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# THE CAUSE, EFFECT AND SOLUTION OF CONGESTION IN THE FEDERAL COURTS

By HARRY C. WESTOVER\*

## *The Problem*

One of the major problems now confronting the federal judiciary is that of court congestion. There seems to be unjustifiable delay between the filing of a complaint and trial. This problem is by no means new. As far back as 1906 Roscoe Pound spoke to the American Bar Association on the subject of "Causes of Popular Dissatisfaction With the Administration of Justice." He concluded that the primary cause of such dissatisfaction was delay in the trial of cases.

In 1957 the Attorney General's Conference, which was studying the question of court congestion, reported:

The inordinate lapse of time between the institution of suits and their final disposition in many of our State and Federal courts constitutes a threat to the effective administration of justice in this country. . . . Prolonged and unjustified delay is the major weakness of our judicial system today.

Congestion in the federal courts continues to become worse. The Honorable Warren E. Burger, Judge of the United States Court of Appeals of Washington, D. C., in an address<sup>1</sup> delivered before the Southern Regional meeting of the American Bar Association in Atlanta, Georgia, on February 21, 1958, stated:<sup>1a</sup>

When it takes five, four, three, or even two years to get a civil case on for trial, judges and lawyers cannot escape the charge that a system which functions so slowly has defeated one of its primary objectives at the very threshold of the judicial process.

Up to the present time, or at least up to 1957, the only attempted solution of the problem was appointment of more and more judges. Since World War II, for example, Congress has increased the number of district judges by fifty-one.<sup>2</sup> Experience has demonstrated this was no solution at all. Regardless of the number of judgeships created and appointments made, the number of cases filed far exceeded the capacity of the judges to dispose of them.

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<sup>1</sup> Published under the title, *The Courts on Trial*, 22 F.R.D. 71 (1958).

<sup>1a</sup> *Id.* at 72.

<sup>2</sup> S. REP. No. 1830, 85th Cong., 2d Sess. (1958), 1958 U.S. Code Cong. & Ad. News 2593, 2594.

## *The Cause*

The primary cause of congestion in federal courts is that case-filings are so numerous adequate handling by the judiciary is not possible. One of the major reasons for the filing of so many cases in federal courts is diversity of citizenship.

### *Diversity Cases*

As stated by the Senate committee,

the underlying purpose of diversity of citizenship legislation (which incidentally goes back to the beginning of the Federal judicial system, having been established by the Judiciary Act of 1789) is to provide a separate forum for out-of-state citizens against the prejudices of local courts and local juries by making available to them the benefits and safeguards of the Federal courts.<sup>3</sup>

One great object in establishing the courts of the United States and regulating their jurisdiction was to have a tribunal in each state, presumed to be free from local influence, and to which all who were non-residents or aliens might resort for legal redress.<sup>4</sup>

The beginning of diversity cases is traced to the Constitution of the United States. Article III of the Constitution provides that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish, and that the judicial power shall extend to all controversies arising under the Constitution between citizens of different states.

Being cognizant of the directive contained in the Constitution that inferior courts might from time to time be ordained and established, the first Congress immediately on convening began to construct the federal court system. The twentieth act passed by the first Congress is known as the Judicial Act of 1789.<sup>5</sup>

The first Congress created a federal court system with thirteen districts and thirteen judges.<sup>6</sup> With the expansion of territory and the increase in population, the district courts have now been increased to 226.

<sup>3</sup> *Id.* at 2596.

<sup>4</sup> *Gordon v. Longest*, 41 U.S. (16 Pet.) 97 (1842).

<sup>5</sup> Under the Judicial Act of 1789 the United States was divided into thirteen districts: New Hampshire; Massachusetts; Connecticut; New York; New Jersey; Pennsylvania; Delaware; Maryland; Virginia; South Carolina; Georgia; that part of Massachusetts lying directly east of New Hampshire, called the Maine District; and that part of Virginia west of the mountains, called the Kentucky District. The Justices of the Supreme Court were to be itinerant and sit on the circuit courts, the circuit courts being trial forums. Judicial Act of 1789, ch. 20, 1 Stat. 73.

