The Budgetary Impact of Possible Changes in Diversity Jurisdiction

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I. Introduction

This report is the product of an effort to estimate the impact on the federal court caseload and the judiciary's budget of a number of changes that have been proposed in diversity-of-citizenship jurisdiction.

The report begins with an estimate of the impact of eliminating diversity jurisdiction. It then assesses the impact of the provisions restricting diversity jurisdiction that are found in Public Law 100-702, signed by the President November 19, 1988.[1] This legislation increases the jurisdictional threshold in diversity cases from $10,000 to $50,000 and makes changes in the definition of diverse citizenship for cases involving resident aliens and cases in which legal representatives such as executors are parties.

Consideration is then given to other proposals to limit diversity jurisdiction. Most of these are found in an earlier version, approved by a House subcommittee, of the bill that was recently enacted.[2] The following provisions from the subcommittee's bill are analyzed:

A provision that would require the jurisdictional threshold to be satisfied in "actual damages," excluding damages for pain and suffering as well as punitive damages.

A provision that would eliminate diversity jurisdiction except where aliens are parties.

A provision that would treat a corporation as a citizen of any state in which it is "licensed or otherwise registered to do business" as well as its state of incorporation, thus replacing the

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1. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, tit. II, 102 Stat. 4642, 4646 (1988).

2. H.R. 4807, 100th Cong., 2d Sess., as introduced June 14, 1988, by Rep. Robert W. Kastenmeier, chairman of the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary [hereinafter Subcommittee bill].

"principal place of business" rule with a more more restrictive one.

Not included in the subcommittee bill was a proposal approved by the American Law Institute in 1968 to bar plaintiffs from bringing diversity cases in their home states.[3] This proposal would make the original jurisdiction parallel to the removal jurisdiction, under which defendants may remove diversity cases "only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."[4] The impact of this proposal is also considered.

Some of the data underlying the report may become dated quickly, but not in ways that will affect the major conclusions. I have used Administrative Office statistical data for the year ended June 30, 1987; data for the year ended June 30, 1988, are now becoming available. I have used 1988 pay scales in estimating the financial resources attributable to diversity jurisdiction; salary increases expected to take effect early in 1989 will increase the costs. The work has been conducted in a manner that will make it easy to recalculate as new data become available. There is every reason to be confident, however, that the impact of recalculating would be minor.

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3. American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 12 (proposed 28 U.S.C. § 1302(a)) (1969) [hereinafter ALI Study].

4. 28 U.S.C. § 1441(b).

II. Estimating Procedure

Use of Sample of Diversity Cases

To assess the impact of various proposals to limit diversity jurisdiction, I analyzed the complaints and/or removal petitions in 403 diversity cases filed in the year ended June 30, 1986. These cases constitute a representative sample of the diversity cases reported by the Administrative Office to have been filed in that year. A sample of this size has approximately a 5 percent margin of error at the 95 percent confidence level: Thus, if 45 percent of the cases in the sample had a particular characteristic, there is a 95 percent probability that this characteristic existed in 40 to 50 percent of the 1986 diversity filings.

The information from this sample of district court cases filed in 1986 has been used to estimate the impact of various proposals on district court cases filed in 1987, juror days served in 1987, and appeals filed in 1987. The cases were divided into five broad categories: insurance contracts, other contracts, motor vehicle personal injury, other personal injury, and other torts. If a jurisdictional change would have eliminated 30 percent of the motor vehicle personal injury cases in the sample, I assumed that it would eliminate not only 30 percent of such cases in the district courts but also 30 percent of the juror time devoted to such cases and 30 percent of the appeals in such cases. The separate estimates for the five categories were combined to estimate the district court cases, juror time, and appeals that would have been affected in the 1987 statistical year. I then estimated the personnel and other resources devoted to handling these cases.

Since there is a margin of error associated with sampling and additional possible error associated with some of the assumptions used in projecting from the sample to the 1987 data, the estimates presented here cannot be taken as precise. But I believe that, in terms of the larger picture, they are highly reliable.

The construction of the sample of complaints and the uses made of it are discussed in greater detail in appendix A.

Potential Savings from Jurisdictional Change

In assessing the impact of possible changes in jurisdiction, I have taken a long-term view: I have asked what resources are devoted to cases that are now within the jurisdiction of the federal courts but no longer would be if a proposal to restrict the jurisdiction were adopted. I assumed that over time the resources attributable to these cases would be either put to other uses or eliminated.

For a number of reasons, the resources attributable to groups of cases could not all be converted into savings in the short term. First, cases filed before the effective date of the jurisdictional legislation would presumably remain in the federal courts and continue to make demands on judicial and support personnel. Second, judges with life tenure are entitled to continue in office even if the number of authorized judgeships is reduced. Third, if reductions in supporting staff are achieved through attrition, there may be delay involved; if not achieved through attrition, there may be other costs. Fourth, if space were rendered surplus to the needs of the judiciary, it would take time before other uses were found for it.

To the extent that jurisdictional changes would eliminate the need for growth that would otherwise occur in the size of the judicial establishment (as contrasted with producing shrinkage), savings would be realized more quickly. Moreover, the short-term savings would include some nonrecurring costs that are associated with growth, such as the construction and furnishing of a judge's chambers. These nonrecurring costs are not included in the estimates.

It is also possible that some of the projected savings might not be realized even in the long run. Individual courts often do not request additional judgeships even when they have caseloads that would justify more judges under the standards used by the Judicial Conference (and generally accepted by the Congress). If a jurisdictional change operated only to prevent caseload growth, these courts would presumably continue to carry caseloads higher than the standard. If such courts' caseloads shrank because of a juris-

dictional change, however, it is possible that the average caseload per judge would be reduced rather than the number of judgeships.

The estimates presented here are based on the assumption that, in the absence of jurisdictional changes, the courts will be fully staffed. In 1986, the Judicial Conference recommended increasing the number of district judgeships to 631 and the number of appellate judgeships (excluding the Court of Appeals for the Federal Circuit) to 169.[5] Using the 1985 data considered by the committee that developed these recommendations, this amounted to one district judge for every 421 weighted filings and one appellate judge for every 90 appeals decided on the merits. These figures were used to estimate the number of judgeships attributable to diversity jurisdiction or to diversity cases with certain characteristics. Similarly, in attributing support personnel, I have assumed full staffing according to accepted formulas, rather than the reduced staffing levels that have been imposed because of budgetary constraints.

All estimates assume stability in patterns of case filings. There is no attempt here to forecast caseloads for future years or to anticipate inflation.

Attribution of Resources and Costs

Appendix B describes the methods by which the various kinds of resources have been attributed to diversity cases. The unit costs attributed to these resources are set forth in appendix C. For the most part, both kinds of attribution are supported by quite solid data. The notable exceptions are as follows:

1. I have been unable to take account of original proceedings in the courts of appeals, of which there were 615 filed in the 1987 statistical year.[6] Some of them are, presumably, ancillary to diversity cases, but I have no basis for estimating the number. It does not seem likely that more than one judgeship could be affected.

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5. In September 1988, the Conference recommended that the numbers be increased to 634 and 170.

6. Administrative Office of the United States Courts, 1987 Annual Report of the Director, table B-1 [hereinafter 1987 AO Ann. Rep.].

2. I have not taken account of the costs of compensating retired judges and providing logistical support to those who continue to work as senior judges. Over the long term, of course, the size of the corps of retired judges is closely related to the number of authorized judgeships, but the long term is in this instance very long. Estimating the impact of jurisdictional changes on the number of retired judges is difficult both because relevant data are not readily available and because the number of such judges is related to the average age of judges at the time of appointment, a figure that changes from time to time.
3. The estimates of the magistrate activity devoted to diversity cases are quite soft. They could easily be off by as much as 50 percent.
4. The estimates of juror time may be subject to considerable error but are unlikely to be off by more than 20 percent.
5. I have not been able to obtain an estimate of space and facilities costs associated with particular numbers of deputy clerks; such costs are therefore not included.

III. Elimination of Diversity Jurisdiction

Proposals to eliminate diversity jurisdiction have a long history.[7] Since 1977, they have had the support of the Judicial Conference of the United States.[8] The bill endorsed in that year would have repealed both 28 U.S.C. § 1332 (the general diversity statute) and 28 U.S.C. § 1335 (the Interpleader Act); such appears to have been the Conference position through 1985.[9] In 1986, the Conference recommended eliminating diversity jurisdiction "under 28 U.S.C. 1332,"[10] apparently carving out an exception for the Interpleader Act. The House subcommittee bill, which would have eliminated diversity jurisdiction except in cases involving aliens, also made an exception for the Interpleader Act.[11]

Complete Elimination

The Administrative Office reported 67,071 diversity cases filed in the district courts in the 1987 statistical year and 4,065 diversity appeals.[12] In this study's sample of 403 district court cases, 16 had been improperly characterized as diversity cases.[13] In estimating the resources devoted to diversity jurisdiction, I have discounted the published data accordingly and estimated that 64,476 district court filings and 3,900 appellate filings would have been eliminated if diversity jurisdiction did not exist.

