774	529
Florida	3,880	621	328
Georgia	2,035	649	350
Louisiana	4,988	925	645
Mississippi	949	462	274
Texas	5,524	1,506	1,105
6th CIRCUIT			
Kentucky	1,208	321	185

Michigan	2,537	756	496
Ohio	2,519	783	517
Tennessee	1,816	662	390
7th CIRCUIT			
Illinois	3,559	1,148	679
Indiana	1,618	940	523
Wisconsin	996	227	144
8th CIRCUIT			
Arkansas	841	427	354
Iowa	479	202	132
Minnesota	921	363	190
Missouri	1,990	522	316
Nebraska	426	147	75
N. Dakota	129	47	29
S. Dakota	177	87	29
9th CIRCUIT			
Alaska	247	60	45
Arizona	872	214	134
California	6,740	476	304
Hawaii	192	75	26
Idaho	225	70	36
Montana	275	102	52
Nevada	279	92	37
Oregon	799	285	202
Washington	1,090	194	170
10th CIRCUIT			
Colorado	865	272	118
Kansas	954	299	164
New Mexico	484	184	110
Oklahoma	1,293	499	337
Utah	394	124	68
Wyoming	115	47	26
TOTAL	81,107	22,854	14,109

Table 3 tabulates and summarizes the overall civil workload of the federal district courts, including the total civil cases commenced (column 1), and the total diversity cases (column 2). It also shows on a state-by-state basis the total number of diversity cases shifted each state under these proposals (column 3).

It should be noted that the total civil cases commenced in the federal district courts number 81,107 cases[46] and that the total diversity cases number 22,854. The 14,109 diversity cases shifted under this proposal would still leave the federal courts with 67,000 civil cases without including any increase in jurisdiction which would occur under the federal question, multiparty-multistate, family tort, and removal provisions of the ALI proposal.

Since the figures in column 3 of Table 3, standing alone, are

46. This total omits figures for District of Columbia, Guam, Virgin Island and Canal Zone.

relatively insignificant, it is necessary to compare them to the workload now being borne by each state court system.

Effect On State Courts

The Subcommittee on Improvements in Judicial Machinery requested state authorities to furnish information regarding the civil caseloads in their courts of general jurisdiction for the year 1970. At the time this article went to press, 33 states had responded, 30 of which furnished the appropriate information. A comparison of the diversity cases shifted under the ALI proposal to the total number of civil cases commenced in each of these 30 states is shown in Table 4. As might be expected the number of diversity cases which would be shifted, in all states except one, varied between 0.27 to 1.5 per cent of the total civil filings.[47]

TABLE 4

DIVERSITY CASES SHIFTED COMPARED TO TOTAL NUMBER OF STATE CIVIL CASES

States	Total No. of State Civil Cases	No. of Diversity Cases Shifted	Shifted Diversity Cases Compared To Total No. of State Civil Cases (%)
1st CIRCUIT			
Maine	—	34	—
Massachusetts	41,047	264	0.6
New Hampshire	12,741	40	0.3
Rhode Island	5,130	26	0.5
Puerto Rico	—	295	—
2nd CIRCUIT			
Connecticut	19,399	83	0.4
New York	75,809	1,132	1.5
Vermont	—	107	—
3rd CIRCUIT			
Delaware	4,203	19	0.5
New Jersey	35,777	255	0.71
Pennsylvania	25,707	1368 (780)*	3.0*
4th CIRCUIT			
Maryland	53,667	193	0.27

47. Pennsylvania reported only 25,707 civil cases as compared to a substantially larger volume for such States as Ohio and Michigan, for example. Apparently the Pennsylvania statistical system reports cases when they are filed at the time of commencement of the action. In order to offer some basis of comparison between Pennsylvania and Federal statistics, it must be noted that the Administrative Office of the U.S. Courts reports that in the nation as a whole 43% of all diversity cases are terminated without court action. If this same percentage is applied to the 1,368 cases shown in Table 3 as being shifted to Pennsylvania, 588 of those cases would be terminated without court action. Thus, the remaining 780 cases would be an approximation of the number of Federal cases shifted which would reach the "ready for trial" stage which is the Pennsylvania criteria for inclusion in its statistical system.