<sup>6</sup> The eighteenth act passed by the first Congress provided for the pay of judges. The Chief Justice of the Supreme Court was to receive \$4,000 per annum and the Associate Justices \$3,500 per annum. Judges of the district courts were to receive varying amounts from \$1,800 per annum for the District of Virginia and District of South Carolina to \$800 for the District of Delaware. Act of Sept. 23, 1789, ch. 18, 1 Stat. 72.

The first Congress, realizing the federal courts were courts of limited jurisdiction and that each state had its own court system, evidently felt that cases to be presented to the federal courts would be limited in number. During the early years of our country this was probably true. But with expansion of territory and population growth, Congress found it necessary from time to time to delegate more and greater areas of litigation to the federal courts. Not only did Congress grant additional jurisdiction but in a number of cases gave exclusive jurisdiction to the federal courts.

There has been a continuing demand upon Congress to increase the number of federal judges. As case-loads increased the number of judges also increased, but at no time did the number of district judges increase as rapidly as did the case-load.<sup>7</sup> As a result there have developed in certain metropolitan areas of this country districts in which it takes from two to four years to get a civil case to trial after it is at issue. Even though the Judicial Conference has adopted as a standard a period of six months from filing to trial for the normal civil case, nearly forty per cent of the civil cases which reached trial in 1958 had been delayed from one to four years after issue had been joined.<sup>8</sup>

The Constitution gave to the federal courts jurisdiction of litigation between citizens of different states. The Judicial Act of 1789 provided that the circuit courts should have original cognizance (when the matter in dispute exceeded five hundred dollars) concurrent with the courts of the several states, of actions between citizens of the state where suit is brought and citizens of other states. The increase of diversity cases, brought about because of expanding areas, population growth and increased business, is the greatest source of civil business of the United States district courts.

Diversity cases for the first 150 years of government did not prove a great burden on the courts.<sup>9</sup> But beginning with 1941 diversity cases began

<sup>7</sup> From 1941 to 1958 the civil cases filed annually have doubled and the number pending has increased by 150 per cent. The private cases filed annually have increased 160 per cent during the same period and the number pending has tripled. During this same period the number of judges in these districts has increased from 179 to 226, an increase of only twenty-six per cent. [July, 1957-June, 1958] DIRECTOR OF ADMIN. OFFICE OF U.S. COURTS ANN. REP. II-5. Since 1905 the number of civil cases filed each year in the federal courts has increased 400 per cent, whereas the number of judges to decide those cases has increased little more than 200 per cent. Olney, *The Administrative Office of the United States Courts*, 42 J. AM. JUD. Soc'y 78, 85 (1958).

<sup>8</sup> [July, 1957-June, 1958] DIRECTOR OF ADMIN. OFFICE OF U.S. COURTS ANN. REP. I-2, II-1.

<sup>9</sup> For the chronological development of diversity of citizenship cases see *Emery v. Greenough*, 3 U.S. (3 Dall.) 369 (1797); *Bingham v. Cabot*, 3 U.S. (3 Dall.) 382 (1798); *Turner v. Enrille*, 4 U.S. (4 Dall.) 7 (1799); *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8 (1799); *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126 (1804); *Gordon v. Longest*, 41 U.S. (16 Pet.) 97 (1842); *Cary v. Curtis*, 44 U.S. (3 How.) 236 (1845); *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850); *Grover & Baker Sewing-Mach. Co. v. Florence Sewing-Mach. Co.*, 85 U.S. (18 Wall.) 553 (1874).

to multiply. In 1941 diversity of citizenship cases commenced in eighty-six United States districts having solely federal jurisdiction totaled 7,286 for the fiscal year. In 1945 diversity cases dropped to 5,268, but beginning with 1946 there has been a continuous increase in diversity cases so that by 1956 there were 20,524 filed for that fiscal year. The 20,524 diversity cases filed during 1956 represented an increase of 180 per cent over the number filed in 1941, and a 290 per cent increase over the number filed in 1944.