Under the reporting rules of the Administrative Office, cases that include both diversity and federal question claims are charac-

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7. For a brief survey, see Joiner, *Corporations as Citizens of Every State Where They Do Business: A Needed Change in Diversity Jurisdiction*, 70 Judicature 291, 294–95 (1987).

8. Conf. Rpt., Mar. 1977, at 8–9, endorsing H.R. 761, 95th Cong., 1st Sess. (1977).

9. *See* Conf. Rpt., Sept. 1985, at 49.

10. Conf. Rpt., Mar. 1986, at 17.

11. Subcommittee bill § 311(b)(6).

12. 1987 AO Ann. Rep., tables B-1A, C-2.

13. See appendix A for additional detail about these cases.

terized as federal question cases. The cases counted as diversity cases are therefore cases in which the complaint did not allege an alternative basis of federal jurisdiction. Although there may be occasional exceptions, these cases do not appear to have the potential for returning to the federal courts under some other jurisdictional provision.

The estimated resources and annual costs attributable to diversity cases are shown in table 1.

TABLE 1
Estimates of Resources and Annual Costs Attributable to Diversity Jurisdiction

193	District judgeships	$ 86,518,040
35	Full-time magistrates	10,759,000
12.0%	Time of part-time magistrates	379,717
149,185	Juror days	7,086,288
477	District court deputy clerks	13,574,466
22	Court of appeals judgeships	10,007,536
52	Court of appeals deputy clerks	1,479,816
41	Administrative Office positions	1,402,200
154	Judicial officers attending FJC seminars	99,200
	TOTAL ANNUAL COSTS	$131,306,263

Effect of Preserving the Interpleader Act

The data indicate that preserving the Interpleader Act would not materially diminish the impact of eliminating diversity jurisdiction. The sample of district court cases contained three interpleader cases, of which two were brought under section 1332 and could not have been brought under section 1335. Only one case was brought under the Interpleader Act. When the projections are run on the assumption that statutory interpleader would be preserved, the change in the estimates is negligible.

A WESTLAW search of court of appeals opinions for the year ending June 30, 1987, confirms the relative rarity of interpleader

cases at the appellate level.[14] The opinions are not uniformly clear about the basis of jurisdiction, but there were, at most, eight published opinions in cases brought as interpleader in which jurisdiction was based on diversity of citizenship, whether under the Interpleader Act or under the general jurisdictional grant. This number compares with 883 diversity appeals terminated with published opinions in that year.[15]

14. The query was "INTERPLE! or (28 /5 1335 1397 2361)" with a date restriction.

15. Unpublished Administrative Office data.

IV. Impact of the 1988 Legislation

Redefining Diverse Citizenship in Cases Involving Permanent Resident Aliens

Section 203 of Public Law 100–702 amends 28 U.S.C. § 1332(a) to provide that, for the purpose of determining diversity, "an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled." The purpose of this amendment is to destroy diversity in cases between a U.S. citizen and an alien resident of the same state.[16]

It can safely be said that this provision will have minimal impact on the workload of the federal courts. The sample of diversity cases did not include a single case in which the provision would have destroyed diversity. Indeed, the sample contained only four noncorporate parties identified as aliens, and only one resided in the United States. The pleadings do not disclose whether the U.S. resident was admitted for permanent residence, but the state of residence was different from the citizenship of the plaintiff.

As is noted below, plaintiffs' lawyers may sometimes wrongly assume that defendants are citizens of the United States and therefore of the states in which they reside.[17] The sample may thus contain some alien defendants not identified as such. However, this possibility does not threaten the conclusion that the new provision will have minimal impact. The provision would simply deem such aliens, if admitted for permanent residence, to be citizens where plaintiffs' counsel already thought they were.

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16. *See* 134 Cong. Rec. S16299 (daily ed. Oct. 14, 1988) (section-by-section analysis). The language could be read as also creating diversity between the permanent resident alien and another alien, whether or not admitted for permanent residence, who is not deemed a citizen of the same state. But so interpreted, the provision would probably be unconstitutional. *See* Jackson v. Twentyman, 27 U.S. (2 Pet.) 136 (1829). In any event, the methodology of this study is not suitable for assessing expansions of federal jurisdiction.

17. *See infra* p. 23.

Redefining Diverse Citizenship in Cases Involving Representatives of Decedents' Estates, Infants, and Incompetents

Section 202 of the legislation amends 28 U.S.C. § 1332(c) to provide that "the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent."

This provision is apparently derived from a proposal of the American Law Institute.[18] The reporters' commentary to that proposal indicated that its purpose was to prevent people from either creating or defeating diversity jurisdiction by selecting executors, administrators, guardians, and the like on the basis of their citizenship.[19]

There is no basis in data for estimating the number of cases, previously barred, that might enter the federal courts as a consequence of this change. The data do indicate that, in its restrictive aspect, this is another provision that will have little impact on the workload of the courts.

The study sample included 34 cases in which decedents' estates, incompetents, or people identified as minors were parties. In 25 of them, the pleadings include information that makes it nearly certain that jurisdiction would survive the new provision; the pleadings allege the relevant citizenship, recite the jurisdiction in which an estate is being probated, or show that a minor is being represented by one or both parents (whose domicile is probably the domicile of the minor). In the other nine cases the pleadings lack information about the citizenship of the decedent or minor. In only three of these nine cases, however, does it appear even remotely likely that the representative party was appointed for the purpose of conferring jurisdiction; in the others it would be happenstance if the citizenship of the decedent or minor were the same as that of an opposing party. It thus seems probable that jurisdiction would sur-

18. ALI Study at 11 (proposed 28 U.S.C. § 1301(b)(4)).

19. *Id.* at 117–19 (reporters' commentary).

vive in most of these nine cases, and it is quite possible that jurisdiction would survive in all of them.

Increasing the Jurisdictional Amount

Section 201 of the legislation amends 28 U.S.C. § 1332 to raise the jurisdictional threshold to $50,000. The $500 threshold of the Interpleader Act is not affected.

Efforts to estimate the impact of a change in the jurisdictional amount are complicated by pleading practices. Many complaints provide no information about the amount demanded, other than to assert that the amount in controversy exceeds $10,000. Many provide only partial information, specifying the amounts of some elements of damages but leaving the amounts of other elements unspecified. Still others, although precise in the amount of the underlying claim, seek attorneys' fees in an unstated amount. And some, in addition to damages, seek injunctive or other relief in a manner such that the reader of a complaint cannot put a value on the amount in controversy.

As is shown in table 2, the 386 diversity cases in the sample (excluding the statutory interpleader case) included 41 (10.6 percent) in which the demand was clearly for $50,000 or less. In another 116 cases (30.1 percent), however, the data were inadequate to support a judgment.

An appreciable amount of the uncertainty results from demands for attorneys' fees in unliquidated amounts. Section 1332 excludes interest and costs from consideration in determining the amount in controversy, but it is established that attorneys' fees are not to be excluded.[20] Attorneys' fees were demanded in 141 cases in the sample and were unliquidated in 125 of them. To reduce the impact of this factor, the data were reanalyzed using the assumption that an unliquidated claim for attorneys' fees will not be valued at more than 50 percent of the amount demanded on the underlying claim (exclusive of interest and costs). This assumption limits, but does

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20. 14A C. Wright, A. Miller & E. Cooper § 3712, at 176–78 (2d ed. 1985).

not eliminate, the uncertainty created by such claims. The second row in table 2 presents the results of the reanalysis.

TABLE 2
Effect on Sample of Raising Jurisdictional Amount to $50,000

	Number of Cases in Which—		
	Jurisdiction Eliminated	Information Inconclusive	Jurisdiction Unaffected
Initial analysis	41 (10.6%)	116 (30.1%)	229 (59.3%)
Reanalyzed to assume unliquidated attorneys' fees do not exceed 50% of underlying claim	64 (16.6%)	93 (24.1%)	229 (59.3%)
Reanalyzed to assume attorneys' fees do not count	78 (20.2%)	85 (22.0%)	223 (57.8%)

The third row presents a reanalysis in which attorneys' fees have been excluded from consideration. In this row, the uncertainty created by unliquidated claims is eliminated and the ad damnum is reduced in cases in which fee claims were liquidated.

It is sometimes argued that attorneys would evade a change in the jurisdictional amount because the amount demanded is often arbitrary and can easily be increased.[21] This argument does not apply to removed cases, of course, in which the party seeking federal jurisdiction does not have the power to inflate the ad damnum. To evaluate the argument as applied to original complaints, each such complaint was analyzed to determine whether the ad damnum could easily be increased. Complaints that asked for damages for pain and suffering or for punitive damages, or for damages that in other respects were subject to considerable uncertainty, were characterized as ones in which the figure could easily be increased. Complaints in which damages were determined in a reasonably

21. *E.g.*, Currie, *The Courts and the American Law Institute*, pt. II, 36 U. Chi. L. Rev. 268, 295 (1969).

mechanical fashion, as is often true in contract matters, were characterized as ones in which the ad damnum could not easily be increased. In characterizing the complaints, I did not second guess the lawyer's theory of the case: I did not, for example, consider whether punitive damages could have been claimed even though they were not. I asked only whether, given the lawyer's theory, the ad damnum could plausibly have been redrawn to claim more than $50,000.