N. Carolina	13,589	193	1.4
S. Carolina	—	360	—
Virginia	49,276	442	0.9
W. Virginia	**	178	**
5th CIRCUIT			
Alabama	—	539	—
Florida	94,411	328	0.3
Georgia	—	350	—
Louisiana	108,749	645	0.6
Mississippi	—	274	—
Texas	200,992	1,105	0.6
6th CIRCUIT			
Kentucky	—	185	—
Michigan	86,893	496	0.8
Ohio	50,060	517	1.0
Tennessee	63,505	390	0.6
7th CIRCUIT			
Illinois	—	679	—
Indiana	—	523	—
Wisconsin	—	144	—
8th CIRCUIT			
Arkansas	29,531	354	1.2
Iowa	37,965	132	0.35
Minnesota	16,924	190	1.1
Missouri	71,166	316	0.45
Nebraska	—	75	—
N. Dakota	4,973	29	0.65
S. Dakota	5,938	29	0.5
9th CIRCUIT			
Alaska	—	45	—
Arizona	—	134	—
California	103,749	304	0.3
Hawaii	4,335	26	0.6
Idaho	—	36	—
Montana	**	52	**
Nevada	—	37	—
Oregon	29,853	202	0.7
Washington	35,212	170	—
10th CIRCUIT			
Colorado	17,717	118	0.6
Kansas	29,826	164	0.5
New Mexico	21,501	110	0.5
Oklahoma	—	337	—
Utah	—	68	—
Wyoming	**	26	**

Looking at one of the states by way of example, in Massachusetts, 264 cases would be transferred to the state courts compared to 41,047 cases filed in the courts of general jurisdiction of Massa-

* *Supra* note 47 and related text.
** These states do not report cases filed.

chusetts in 1970. Thus the cases transferred constitute only 0.6 per cent of the present state civil caseload in Massachusetts.

To further evaluate these proposals a determination was made of the average number of cases shifted to each state in relation to the number of judges in that state's court of general jurisdiction. As shown in Table 5 the transfer of this maximum number of diversity cases would impose an additional number of cases varying between 0.8 and 7.4 cases per judge in all states except Vermont and South Carolina.[48]

TABLE 5

NUMBER OF DIVERSITY CASES SHIFTED PER STATE TRIAL JUDGE

States	Number of State Trial Judges General Jurisdiction	Diversity Cases Shifted (1970 Data)	Diversity Cases Shifted Per State Trial Judge (Avg.)	Civil Terminations Per State Trial Judge (Avg.)
1st CIRCUIT				
Maine	11	34	3.1	—
Massachusetts	46	264	5.7	858
New Hampshire	10	40	4.0	1,268
Rhode Island	13	26	2.0	—
2nd CIRCUIT				
Puerto Rico	70	295	4.2	—
Connecticut	35	83	2.4	508
New York	225	1,132	5.0	336
Vermont	6	107	18.8/a	—

48. In Vermont there are 6 judges in the county courts, the courts of general jurisdiction. There are 10 judges in the district courts. VT. STAT. ANN. § 444(a) (Supp. 1971). They have jurisdiction in civil cases for amounts up to $5,000.

Thus when the 107 shifted cases are compared with the total number of judges in the State courts of major jurisdiction, the average number of cases shifted per judge is 6.7, a figure comparable with many other states.

It is of course true that since a claim for over $10,000 must be made in all diversity cases they will apparently all go to the county courts. However a study of diversity cases in New York City, both settled and going to judgment, shows they do not all have high values. A substantial number of these cases are settled or reached judgment for less than $10,000, many for under $5,000.

THE SIXTEENTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE OF THE STATE OF NEW YORK, COURT AND MONETARY BREAKDOWN OF CLOSING STATEMENT 292 (1970).

In South Carolina there are 16 Circuit Court judges in the trial courts of general jurisdiction. However, South Carolina has a very well developed system of county courts of limited jurisdiction, with substantial jurisdictional limits.

These county courts have jurisdiction in law and equity up to the amount shown:

Anderson—$12,500—S.C. CODE ANN. § 15-631.11 (Supp. 1970).
Greenville—$10,000—S.C. CODE ANN. § 15-654 (1962).
Marlboro—$7,500—S.C. CODE ANN. § 15-696 (1962).
Orangeburg—$10,000—S.C. CODE ANN. § 15-714 (1962).
Richland (2 judges)—$10,000—S.C. CODE ANN. § 15-764 (1962).
Spartanburg—$6,000—S.C. CODE ANN. § 15-804 (1962).

So we have expressed a comparison of the cases shifted to the major state trial courts (16 circuit plus these 8 county judges). However, it is recognized that since in all diversity cases a claim of over $10,000 must be made most of the shifted cases would go to the circuit courts. Therefore it would be necessary in South Carolina to increase the jurisdictional limit of the county courts or appoint additional circuit court judges or a combination of both.