In the years following World War II the judicial business of the United States district courts increased tremendously. Total civil cases filed are up seventy-five per cent, and the private civil business has more than doubled in the districts having exclusively federal jurisdiction. Most of the increase has occurred in the diversity of citizenship cases, which have increased from 7,286 in 1941 to 20,524 in 1956.<sup>10</sup>

One of the reasons diversity cases present to the federal courts so much civil business is that modern business has seen fit to conduct its affairs by corporations. In 1956 diversity of citizenship cases involving corporations accounted for one-fourth of all civil cases filed in the eighty-six district courts.<sup>11</sup> Of the 20,524 diversity of citizenship cases filed in the same year corporations were parties in 12,732 cases, or sixty-two per cent.<sup>12</sup>

Within the area of private cases, those based on diversity of citizenship jurisdiction have shown great increases during the past twelve years. In 1946 there were 12,710 private cases filed in the eighty-six district courts having purely federal jurisdiction. In 1958, 37,724 such cases were filed in those same courts—an increase of 25,000 cases for the thirteen year period or an average increase of 2,000 cases per year. In the past two years, fiscal 1957 and fiscal 1958, the increase has exceeded 3,000 cases per year.<sup>13</sup>

The diversity cases constituted more than one-third of the total civil cases filed in the district courts during 1955 and 1956. According to studies conducted by the Administrative Office of the United States Courts these same cases are taking more than fifty per cent of the time of the district judges because of their complexity and due to the fact that a larger percentage reach the trial stage.<sup>14</sup>

### *The Attempted Solutions*

The various Judicial Conferences became aware of the burden diversity cases placed upon the trial courts, and in 1950 the Judicial Conference of

<sup>10</sup> Statement of Joseph F. Spaniol, Jr., Division of Procedural Studies and Statistics, Administrative Office of the United States Courts [hereinafter cited as Spaniol], 1958 U.S. Code Cong. & Ad. News 2603, 2604.

<sup>11</sup> *Id.* at 2605.

<sup>12</sup> *Ibid.*

<sup>13</sup> [July-Sept. 1959] DIRECTOR OF ADMIN. OFFICE OF U.S. COURTS QUARTERLY REP.

<sup>14</sup> Spaniol, 1958 U.S. Code Cong. & Ad. News 2603, 2605.

the United States appointed a committee to study the over-all problem of jurisdiction and venue. In September, 1951, the Committee made its report, recommending:

1. That the historic jurisdiction based upon diversity of citizenship be retained in the federal courts.

2. That in cases based upon diversity of citizenship jurisdiction a corporation should be deemed a citizen of both the state of its creation and the state in which it had its principal place of business.

3. That the jurisdictional amounts as a requisite for federal jurisdiction in cases based upon diversity of citizenship be raised from \$3,000 to \$7,500.

Based upon the recommendation of the Judicial Conference of the United States, several bills were introduced in Congress concerning this problem, and finally on July 25, 1958, Public Law 35-554 was signed and went into effect.<sup>15</sup> The Act made three changes:

It raised the jurisdictional amount in diversity cases to above \$10,000.

It provided that a corporation should be deemed a citizen of the state in which it was incorporated and of the state where it had its principal place of business.

It provided that workmen's compensation cases could not be removed to the federal courts.

#### *Removal of Workmen's Compensation Cases*

The provision of the act relative to removal of workmen's compensation cases materially affects only two states—Texas and New Mexico. In Texas, during the fiscal year 1957, 2,147 workmen's compensation cases were filed, 982 being filed in the federal courts as original actions and 1,148 being removed from the state courts to the federal courts.<sup>16</sup> In New Mexico for the same period of time sixty-eight workmen's compensation cases were filed, of which eleven were original actions.<sup>17</sup>

Workmen's compensation cases arise and exist only by virtue of state laws, no federal question and no law of the United States being involved. In California the removal of workmen's compensation cases to the federal courts has never been a problem.

That part of the Judicial Act of 1958 relating to workmen's compensation cases will give substantial relief to the district courts of Texas and New Mexico but will not appreciably affect district courts of other states. This section has already had a marked effect on the number of cases filed

<sup>15</sup> 28 U.S.C.A. §§ 1331, 1332, 1445(c) (1958).

<sup>16</sup> S. REP. No. 1830, 85th Cong., 2d Sess. (1958), 1958 U.S. Code Cong. & Ad. News 2594, 2599.