In table 2, cases in which the claim could easily have been increased have been classified as cases in which the available information is inconclusive. There were very few of these, however; the analysis confirmed the suspicion that plaintiffs' lawyers are not unduly modest in their claims. In particular, in cases in which punitive damages or pain and suffering are alleged, the ad damnum is not often under $50,000. If the complaints had been taken at face value, the figures in the "Jurisdiction eliminated" column of table 2 would have been 43, 66, and 82 rather than 41, 64, and 78.

In view of the number of cases in which the available information was inadequate to support a judgment about the impact of the $50,000 threshold, it is quite conservative to estimate the impact by projecting from the 64 cases (in the second row of table 2) that would be eliminated on the assumption that unliquidated attorneys' fees do not exceed 50 percent of the underlying claim. Table 3 presents the estimates of resources and costs attributable to the 10,171 cases that would be eliminated on this assumption.

Table 4 shows the effect of raising the jurisdictional amount to $100,000 rather than $50,000. Using the 98 cases in the second row of table 4 as the basis for projection, a conservative estimate is that cases involving $100,000 or less account for forty-eight district judgeships, six appellate judgeships, and an annual system cost of nearly $32 million.

Not surprisingly, the cases affected by increasing the jurisdictional amount are principally contract cases. Of the 104 cases that would be eliminated if the amount were raised to $100,000 with attorneys' fees excluded, 97 (93.3 percent) are contract cases and only 7 (6.7 percent) are tort cases. In the entire sample of 386 cases, by contrast, 57.3 percent are contract and 42.0 percent

tort.[22] Put another way, the $100,000 limit (with attorneys' fees ignored) would bar 43.9 percent of the contract cases but only 4.3 percent of the tort cases.

TABLE 3
Estimates of Resources and Annual Costs Attributable to Diversity Cases Where Matter in Controversy Is $50,000 or Less

32	District judgeships	$14,344,960
6	Full-time magistrates	1,844,400
1.9%	Time of part-time magistrates	59,900
14,932	Juror days	709,270
74	District court deputy clerks	2,105,892
4	Court of appeals judgeships	1,819,552
9	Court of appeals deputy clerks	256,122
7	Administrative Office positions	239,400
26	Judicial officers attending FJC seminars	16,750
	TOTAL ANNUAL COSTS	$21,396,246

Diversity cases as a group are more burdensome to the courts than are other civil cases. In the year ended June 30, 1987, for example, diversity cases accounted for 28.1 percent of the civil cases filed but accounted for 36.5 percent of the weighted civil filings.[23] Analysis of the data in tables 2 and 4 indicates that, as measured by weighted caseload, the cases that would be eliminated from the federal courts' jurisdiction are not substantially more or less burdensome than all diversity cases. It is noted, however, that the case weights used to determine weighted caseload are based only on the nature of suit. If, among cases with the same nature-of-

22. Cases characterized as "Real property—foreclosure" in the Administrative Office data are characterized here as contract cases. Three cases characterized as "Other real property," none of which would be excluded by a $100,000 limit, have not been characterized as either contract or tort.

23. 1987 AO Ann. Rep., table C-2; unpublished Administrative Office data. Readers unfamiliar with the case-weighting system are referred to p. 45, *infra*.

suit code, those with relatively small amounts at stake are less burdensome to the courts than those with large amounts at stake, the cases to be eliminated by a change in the jurisdictional amount will be the less burdensome ones.

TABLE 4
Effect on Sample of Raising Jurisdictional Amount to $100,000

	Number of Cases in Which—		
	Jurisdiction Eliminated	Information Inconclusive	Jurisdiction Unaffected
Initial analysis	56 (14.5%)	146 (37.8%)	184 (47.7%)
Reanalyzed to assume unliquidated attorneys' fees do not exceed 50% of underlying claim	98 (25.4%)	104 (26.9%)	184 (47.7%)
Reanalyzed to assume attorneys' fees do not count	104 (26.9%)	98 (25.4%)	184 (47.7%)

V. Measuring the Jurisdictional Amount in "Actual Damages"

The House subcommittee bill would have changed the jurisdictional amount to "$50,000 in actual damages." It further provided that "the term 'actual damages' includes lost wages and out-of-pocket expenses (including medical expenses), but does not include punitive damages or pain and suffering."[24] This wording illustrates but does not define the term "actual damages." In analyzing the sample of complaints to evaluate the impact of the "actual damages" restriction, I found a number of ambiguous situations. I resolved them for the sake of this report; I enumerate them here principally to assist future drafters. They are as follows.

1. I treated a claim based on loss of anticipated earnings or on anticipated medical expenses as included within "actual damages" even though such a claim is often quite speculative.
2. By analogy to the exclusion of pain and suffering, I excluded the following from "actual damages":
   (a) mental anguish, even where it was the only damage claimed;
   (b) humiliation and embarrassment in defamation cases; and
   (c) loss of consortium or companionship.
3. By analogy to the exclusion of punitive damages, I accepted only the unmultiplied damages as "actual" where a state statute provided for double or treble damages.
4. In a suit about whether a liability insurer was obliged to defend a tort action against an insured, I treated the full potential liability of the insurer as "actual damages" even

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24. Subcommittee bill § 311(a), (c).

though based partly on a claim for pain and suffering in the tort action against the insured.

The number of cases in which jurisdiction would demonstrably be eliminated was only modestly affected by addition of the "actual damages" restriction. The principal result of the analysis was to shift a large number of cases from the "Jurisdiction unaffected" column in tables 2 and 4 to the "Information inconclusive" column. While claims for pain and suffering and punitive damages had in many cases provided the basis for concluding that the case would survive a jurisdictional threshold of $50,000 or $100,000, it was often not possible to determine the value of what was left when those claims were not considered. Indeed, in the analyses in which claims for unliquidated attorneys' fees were treated as open ended—the first row of these tables—more than half the cases in the sample found their way into the "Information inconclusive" column. The results of the reanalysis are presented in tables 5 and 6.

Based on impressions formed from reading the complaints in these cases, there is strong reason to suspect that many of the cases in the "Information inconclusive" column would in fact be taken out of the federal courts by the "actual damages" restriction when combined with a $50,000 or $100,000 threshold. But it remains a suspicion that does not readily lend itself to quantification.

TABLE 5
Effect on Sample of Raising Jurisdictional Amount to $50,000 in "Actual Damages"

	Number of Cases in Which—		
	Jurisdiction Eliminated	Information Inconclusive	Jurisdiction Unaffected
Initial analysis	54 (14.0%)	212 (54.9%)	120 (31.1%)
Reanalyzed to assume unliquidated attorneys' fees do not exceed 50% of underlying claim	79 (20.5%)	187 (48.4%)	120 (31.1%)
Reanalyzed to assume attorneys' fees do not count	96 (24.9%)	174 (45.1%)	116 (30.1%)

TABLE 6
Effect on Sample of Raising Jurisdictional Amount to $100,000 in "Actual Damages"

	Number of Cases in Which—		
	Jurisdiction Eliminated	Information Inconclusive	Jurisdiction Unaffected
Initial analysis	70 (18.1%)	237 (61.4%)	79 (20.5%)
Reanalyzed to assume unliquidated attorneys' fees do not exceed 50% of underlying claim	116 (30.1%)	191 (49.5%)	79 (20.5%)
Reanalyzed to assume attorneys' fees do not count	124 (32.1%)	183 (47.4%)	79 (20.5%)

VI. Eliminating Diversity Jurisdiction Except in Cases Involving Aliens

Section 311(b)(1) of the subcommittee's version of H.R. 4807 would have eliminated jurisdiction over cases "between . . . citizens of different States" but preserved the three paragraphs of 28 U.S.C. § 1332(a) that provide for jurisdiction over suits involving noncitizens. These paragraphs cover cases between

> (2) citizens of a State and citizens or subjects of a foreign state;
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
> (4) a foreign state . . . as plaintiff and citizens of a State or of different States.

The proposal would not have applied to statutory interpleader.[25]

There are some difficulties involved in identifying cases that include parties of foreign citizenship. Many complaints allege that an individual party is a "resident" of a particular state, an allegation that is consistent with either U.S. or foreign citizenship. Many allege that a corporate party is a "foreign corporation," an allegation that is consistent with incorporation in either another state or another nation. Some complaints allege the citizenship of a partnership without alleging the citizenship of the individual partners. There may well be cases in which plaintiff's counsel does not know whether an individual defendant is a citizen of the United States or where a corporate defendant is incorporated. Nevertheless, if one can assume that alienage would be alleged if known to plaintiff's counsel, I have probably identified almost all of the cases in the sample with alien parties. A few have no doubt been missed. Moreover, there are probably some cases without alien parties in which an alien defendant could be added if needed to confer federal jurisdiction. These considerations suggest that I have undercounted the cases that would survive if the subcommittee proposal were adopted.

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25. *See* Subcommittee bill § 311(b)(6).

Subject to these qualifications, table 7 shows the effect on the sample of eliminating jurisdiction over cases between citizens of different states but preserving jurisdiction where aliens are parties. The single statutory interpleader case in the sample is excluded from the table, thereby limiting consideration to the cases brought or removed under the general grants of diversity jurisdiction, 28 U.S.C. §§ 1332 and 1441.