3rd CIRCUIT				
Delaware	12	19	2.1	403
New Jersey	78	255	3.3	427
Pennsylvania	254	1368 (780)*	5.9	—
4th CIRCUIT				
Maryland	79	193	2.5	635
N. Carolina	49	193	4.0	317
S. Carolina	16	360	22.5/a	—
Virginia	99	442	4.5	458
W. Virginia	32	178	5.5	/b
5th CIRCUIT				
Alabama	80	539	6.7	—
Florida	144	328	2.3	655
Georgia	52	350	6.7	—
Louisiana	94	645	6.9	858
Mississippi	49	274	5.6	—
Texas	211	1,105	5.3	927
6th CIRCUIT				
Kentucky	73	185	2.5	—
Michigan	116	496	3.9	730
Ohio	181	517	2.9	249
Tennessee	78	390	5.0	751
7th CIRCUIT				
Illinois	360	679	1.9	—
Indiana	186	523	3.9	—
Wisconsin	174	144	0.8	—
8th CIRCUIT				
Arkansas	48	354	7.4	593
Iowa	76	132	1.7	469
Minnesota	68	190	2.7	244
Missouri	102	316	3.1	628
Nebraska	38	75	2.0	—
N. Dakota	19	29	1.5	247
S. Dakota	21	29	1.4	193
9th CIRCUIT				
Alaska	11	45	4.1	—
Arizona	51	134	3.8	—
California	416	304	0.7	180
Hawaii	14	26	1.5	217
Idaho	24	36	2.0	—
Montana	28	52	1.5	/b
Nevada	18	37	2.0	—
Oregon	59	202	3.4	467
Washington	88	170	1.9	—
10th CIRCUIT				
Colorado	74	118	1.6	266
Kansas	61	164	2.7	485
New Mexico	21	110	5.2	974
Oklahoma	138	337	2.5	—
Utah	22	68	3.1	—
Wyoming	11	26	2.4	/b

* *Supra* note 47 and related text.
a/ *Supra* note 48 and related text.
b/ These states do not record civil terminations.

Column 4 of Table 5 shows the average number of civil terminations per judge in the 30 states. This figure can then be compared to the number of diversity cases shifted per judge. As can be seen, in most states the number of diversity cases shifted per trial judge ranges between approximately two and seven. While the number of terminations per state trial judge ranges for the most part between about 250 and 800. Therefore, the effect of this bill would only slightly increase the number of cases per state trial judge. And of course, most of these shifted cases would be settled without trial.[49]

An example will illustrate the point. In Massachusetts the number of diversity cases shifted per state trial judge is 5.7 while the average number of civil terminations per state trial judge is 858.

Table 6 shows the number of diversity cases shifted to state courts compared to the annual increase in state civil litigation. It includes those states from which comparisons between 1969 and 1970 civil filings were available. This table demonstrates that the shift in diversity cases is not large in comparison to the annual fluctuation in state civil litigation.

In all states with an increase in civil litigation during 1970, the

TABLE 6

COMPARISON OF DIVERSITY CASES SHIFTED UNDER S.1876 TO THE INCREASE IN CIVIL CASES COMMENCED: SELECTED STATES

	Civil Cases Filed '69	Civil Cases Filed '70	Increase	Diversity Cases Shifted	Change in Civil Case Filings Comp. to Div. Cases Shifted—%
California	97,997	103,749	5,752	304	5.3%
Connecticut	17,565	19,399	1,834	83	4.5%
Kansas	25,995/a	28,737/a	2,742	164	5.6%
Louisiana	99,139	105,439	6,300	645	10%
Maryland	50,384	53,667	3,283	193	6%
Massachussetts	41,736	41,047	—689	264	38.5%/b
Michigan	82,292	86,893	4,601	496	11%
Minnesota	15,533	16,924	1,391	190	13.5%
Missouri	59,037	71,166	12,129	316	2.6%
New Jersey	34,341	33,892	—449	255	57%/b
New York	69,783	75,809	6,026	1,132	19%
North Carolina	11,880	13,589	1,709	193	11.3%
North Dakota	4,344	4,973	629	29	4.6%
Oregon	17,401	19,682	2,281	202	9%
South Dakota	5,341	5,939	597	29	4.9%
Washington	57,423	60,569	3,146	170	5.4%

a/ The case filings for Kansas are from 1970 and 1971 respectively.

b/ In Massachusetts and New Jersey civil case filings were less in 1970 than 1969. However, the cases shifted are substantially fewer than the decrease in state cases so that a net reduction of the state caseload would still occur.