TABLE 7
Effect on Sample of Eliminating Diversity Jurisdiction but Preserving Alien Jurisdiction

Number of cases in which—	
Jurisdiction eliminated	Jurisdiction unaffected
354 (91.7%)	32 (8.3%)

Table 8 presents the estimates of resources and annual costs attributable to the cases that would be eliminated.

Of the 32 cases in the sample in which jurisdiction would be preserved because of the presence of noncitizens, 16 were asbestos cases in which U.S. citizens were suing numerous corporations, most of which were incorporated in the United States but one or more of which were incorporated in a foreign country. Four other cases also had U.S. citizens on both sides of the litigation. Jurisdiction over these cases is established under section 1332(a)(3), governing cases between "citizens of different States and in which citizens or subjects of a foreign state are additional parties." If diversity jurisdiction is to be eliminated where aliens are not involved, it seems anomalous to preserve subsection (a)(3), which makes the alien's access to federal courts turn on whether the U.S. parties are diverse.[26]

26. The language of subsection (a)(3) apparently was added to the Code to cure the anomaly created by decisions such as Tracy v. Morel, 88 Fed. 801 (C.C.D. Neb. 1898) (alternative holding). It was there held that a case with citizens on one side and aliens and citizens on the other side was outside the

TABLE 8
Estimates of Resources and Annual Costs Attributable to Diversity Cases Not Involving Aliens

176	District judgeships	$ 78,897,280
32	Full-time magistrates	9,836,800
11.0%	Time of part-time magistrates	346,608
133,841	Juror days	6,357,448
436	District court deputy clerks	12,407,688
21	Court of appeals judgeships	9,552,648
48	Court of appeals deputy clerks	1,365,984
37	Administrative Office positions	1,265,400
140	Judicial officers attending FJC seminars	90,200
	TOTAL ANNUAL COSTS	$120,120,056

Twelve of the sample cases were subsection (a)(2) cases; that is, cases between "citizens of a State and citizens or subjects of a foreign state."[27] Two of these twelve included alien individuals as defendants: one in which the only defendant was described as "a citizen or subject of a foreign country and a resident of the State of Maryland" and one in which the individual was joined with a non-U.S. corporate defendant and was described as a resident of Canada. In the ten remaining cases, the non-U.S. parties were entirely corporate: They were plaintiffs in five cases and defendants in five (one of which was removed from state court).

federal courts' jurisdiction because it was neither a suit between "citizens of different states" nor a suit between "citizens of a state and foreign citizens or subjects." There would have been no anomaly, of course, if there were no jurisdiction over suits between "citizens of different states."

27. There were no foreign-state plaintiffs in the sample.

VII. Making Corporations Citizens Where They Are Registered to Do Business

Section 312 of the subcommittee bill would have deemed a corporation "to be a citizen of any State by which it has been incorporated and of any State in which it is licensed or otherwise registered to do business."

According to an unpublished staff draft of a committee report, this provision was derived from a proposal made by Judge Charles W. Joiner of the Eastern District of Michigan in 1987.[28] The proposal has had the support of the Department of Justice and the Judicial Conference.[29] Judge Joiner advanced the argument that the present rules give an unfair advantage to multistate corporations by providing a multistate company having a local business establishment a choice of court systems that a localized business is denied. If a Michigan citizen sues the owner of a Michigan retail establishment in the Michigan courts, a localized business has no option to remove to the federal courts but a multistate company often has. Similarly, a multistate corporation with a Michigan establishment may have a choice of forums when it sues a Michigan citizen, but a local plaintiff does not. Judge Joiner proposed that a corporation be treated as a citizen of every state in which it does business and that whether it does business in a state be determined by whether it has registered to do so.

Judge Joiner conducted some research to determine how many of the cases filed in the Ann Arbor unit of his court in 1985 would have been barred by the proposal. His basic methodology was to learn, for the diversity cases in that unit, which corporate parties,

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28. Joiner, *Corporations as Citizens of Every State Where They Do Business: A Needed Change in Diversity Jurisdiction*, 70 Judicature 291 (1987). A similar proposal was contained in H.R. 3217, 86th Cong., 1st Sess. (1959). Judge Joiner's proposal provided the impetus for the present study.

29. *See* Conf. Rpt., Mar. 1988, at 23 (supporting the proposal as a "recommendation of the Department of Justice").

not Michigan citizens under existing law, were registered to do business in the state and would therefore be Michigan citizens under his proposal. It is noted that this methodology implies that a corporation would be treated as a citizen of the *forum* state if it was qualified to do business there, not as a citizen of *every* state in which it did business. If a California corporation sued a Michigan corporation in the Eastern District of Michigan, the case was treated as barred by Judge Joiner's rule only if the plaintiff had a place of business in Michigan; the fact that both corporations had places of business in Florida was not sufficient to invoke the rule.

Thus, in his research, although not in his description of the proposal, Judge Joiner applied a rule similar to the "forum doctrine." That doctrine holds that a company incorporated in more than one state will be treated for jurisdictional purposes as if it were incorporated only in the forum state. Although diversity jurisdiction would not support a lawsuit in the Southern District of New York between two Delaware corporations, the forum doctrine would permit the suit if one company were incorporated in both Delaware and New York; the dual-citizenship company would be regarded in the New York forum as only a New York corporation.[30]

I conducted my research in a manner similar to Judge Joiner's but on a nationwide basis. Where corporate citizenship in the forum state would have made the rule applicable but the complaint or removal petition did not disclose whether a company was qualified to do business in that state, inquiry was made of the appropriate state officials. The forum doctrine was applied more as a matter of economics than of theory: When corporate parties appeared on both sides of a lawsuit, it would have been a monumental task to determine whether there might be some state in which at least one plaintiff and one defendant were qualified to do business. It should be noted that this is not merely a problem for researchers. Should Judge Joiner's rule be adopted and not limited by the forum doc-

30. It is unclear whether the forum doctrine survived the 1958 amendments to 28 U.S.C. § 1332(c). *See* 13B Wright, Miller & Cooper, Federal Practice and Procedure § 3626, at 644–45 (2d ed. 1984).

trine, it might often be very difficult for lawyers to determine whether diversity jurisdiction exists.[31]

It may also be argued, if concern for bias against out-of-state parties is the basis for retaining diversity jurisdiction, that introduction of the forum rule would be a sensible modification of the Joiner proposal. The fact that California and Michigan corporations are both qualified to do business in Florida would not appear to diminish the likelihood of bias in the state courts of Michigan. Moreover, if the California corporation does not do business in Michigan, Judge Joiner's discrimination argument would be inapplicable. It should be recognized, however, that discussions about potential bias against out-of-state corporations generally rest on very weak foundations. Multistate corporations conduct their affairs in different ways. If two companies have places of business in Michigan, they may be regarded by Michiganders as both local, both foreign, or one local and one foreign; there is no satisfactory statement that can be made in the abstract, except perhaps for the observation that state of incorporation—which the law regards as critical—is probably of minimal importance.

Table 9 shows the impact on the sample of applying the Joiner proposal as limited by the forum rule. Once again, and in subsequent tables as well, the statutory interpleader case is not included.[32] Table 10 shows the estimates of the resources and costs attributable to the cases that would be eliminated.

Judge Joiner found that 43.5 percent of the cases in his study would have been barred by his proposal. It appears that the national experience would not be too different from that of the Ann Arbor unit of the Eastern District of Michigan.

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31. Unlike researchers, lawyers could easily determine the states in which the parties on one side of the lawsuit were qualified. But acquiring information about potential adversaries might often require multiple inquiries to state authorities. As was noted earlier, there is some suggestion in the complaints in the sample that the present rules create similar difficulties: that plaintiffs' lawyers don't always know, before filing suit, whether an individual defendant is a U.S. citizen or where a corporate defendant is incorporated or has its principal place of business.

32. Diversity was based on the citizenship of noncorporate claimants.

TABLE 9
Effect on Sample of Treating a Corporation as a Citizen of the Forum State if Qualified to Do Business There

Number of Cases in Which—		
Jurisdiction Eliminated	Information Inconclusive	Jurisdiction Unaffected
175 (45.3%)[a]	15 (3.9%)	196 (50.8%)

[a]Although jurisdiction would be eliminated in federal courts in the state in which suit was brought, some of these cases might enter the federal courts elsewhere. See the discussion in text.

Of the 175 cases in which jurisdiction would be eliminated, 47 entered the federal courts by removal. If the suggested rule had been in place, the defendants in these cases would have been compelled to defend in the state courts. In the remaining 128 cases, however, there is at least a theoretical possibility—if the forum doctrine is applied—that plaintiffs barred in one federal district could have brought suit in another. In some of them, it might also have been possible to preserve jurisdiction by dropping one or more defendants. I have no way of assessing the frequency with which these responses might occur, but the impact of the proposal may in fact be somewhat smaller than indicated.

The proposal would affect tort cases and contract cases roughly in proportion to their numbers. There is no suggestion in the data that the cases affected would be either more or less burdensome than diversity cases generally.

Of the 196 cases in the sample in which jurisdiction would have survived, 40 had no corporate parties. The 15 cases for which the information is inconclusive include three in which responses from state authorities were not obtained, two in which it was unclear whether parties were incorporated or not, four in which jurisdiction was plainly lacking under present law (three wrongly removed by in-state defendants, one lacking complete diversity), and six in which the corporations had federal charters.

TABLE 10
Estimates of Resources and Annual Costs Attributable to Diversity Cases in Which Jurisdiction Would Be Eliminated Under the Joiner Proposal

86	District judgeships	$ 38,552,080
16	Full-time magistrates	4,918,400
5.3%	Time of part-time magistrates	168,987
69,458	Juror days	3,299,255
213	District court deputy clerks	6,061,554
11	Court of appeals judgeships	5,003,768
25	Court of appeals deputy clerks	711,450
18	Administrative Office positions	615,600
69	Judicial officers attending FJC seminars	44,450
	TOTAL ANNUAL COSTS	$ 59,375,544

The application of the proposed rule to corporations with federal charters is a matter of some interest. At least some such corporations claim that authority to do business in particular states is derived from their federal charters.[33] The language of the subcommittee bill—"licensed or otherwise registered to do business"—seems ambiguous in its application to them. A broad reading might treat such a corporation as licensed to do business in every state in which its federal charter permits it to do so. A narrow reading might treat it as licensed or registered in none. If this proposal is considered further, some thought should be given to what outcome is desired. A possible model is the Amtrak statute, which states that Amtrak "shall be deemed to be qualified to do business in each State in which it performs any activity authorized under this chapter."[34] A similar issue may arise with regard to corporations

33. E.g. (from a complaint in the sample): "Federal National Mortgage Association, Plaintiff herein is a corporation organized under an Act of Congress and existing pursuant to the Federal National Mortgage Association Charter Act . . . and as such is authorized to transact business in the State of Indiana."

34. 45 U.S.C. § 546(m). Amtrak was a party in one case in the sample; because of the quoted provision, I treated it as qualified to do business in Pennsylvania and therefore treated the case as one that would be eliminated. I also

whose operations in a state are wholly in pursuit of interstate commerce.

Finally, if the subcommittee language is adopted, there surely will be questions about corporations that are not licensed or otherwise registered in a state even though they engage in activities that require licensure or registration. Presumably, a corporate party would not be permitted to defeat federal jurisdiction by claiming citizenship in a state in which it had not complied with a licensure or registration requirement. Allowing such a corporation to invoke federal jurisdiction, however, would reward its noncompliance with state law. To avoid that outcome, federal courts would have to apply state laws governing qualification to do business in order to determine their own jurisdiction; I know of no basis for estimating the volume of jurisdictional litigation that would ensue.

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assumed that a federally chartered corporation would be treated as licensed or registered in the state of its principal place of business, even though the subcommittee language does not retain a principal place of business test. That assumption caused me to treat one other case as a case that would be eliminated.

VIII. Closing Federal Courts to In-State Plaintiffs in Diversity Cases

In its study of the division of jurisdiction between federal and state courts, the American Law Institute proposed a rule that would prevent a plaintiff from invoking diversity jurisdiction in a court sitting in the state of the plaintiff's citizenship.[35] The rule governing original complaints would thus be harmonized with the existing rule governing removals, which permits diversity cases to be removed only if none of the defendants is a citizen of the state in which the action is brought.[36] The reporters' commentary argued that

> [t]he right of an in-state plaintiff to institute a diversity action against an out-of-state defendant, although it dates back to the first Judiciary Act, is not responsive to any acceptable justification for diversity jurisdiction. The in-stater can hardly be heard to ask the federal government to spare him from litigation in the courts of his own state.[37]

The Judicial Conference endorsed this proposal in 1976.[38]

Table 11 shows the effects of this change on the 386 cases in the sample. Of the 169 cases in which jurisdiction would be eliminated, three were cases in which only some of the plaintiffs were citizens of the forum state; in the other 166, all plaintiffs were such citizens.

Of the 216 cases that would be unaffected by the proposed rule, 70 were removed cases. Among the cases that entered the federal courts as original proceedings, somewhat more than half would be barred by this rule.

It is important to note, however, that all of the cases that would be barred by the proposed rule have some potential for returning to the federal courts. Although the ALI characterized the proposed

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35. ALI Study at 12 (proposed 28 U.S.C. § 1302(a)).
36. 28 U.S.C. § 1441(b).
37. ALI Study at 124.
38. Conf. Rpt., Apr. 1976, at 6.

rule as jurisdictional in order to make it nonwaivable,[39] it is in normal parlance a venue rule. If venue and service-of-process requirements could be met in a district in another state, a case barred by this rule could still be brought in federal court. In addition, if the barred case were brought in a state court in the plaintiff's home state, it would be removable by the defendants, all of whom—if complete diversity existed—must have been noncitizens of that state.[40] There is no basis for estimating the number of cases that would enter the federal courts through one of these routes if this ALI proposal were adopted. The estimates of resources and costs in table 12 should therefore be used with caution.

TABLE 11
Effect on Sample of Closing Federal Courts to In-State Plaintiffs in Diversity Cases

Number of Cases in Which—		
Jurisdiction Eliminated	Information Inconclusive	Jurisdiction Unaffected
169 (43.8%)[a]	1 (0.3%)	216 (56.0%)

[a]Although original jurisdiction would be eliminated in federal courts in the state in which suit was brought, some of these cases might enter the federal courts by other means. See the discussion in text.

As has previously been observed, more diversity cases are contract cases than are tort cases. Thus, although this proposal would affect tort and contract cases in roughly equal numbers, the proportional effect on tort cases would be greater. In the sample, 53.7 percent of the tort cases and only 37.1 percent of the contract cases would be barred. As measured by case weights, the cases that would be affected by the proposal are slightly more burden-

39. ALI Study at 124 (reporters' commentary).

40. Complete diversity was in fact lacking in one of the cases.

some (average weight 1.3158) than those that would not be (average weight 1.2439).[41]

TABLE 12
Estimates of Resources and Annual Costs Attributable to Diversity Cases Brought by Plaintiffs in the States of Their Citizenship

87	District judgeships	$39,000,360
16	Full-time magistrates	4,918,400
5.3%	Time of part-time magistrates	168,475
70,329	Juror days	3,340,628
212	District court deputy clerks	6,033,096
9	Court of appeals judgeships	4,093,992
22	Court of appeals deputy clerks	626,076
18	Administrative Office positions	615,600
69	Judicial officers attending FJC seminars	44,450
	TOTAL ANNUAL COSTS	$58,841,077

41. The difference is statistically significant at the 95 percent confidence level ($t = 2.04$, $df = 383$).

APPENDIX A

Use of the Sample of Diversity Cases

All of the estimates in this report are based on the analysis of complaints and removal petitions in the sample of diversity cases. This appendix discusses the reasons for use of the sample, the method of its selection, the procedure used for projecting from sample data to populations of cases and trials, and the procedures for coding data.

Reasons for Use of Sample

This study had its genesis in Judge Joiner's proposal that a corporation be treated as a citizen of every state in which it does business. Since there are no regularly collected statistical data that indicate where litigating corporations do business (other than their principal place of business), the impact of this proposal could be evaluated only by going into case files. The decision to use a sample resulted from this necessity.

After the study was launched, other proposals came to my attention that also could be assessed only on the basis of case file data. No regularly collected data, for example, bear on the proposal to measure the jurisdictional amount in terms of "actual damages."

The Administrative Office does collect data about the citizenship of parties in diversity litigation and about the amount demanded in the complaint. These data are collected for all diversity filings and are therefore not subject to sampling error. Nevertheless, I decided in both instances to rely on the data from the sample of complaints and removal petitions rather than use the regularly collected data.

The Administrative Office data are based on information provided on the JS-44 Civil Cover Sheet by the attorney filing the case in federal court—that is, the plaintiff's attorney in cases originally filed in federal court and the defendant's attorney in removed cases. The attorney reports on a number of case characteristics, in-

cluding the amount demanded and—in diversity cases—the citizenship of principal parties.

In December 1984, the codes for reporting the citizenship of principal parties were changed. Unfortunately, the change was made in a manner such that old codes were given new meanings. For example, code "4," which had previously meant "Other Non-Citizen of This State," was changed to mean "Incorporated or Principal Place of Business in This State." At least through the 1987 statistical year, both old and new versions of the JS-44 were in use, with the result that much of the data about the parties' citizenship is uninterpretable. Using the sample data is plainly to be preferred.

With regard to the jurisdictional amount, comparison of the complaints in the sample with the Administrative Office data based on them revealed a number of deficiencies in the data, of which the following were salient:

1. Lawyers apparently are often not thinking about the jurisdictional amount when they complete the "demand" item on the JS-44. They often aggregate different plaintiffs' claims in circumstances where the claims cannot be aggregated to satisfy the jurisdictional threshold. They also often include interest in circumstances in which it cannot be counted toward the threshold. On the other hand, they often do not include countable attorneys' fees even when such fees are demanded (usually unliquidated) in the complaint. To the extent that this behavior occurs in the reporting, it makes the responses to the "demand" item unsuitable for evaluating proposed changes in the jurisdictional amount.
2. Lawyers often write "in excess of" a certain amount or use other qualifying language indicating that the amount reported does not represent the entire claim; clerical personnel in the courts then enter the amount without noting the qualification. That produces an appreciable number of cases in which the Administrative Office wrongly carries the demand as $10,000; the problem also occurs at other dollar levels. Using the Administrative Office figures could cause

one to conclude wrongly that a case would be excluded by a particular jurisdictional limit.