49. Over 83% of all diversity cases are concluded prior to trial (*See* Annual Report of the Director of the Administrative Office of the U.S. Courts, Table C4, at 245(b) (1970).

number of diversity cases shifted were but a small fraction of that increase. In New York, where 1,100 cases would be shifted by the ALI proposal, these shifted cases were only 19 per cent of the 6,000 increase in civil filings. In all other states shown in Table 6 the diversity cases shifted were less than 11 per cent of the 1970 increase in civil filings.

Massachusetts and New Jersey showed a decrease in civil litigation between 1969 and 1970. Yet even in these two states, the decrease in state civil litigation was considerably larger than the number of diversity cases which would be shifted to the state courts.

Of particular interest to the readers of this article will be a summary of the information in the tables as it relates to the States of North Dakota and Minnesota.

North Dakota

In 1970, there were 4,973 civil cases filed in the district courts of North Dakota, as against a maximum of 29 diversity cases commenced in or removed to the United States District Court which would be transferred under this proposal (0.5 per cent). Of those 29 cases, three would remain removable to the federal courts, leaving a potential shift of only 26 cases. The maximum shift (29 cases) is only 4.6 per cent of the annual civil case *increase* (1969-70) in North Dakota.

There were 4,688 cases terminated in North Dakota in 1970. Since there are 19 district judges, the average number of terminations of a district judge is 247 cases. If the shifted cases were spread among the 19 judges, they would add 1.5 cases per judge or about 0.6 per cent of their average caseload.

Thus, the adoption of the present proposals would not, it appears, markedly affect the caseload of the North Dakota state courts or of its judges.

Minnesota

In the fiscal year 1970, there were 16,924 civil cases commenced in the district courts of Minnesota, the state courts of general jurisdiction, as against a maximum of 190 diversity cases brought in or removed to the United States District Court which would be transferred under this proposal (1.1 per cent). Of those 190 cases, approximately 70 would remain removable to the federal courts. If we assume that about half of these cases would be removed, then the actual shift of diversity cases would be between 150-160 cases. The maximum shift (190 cases) is 13.7 per cent (190/1391) of the annual civil case *increase* (1969-70) in Minnesota.

There were 16,576 civil cases terminated in Minnesota in 1970. Since there are 68 judges (excluding juvenile judges) in courts of general jurisdiction, the average number of civil terminations of a

district judge is 244 cases. If the shifted cases were spread among the 68 judges, they would add 2.73 cases per judge, or about 1 per cent of their average caseload.

Thus, the adoption of the present proposals would not, it appears, markedly affect the caseload of the Minnesota state courts.

Conclusion

My goal has been to furnish to the bar a concise explanation of the American Law Institute's recommended changes in the jurisdiction of federal courts, to summarize and explain the Institute's reasons for its diversity recommendations, and to demonstrate what impact these changes will have upon the state court systems.

This article is not to be taken as an indication of what final action will be taken by the Senate Subcommittee on Improvements in Judicial Machinery. Nor should one conclude that this article necessarily indicates my final judgment on S. 1876. The caseload study reported herein represents only one of many studies which will be made of this bill. In late September 1971, hearings were commenced on the bill. Only after these hearings have been concluded sometime in 1972 will any member of the Subcommittee be in a position to make a final evaluation of the merits of the bill.

However, it seems clear that a final evaluation should not be based merely upon the numerical effect of the bill upon the caseload of either the federal or the state courts. From time to time because of the important national needs, Congress has passed various legislative programs dealing with many problems traditionally handled by the states. For example, under the Dyer Act,[50] 4,090 cases were handled in the federal courts in 1970.[51] Recently, Congress passed the Narcotics Rehabilitation Act[52] which brought 2,011 cases into the federal courts in 1969 and 3,268 cases in 1970.[53] There were 3,511 narcotics cases, including over 2,000 marijuana cases tried in the federal courts in 1970, and in addition, over 1,000 cases of bank robbery.[54] Altogether these cases total almost 12,000, very nearly the amount of cases which would be transferred to the state courts under S. 1876.

The responsibility of Congress in finally passing upon S. 1876 is to assess the need for a revision of the division of jurisdiction between state and federal courts. In final analysis, if the need is found to exist and if the revision is, in fact, a principled one which

50. 18 U.S.C. § 2312 (1971).
51. Annual Report of the Director of the Administrative Office of the U.S. Courts, Table D2, at 267 (1970).
52. 18 U.S.C. §§ 4251-4255 (1971).
53. Annual Report of the Director of the Administrative Office of the U.S. Courts, Table 14, at 109 (1970).
54. Annual Report of the Director of the Administrative Office of the U.S. Courts, Table D2, at 267, 268 (1970).

will help to preserve and strengthen the dual system of courts in this country, then the American Law Institute's proposal may finally be enacted by Congress.