3. In a substantial number of cases, lawyers do not fill in the "demand" even though the amount can be determined from the complaint.

After examining the aggregate impact of these and other deficiencies in the regularly collected data, I again concluded that use of data from the sample was preferable.

Description of the Sample

The sample of diversity cases was drawn from the list of 63,672 district court filings reported by the Administrative Office for the year ended June 30, 1986. The filings were arrayed by district, office within district, and docket number. The first case in the sample was selected by generating a random number between 1 and 158, and every 158th case thereafter was included. This method, rather than strictly random selection, was used because it assures that judicial districts are included in the sample in proportion to their shares of the diversity filings. The method incidentally eliminates the possibility of including two or more cases from a group of cases that were filed together and were assigned consecutive docket numbers (unless the group included more than 158 cases).

When the sample was drawn, I wrote to the clerks of the courts, asking them to provide copies of the original (not amended) complaints and civil cover sheets in the listed cases; for removed cases, I asked for the removal petitions and any state-court pleadings submitted. A 100 percent response was achieved, although the civil cover sheets were not available in every case.

As is observed in the text, 16 of the cases in the sample were improperly characterized as diversity cases in the Administrative Office data. In 15 of these cases, the complaint or removal petition asserted diversity jurisdiction and also asserted either federal question or admiralty jurisdiction. Under the Administrative Office's practice, these cases should have been reported as federal question cases, but the lawyers characterized them as diversity

cases on the JS-44. In the remaining case, the civil cover sheet was correct; clerical error produced the mischaracterization.

The sample also included a number of cases in which a litigant's assertion of jurisdiction was either erroneous or questionable. In three cases, the removal petitions plainly showed that one or more defendants were citizens of the state in which the action was brought, a fact that makes the case nonremovable under the last sentence of 28 U.S.C. § 1441(b). In one case, the complaint plainly showed that complete diversity was lacking; in another, the demand was exactly $10,000, although it could easily have been more; in one pro se case, damages of less than $10,000 were alleged and more could not easily have been claimed. In a surprising number of other cases, the jurisdictional allegations in the original complaint were inadequate to support the claim of diversity jurisdiction, but it is unclear whether the deficiency was curable.[42] No effort was made to determine what became of the cases in which the jurisdictional assertion was erroneous or questionable, and no adjustment to the reported data has been made. The Administrative Office counts a case as a case even if it is ultimately dismissed for want of jurisdiction, and such cases are included in the various measures of workload that are used in allocating judicial and staff resources. Thus, a case in which diversity jurisdiction is asserted in the complaint or removal petition is properly counted as a diversity case even if the jurisdictional claim is plainly wrong.

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42. I did not keep a count of inadequate allegations; the "surprising number" is an impression. The most common variety appears to be an allegation that states the residence of an individual party instead of the citizenship. *See* Sanders v. Clemco Indus., 823 F.2d 214 (8th Cir. 1987). Also common are failure to allege the location of a corporation's principal place of business (e.g., "Defendant . . . is a corporation trading and doing business in Pennsylvania and having an office located at P.O. Box 1967, Grand Rapids, Michigan, 49501 in which State it is incorporated") and failure to allege the citizenship of individual members of an unincorporated association (e.g., plaintiff is "a Louisiana limited partnership with its principal place of business in East Baton Rouge Parish, Louisiana"). In one case, it was not clear which of these deficiencies was present: "Defendant . . . is a baseball club doing business at 525 Falconer Street, Jamestown, New York, and operating a baseball team known as the Jamestown Expos." None of the quotations is from a pro se pleading.

Nevertheless, when the objective is to assess the impact of a change in the jurisdictional rules, some difficulty is created by the knowledge that cases are filed that do not satisfy the rules presently in effect. Would the Virginia citizen who removed a case from a Virginia state court have been deterred if the definition of corporate citizenship had made the plaintiff a Virginia citizen for diversity purposes? I have generally assumed that the answer to such questions is affirmative. In the case of the wrongful removal, for example, diversity existed; had the plaintiff been a Virginia citizen, diversity would have been destroyed. However, in assessing the proposal to treat a corporation as a citizen of every state in which it is qualified to do business, I treated the three cases that were wrongly removed and the one in which complete diversity was lacking as cases on which the available information is inadequate.

In cases in which the jurisdictional allegation was insufficient, my knowledge of the parties' citizenship was generally incomplete. This deficiency did not affect most of the analyses, particularly in light of the general policy of assuming that a change in the jurisdictional rules could affect a case that was already in violation of them. The principal exception, noted in the text, involves the identification of alien parties.

Projection from the Sample to 1987 Data

As is noted in the text, I made separate projections for five categories of cases. In assessing a jurisdictional proposal, I determined the proportion of sample cases within each category that would be eliminated by the proposal and used that proportion to estimate the effect of the proposal on 1987 filings, appeals, and juror days. The five categories, and the numbers of cases in the sample, were as follows:

Insurance contracts (nature of suit code 110)	46
Other contracts (codes 120–230, 290)	188
Motor vehicle personal injury torts (codes 350, 355)	32
Other personal injury torts (codes 310–45, 360–68)	118
Other torts (codes 240, 245, 370–85)	19
TOTAL	403

Note that these figures include the 16 cases in the sample that were improperly characterized as diversity cases. In the analysis of the sample, I have, of course, assumed that jurisdictional proposals would affect only the cases properly characterized. For example, complete elimination of diversity jurisdiction is assumed to affect only 387 cases. But in calculating the proportions on which the projections to national data are based, I have used denominators that total 403. The result is that I have discounted for the incorrectly characterized cases, and not assumed that all the cases characterized as diversity cases in Administrative Office data would be eliminated. The same result obtains when less global proposals are analyzed. Of course, I have no information about cases that should have been characterized as diversity cases but were otherwise characterized in the Administrative Office data; only those cases identified as diversity cases were sampled. There may be errors of classification that would offset the impact of the errors that I found. But the nature of the errors in the sample provides no affirmative basis for believing that errors were offset; all but one error involved failure to follow the rule that cases with more than one jurisdictional claim should not be treated as diversity cases. Accordingly, the discount seems appropriate. In the Administrative Office data about appeals, numbers of trials, and trial days, the information about the basis of jurisdiction is derived from the information recorded in the district court at filing; the discount is therefore also applied to these data.

The five case categories were chosen intuitively. I made an effort to group cases of similar subject matter and to avoid categories with fewer than 25 cases in the sample. My expectation is that making separate projections for these categories and then combining them is a procedure that is marginally better than making simple projections for all diversity cases; at least there is no reason to think that it is worse.

Coding the Complaints

Almost all the pleadings in the cases were read and coded by Oscar Gonzales, a law student at the University of Michigan employed with the Federal Judicial Center in the summer of 1987. I

also coded all of them independently. I compared my coding forms with Mr. Gonzales's, and resolved discrepancies. For perhaps 10 percent of the sample—cases that arrived after Mr. Gonzales returned to school—I did both coding jobs, usually with a sufficient time interval to permit the second look to be a fresh one. Information from the coding forms was entered into the computer and verified by rekeying.

The initial round of coding did not include some information that I later decided was needed, and I therefore did some additional coding on my own. The search for alien parties and the classification of dollar claims under the "actual damages" standard were mine alone; in some other instances, I was dissatisfied with my original coding standards and therefore reconsidered work that had already been done. Although I dare not assert that the final results are free of error, I believe that they are highly accurate.

APPENDIX B

Attributing Resources to Diversity Cases

This appendix describes the methods of estimating the resources attributable to diversity jurisdiction and to groups of cases within that jurisdiction.

District Judgeships

In making recommendations to Congress about the number of district judgeships, the Judicial Conference relies heavily on its Committee on Judicial Resources. The recommendations are largely based on the view that a reasonable caseload for a district judge is 400 weighted case filings per year. The number of weighted filings is derived by assigning weights to types of cases (such as "Diversity—motor vehicle personal injury"); the weights reflect the relative amount of judge time required to dispose of such cases, as determined in a 1979 time study.[43]

Other factors also go into the recommendations, including the number of pending cases and whether a district believes that it needs additional judicial personnel. In developing an estimate of the number of judgeships attributable to diversity cases, it is of course not practicable to simulate the judgmental factors that go into actual decisions. Weighted filings appear to be the best objective estimator.

The judgeship recommendations approved at the September 1986 session of the Judicial Conference would have resulted in 421 weighted filings per judgeship, based on the data (for calendar 1985) that were before the predecessor of the Committee on Judicial Resources when the recommendations were developed.[44] I

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43. S. Flanders, The 1979 Federal District Court Time Study (Federal Judicial Center 1980).

44. Unpublished Administrative Office data.

have therefore assumed that a judgeship is equivalent to 421 weighted filings.

To estimate the number of weighted filings that would be eliminated by a particular proposal, I first determined, for each of the five case categories used in making projections, the proportion of cases in the sample that would be eliminated. I then applied that proportion to the number of weighted filings for the case category represented in the Administrative Office data on 1987 district court filings.

Magistrates' Activity

There is little basis for making an informed estimate of the amount of magistrate time devoted to diversity cases. The Judicial Conference approves magistrate positions on the basis of surveys of individual districts. There are no benchmarks similar to the weighted caseload figures used for recommending new district judgeships. Moreover, there have been no studies that would provide a basis for estimating the relative amount of time various magistrate activities consume.

The statistical data routinely collected about magistrates are primarily transaction-based rather than case-based. Magistrates report the number of pretrial conferences held, the number of motions on which a report and recommendation is made, etc. However, some case-based data are also reported. While the data distinguish magistrate participation in civil cases from participation in criminal cases, they do not distinguish between diversity cases and other civil cases.

In order to arrive at a very rough approximation of the extent to which magistrate time is devoted to diversity cases, I began with a summary of the magistrate activity reported in the 1987 Annual Report of the Administrative Office:

Activities Involving Criminal Cases, Prisoner Petitions, and Social Security Cases

Misdemeanor defendants disposed of (13,827 after trial) (table M-2)	95,988
Preliminary criminal matters disposed of, such as conducting initial appearances and arraignments and issuing search warrants (table M-3)	134,091
Motions disposed of, pretrial conferences held, etc., in criminal cases (table M-4)	40,063
Recommendations on prisoner petitions and Social Security cases (table M4-A)	33,716
TOTAL	303,858

Activities Involving Civil Cases Other Than Prisoner Petitions and Social Security Cases

Civil cases disposed of (assigned with consent of the parties under 28 U.S.C. § 636(c)) (962 after trial) (tables M4-A, M-5)	4,970
Motions disposed of, pretrial conferences held, etc., in civil cases (table M4-A)	152,757
Assignments completed as special master in civil cases (237 with hearings) (tables M4-A, M-5)	1,509
TOTAL	159,236

The activities in the first group are clearly not in cases based on diversity jurisdiction. The activities in the second group are in civil cases in which the data do not disclose the basis of jurisdiction. In the 1987 statistical year, 188,344 civil cases other than prisoner petitions and social security cases were commenced in district courts; 67,071, or 35.6 percent, were diversity cases.[45] Hence, one might guess that 56,700 of the reported magistrate activities in the

45. 1987 AO Ann. Rep., table C-2.

second group were in diversity cases, which would be slightly under one-eighth of all reported activities.

There is no solid basis for the assumption that the activities in the second group are divided proportionately among diversity cases and others. Unpublished data collected for another study indicate that diversity jurisdiction's share of the motions and pretrial conferences in the second group varies substantially from district to district. These data, which embrace nine districts for the 1982 statistical year, do not suggest that the 35.6 percent assumption is implausible as a national average. The true proportion could be quite different, however.

There is also no basis in the data for assuming that a reportable activity in a diversity case is about as burdensome, on the average, as a reportable activity in a criminal case or a civil case with some other jurisdictional basis. One-eighth of the cost of the magistrate system is attributed to diversity cases not because I have confidence in the estimate, but because it is the best I can do and is better than nothing. The figure is subject to substantial error, but probably tells us reliably that diversity matters are a reasonably small portion of magistrates' work.

The data do not distinguish between the activities of part-time and full-time magistrates. Therefore, I have assumed that the activities of both would be reduced proportionately. In fact, full-time magistrates probably perform a disproportionate amount of the work associated with civil cases.

In assessing various proposals to limit diversity jurisdiction, I have assumed that the reduction in magistrate activity would be proportionate to the reduction in raw (unweighted) filings.

Juror Costs

For 1987, the Administrative Office reported a total of 732,039 juror days in connection with petit juror service, of which 344,863 were on days on which the jurors were available for voir dire and (by subtraction) 387,176 were days on which they were in trial and

not available for voir dire.[46] To estimate the number of juror days attributable to diversity jurisdiction, I made separate estimates for these two subsets.

Juror days in trial—not available for voir dire

The Administrative Office reports the proportions of jury trial days devoted to civil and criminal trials; these are proportions of trial days rather than juror days.[47] In the statistical series on which these figures are based, a trial is defined as beginning with the opening statement and ending when the jury is dismissed.

The Administrative Office also reports the number of jury trials that started on the day that jury selection was completed.[48] Each of these trials included one day that was also a jury selection day; the number of such trials is thus equal to the number of jury trial days that were also selection days. By subtracting this number from the total number of jury trial days, I arrived at the number of jury trial days on which the jurors were not available for voir dire. I then allocated the 387,176 juror days between civil and criminal trials on the basis of assumed averages of 7.7 juror days per civil trial day and 14.65 juror days per criminal trial day:

	All Cases	Civil Cases	Criminal Cases
Jury trial days	44,511	25,416	19,095
Jury trial days that were also jury selection days	8,458	5,134	3,324
Jury trial days when jurors not available for voir dire	36,053	20,282	15,771
Juror days when jurors not available for voir dire	387,176	156,171 (est.)	231,005 (est.)

46. Administrative Office of the United States Courts, 1987 Grand and Petit Juror Service in United States District Courts, table 5.

47. *Id.*

48. *Id.*, table 6.

On the basis that 50.64 percent of the total civil jury trial days were in diversity cases,[49] I estimated that the diversity share of the civil juror days was 79,085.

Finally, on the basis of the reported number of jury trial days, I allocated these 79,085 juror days among the five case categories used for projecting national data from the sample.

As has been noted, the allocation of juror days between civil and criminal trials was based on assumed averages of 7.7 juror days per civil trial day and 14.65 juror days per criminal trial day. Using a lower assumed figure for one kind of trial would necessitate using a higher figure for the other, since there is a known number of juror days to be allocated to known numbers of civil and criminal trial days. Subject to that substantial constraint, the choice of figure was intuitive.

The six-person jury has become very much the norm for civil cases in the federal courts, although twelve-person juries are still used in some districts.[50] A report of a 1981 survey indicated that two alternates was the norm for civil trials in about half the districts, and one alternate in about half.[51] The twelve-person jury, of course, remains the norm in criminal cases, and the survey indicated that two alternates was the norm in most districts. These figures might suggest averages of 7.5 jurors per civil jury trial day and 14 per criminal jury trial day. Since alternates are dismissed when the jury retires for deliberation, it could be argued that even these figures are on the high side. On the other hand, more alternates are generally used in longer trials. Of the criminal jury trials completed in the 1987 statistical year, those lasting 10 days or more accounted for 38 percent of the trial days; of the civil jury trials, those lasting 10 days or more accounted for 25 percent of the

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49. Unpublished Administrative Office data based on reports of trials. Trials before magistrates are excluded. In contrast to the statistics based on reports of juror usage, a trial is defined in this series as beginning when the first evidence is introduced and ending when the jury retires to deliberate. There is thus some dissonance introduced when data from the trial reports are used to refine the data from the juror usage reports.

50. *See* 1987 Grand and Petit Juror Service, *supra* note 46, at app. B.

51. Administrative Office, Clerks Division, Administration of the Jury System in the Federal Courts 9 (1982).

trial days.[52] Hence, there may be a substantial number of trial days on which more than the usual number of alternates are present. Although the assumptions of 7.7 and 14.65 days are subject to error, they are not implausible. In any event, they are unlikely to be grossly wrong.

Juror days when present for voir dire

In 1987, 11,074 juries were selected.[53] 59.3 percent of the jury trials terminated were in civil cases and 40.7 percent were in criminal cases.[54] I used these proportions to estimate the numbers of juries selected for civil and criminal cases, respectively. I then allocated the 344,863 juror days by using the assumption that twice as many jurors must be available for a criminal voir dire as for a civil voir dire:

	All Cases	Civil Cases	Criminal Cases
Juries selected	11,074	6,569 (est.)	4,505 (est.)
Juror days available for voir dire	344,863	145,414 (est.)	199,449 (est.)

On the basis that 52.25 percent of the civil jury trials terminated in 1987 were in diversity cases,[55] I estimated that the diversity share of the civil juror days was 75,979 juror days.

Finally, on the basis of the reported number of jury trials, I allocated these 75,979 juror days among the five case categories used for projecting from the sample to national data.

Once again, the estimating procedure employs an assumption to allocate juror days between civil and criminal proceedings. That assumption—that twice as many jurors must be available for a

52. Unpublished Administrative Office data based on reports of trials. Trials before magistrates are excluded.

53. 1987 Grand and Petit Jury Service, *supra* note 46, table 5.

54. 1987 AO Ann. Rep., tables C-7, M-2, M-5. Table C-7 is based on reports of trials; *see supra* note 49.

55. Unpublished Administrative Office data based on reports of trials. Trials before magistrates are excluded.

criminal case as for a civil case—is based on the following calculation:

	Civil	Criminal
Jurors		
Number of jurors to be selected	6	12
Number of peremptory challenges allowed	6	16
Alternates		
Average number of alternates to be selected	1.7	2.7
Average number of peremptory challenges allowed	2.4	2.6
TOTAL	16.1	33.3

The calculation does not include an estimate of the number of jurors called because of possible challenges for cause; it is assumed that this number is also about twice as great in the average criminal case as in the average civil case.

The numbers for peremptory challenges are derived from 28 U.S.C. § 1870, Fed. R. Civ. P. 47, and Fed. R. Crim. P. 24. I have made a rough allowance for increases in the number of peremptory challenges when more than two alternate jurors sit.

The two-to-one assumption results in a figure of 22.14 juror days available for voir dire in the average civil trial and 44.28 in the average criminal trial. In the 1981 survey referred to above, when districts were asked the size of panels called for civil and criminal trials, the median responses were 20 and 36, respectively. When jury selection takes more than one day, the number of juror days would be higher. The figures would presumably be increased for long or highly publicized trials. Moreover, because of last-minute settlements or pleas, some panels are called but not used. Hence, the 22.14 and 44.28 assumptions do not seem implausible. If there is error, it seems likely that I have allocated too few juror days to the civil cases, which will tend to produce a conservative estimate of the juror days devoted to diversity cases.

District Court Deputy Clerks

District court deputy clerk positions are authorized using a formula based on a number of work-measurement factors. The factors that have been considered call for the following:

.0068 positions per civil filing
.000135 positions per juror day
.0038 positions per appeal taken
.0103 positions per law clerk employed.

I have calculated deputy clerk savings (other than for courtroom deputies, who are included with judgeships) by applying these ratios to the estimates of the civil filings, juror days, and appeals attributable to particular jurisdictional rules. The number of law clerks is two per judgeship.

The work-measurement factors that have not been considered are largely factors, such as the number of criminal filings, that would not be affected by changes in diversity jurisdiction. A few of the unconsidered factors might be affected, but only remotely. Number of divisional offices is in the formula, for instance, and could be affected by a reduction in the court's workload, but I had no way of taking it into account.

As is noted in text, the estimates are based on the assumption that application of the staffing formula is the norm. Because of budgetary constraints, courts have recently been required to adhere to staffing ceilings somewhat below formula.

Appellate Judgeships

For the purpose of making recommendations about appellate judgeships, the Judicial Conference Committee on Judicial Resources uses a benchmark figure of 255 case participations per judgeship in appeals decided on the merits, or 85 filings per judgeship of appeals that will be decided on the merits. (Prisoner petitions, not relevant here, are counted as half-cases.) As with district judgeships, a number of discretionary factors affect the final recommendations, but the objective standard that the committee uses

is the best objective estimator available. It should be noted that the standard used for appellate cases does not, except for prisoner petitions, attempt to take account of differences in workload burden among types of cases. If diversity cases as a class are either more or less demanding of judge time than other cases within the appellate jurisdiction, the difference is therefore not reflected in this report's estimates.

The judgeship recommendations approved at the September 1986 session of the Judicial Conference would in fact have resulted in an estimated 90 filings per judgeship of appeals that will be decided on the merits, based on the 1985 data that were before the predecessor of the Judicial Resources Committee when the recommendations were developed.[56] I have therefore assumed a judgeship to be equivalent to 90 such filings.

In the 1987 statistical year, there were 4,065 appeals filed in diversity cases.[57] To estimate the number of these that will be decided on the merits, I took the average of the proportions of appeals that were decided on the merits among those diversity appeals *terminated* in the 1985, 1986, and 1987 statistical years.[58] The average proportion was 51.62 percent; accordingly, I treated 174 appellate filings as the equivalent of 90 filings that will be decided on the merits.

Estimates of the number of appellate filings that would be eliminated by various proposals were based on the proportions of raw (unweighted) district court filings that would be eliminated in the sample in each of the five case categories used for projecting.

The estimates do not take account of original proceedings such as petitions for mandamus. There were 615 such proceedings filed in 1987,[59] but there is no way of telling how many of them may have been related to diversity litigation. In the 1987 statistical year, 88.1 percent of the original proceedings terminated were terminated on the merits.[60]

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56. Unpublished Administrative Office data.
57. 1987 AO Ann. Rep., table B-1A.
58. 1985, 1986, & 1987 AO Ann. Reps., table B-1A.
59. 1987 AO Ann. Rep., table B-1.
60. *Id.*, table B-5.

Appellate Court Deputy Clerks

The current staffing formula calls for one deputy clerk for each 75 filings.

As with district court deputy clerks, the estimates are based on the formula without taking account of the lower staff ceilings imposed because of budgetary limitations.

Administrative Office Support Staff

The estimates for support staff are based on one position for six judgeships and one position for 7.5 full-time magistrate positions.

I have not estimated the impact of a reduction in deputy clerk positions on Administrative Office staff. I believe that the impact would be small.

Federal Judicial Center Education and Training Activities

The estimates are based on attendance at workshops each year by approximately two-thirds of all district judges, one-third of all circuit judges, and one-half of all full-time magistrates. Marginal training costs for people other than judicial officers are minimal, since the programs do not often involve travel and subsistence.

Court Security

Recurring equipment costs associated with judgeships include those associated with security equipment, such as closed-circuit television cameras. No estimates have been made of savings in other court security costs. Security costs covered by the Administrative Office budget are largely for perimeter security, which would be reduced only if the number of courthouse entrances were reduced.

I have not attempted to estimate the extent to which the security demands on the Marshals Service might be attributed to diversity jurisdiction. It may be assumed that judges are not often at risk of

harm from parties to diversity litigation, but the demands on the Marshals Service must to some extent be a function of the number of judges.

APPENDIX C

Cost Factors

Except for the Federal Judicial Center education and training costs, the cost factors used have been developed by the Financial Management Division of the Administrative Office of the United States Courts.

District Judge and Judge's Staff[61]	
Salary and benefits for judge	$ 95,700
Salaries and benefits for two law clerks, court reporter, secretary, and 1.5 courtroom deputy clerks	197,100
Travel, judge and staff	8,500
Miscellaneous expenses (communications, supplies, etc.)	14,800
Recurring equipment and library costs	25,380
Space and facilities	106,800
TOTAL	$448,280

Full-Time Magistrate and Staff	
Salary and benefits for magistrate	$101,482
Salaries and benefits for one law clerk, one secretary, and one clerical assistant	99,518
Reportorial services	2,000
Travel, magistrate and staff	2,000
Miscellaneous expenses (communications, supplies, security investigation, etc.)	12,700
Recurring equipment and library costs	18,600
Space and facilities	71,100
TOTAL	307,400

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61. A district court with 10 or more judges is entitled to a court reporter coordinator. The chief judge of a district court with five or more judges is entitled to an additional secretary. Since the estimates have not been prepared on a court-by-court basis, these positions are not taken into account. Their impact would, of course, be minor.

Part-time Magistrates	
Total system costs (including salaries, benefits, and expenses)	$3,160,000
Jurors	
Cost per petit juror per day (including fees, subsistence, mileage)	$47.50
Court of Appeals Judge and Judge's Staff	
Salary and benefits for judge	$101,600
Salaries and benefits for three law clerks, two secretaries, one central staff attorney, and 0.5 staff attorneys' secretaries	228,908
Travel, judge and staff	16,000
Printing of opinions	14,000
Miscellaneous expenses (communications, supplies, etc.)	19,100
Recurring equipment and library costs	27,780
Space and facilities	47,500
TOTAL	$454,888
Deputy Clerk (District or Appellate Court)[62]	
Salary and benefits	$ 26,650
Miscellaneous expenses	1,608
Recurring equipment costs	200
TOTAL	$28,458
Administrative Office Support Staff	
Cost per support position, including salaries, benefits, and overhead	$34,200
Federal Judicial Center Education and Training Costs	
Travel and subsistence for attending a workshop:	
Per attending judge	$650
Per attending full-time magistrate	$600

62. The estimates do not include space and facilities costs for deputy clerks. The Financial Management Division does not calculate these costs on a per-employee basis.

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THE FEDERAL JUDICIAL CENTER

The Federal Judicial Center is the research, development, and training arm of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620-629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States is chairman of the Center's Board, which also includes the Director of the Administrative Office of the United States Courts and six judges elected by the Judicial Conference.

The Center's **Continuing Education and Training Division** provides educational programs and services for all third branch personnel. These include orientation seminars, regional workshops, on-site training for support personnel, and tuition support.

The **Division of Special Educational Services** is responsible for the production of educational audio and video media, educational publications, and special seminars and workshops, including programs on sentencing.

The **Research Division** undertakes empirical and exploratory research on federal judicial processes, court management, and sentencing and its consequences, usually at the request of the Judicial Conference and its committees, the courts themselves, or other groups in the federal court system.

The **Innovations and Systems Development Division** designs and tests new technologies, especially computer systems, that are useful for case management and court administration. The division also contributes to the training required for the successful implementation of technology in the courts.

The **Division of Inter-Judicial Affairs and Information Services** prepares a monthly bulletin for personnel of the federal judicial system, coordinates revision and production of the *Bench Book for United States District Court Judges,* and maintains liaison with state and foreign judges and related judicial administration organizations. The Center's library, which specializes in judicial administration materials, is located within this division.