<sup>17</sup> *Ibid.*

in Texas. In August and September of 1958 only sixty-five workmen's compensation cases were filed there as compared to 371 such filings during the same two-month period in 1957. This amounted to a decline of eighty-two per cent in the workmen's compensation cases, resulting in a reduction of fifty-nine per cent in all private cases filed in Texas during this period.<sup>18</sup> The latest report from the Administrative Office of the United States Courts indicates that in Texas there was a decrease of nearly sixty per cent in the number of civil cases filed from August through December, 1958, as compared to the same period of 1957. For the same period New Mexico had a decrease of thirty-two per cent.

### *Jurisdictional Amount*

It is rather problematical whether that provision of the act raising the amount in controversy from \$3,000 to \$10,000 will give any great relief. In fact, the Judicial Conference Committee was of the opinion that raising the jurisdictional amount would not appreciably lessen the number of federal cases;<sup>19</sup> and the Administrative Office of the United States Courts estimates the increase of the jurisdictional amount from \$3,000 to \$10,000 will reduce the load of work in the eighty-six districts having exclusively federal jurisdiction by approximately only eight per cent.<sup>20</sup>

Since 1911 when the required amount was increased from \$2,000 to \$3,000 the purchasing power of the dollar has dwindled, and its value at the time of passage of the 1958 legislation was a little more than one-third of the value of the dollar when the \$3,000 minimum amount was fixed. It appears from the Committee Report that for this reason alone the jurisdictional amount was raised to \$10,000. The committee stated:<sup>21</sup>

The jurisdictional amount should not be so high as to convert the Federal courts into courts of big business, nor so low as to fritter away their time in the trial of petty controversies. The present requirement of \$3,000 has been on the statute books since 1911 and obviously the value of the dollar in terms of its purchasing power has undergone market depreciation since that date. The Consumers Price Index for moderate income families in large cities indicates a rise of about 152 percent since 1913, shortly after the present \$3,000 minimum was established. It is apparent that since \$3,000 was the smallest amount that was considered substantial in 1911 for problems of Federal jurisdiction, there is today no substantiality in such an

<sup>18</sup> [July-Sept. 1959] DIRECTOR OF ADMIN. OFFICE OF U.S. COURTS QUARTERLY REP. 4.

<sup>19</sup> 1958 U.S. Code Cong. & Ad. News 2614.

<sup>20</sup> Spaniol, 1958 U.S. Code Cong. & Ad. News 2603, 2607.

<sup>21</sup> S. REP. No. 1830, 85th Cong., 2d Sess. (1958), 1958 U.S. Code Cong. & Ad. News 2593, 2595. The following changes have been made in the jurisdictional amount in diversity cases: 1789—\$500; 1801—\$400; 1802—\$500; 1877-88—\$2,000; 1911—\$3,000; 1958—\$10,000.

amount for jurisdictional problems. Accordingly the committee believes that the standard for fixing jurisdictional amounts should be increased to \$10,000.

It is true the 1958 Act provides that where recovery is less than \$10,000, computed without regard to any setoff or counter-claim and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. However, such provision will probably be a slight deterrent to the pleader.

### *Citizenship of Corporations*

If any great relief is to come to the district courts from the Judicial Act of 1958, other than the courts of Texas and New Mexico, it must come from the provision of the Act requiring that corporations shall be deemed citizens of states by which they have been incorporated and of the states where they have their principal places of business.

For many years it has been established that a corporation, for the purposes of jurisdiction, is deemed a citizen of the state in which it is incorporated, and when foreign corporations are either parties plaintiff or parties defendant it is easy to allege and prove diversity of citizenship.<sup>22</sup> The fact that corporations can now be sued in states where they have their principal places of business may divest the federal courts of jurisdiction in a substantial number of cases. During the first quarter of fiscal 1959 there was a decrease in total civil cases filed, including a decrease in the private cases. According to the thirteen year trend we could have expected an increase in 1959 of 165 private cases monthly over the total filed in fiscal 1958 and according to the two year trend we could have expected an increase of 250 cases monthly over the total filed in fiscal 1958. The apparent effect of the statute has been not only to eliminate this increase, but to reduce the number of private cases filed below the total for last year. It is probable that there has been a decrease in filings of from twenty-five to twenty-seven per cent compared with what it would have been without the Act.<sup>23</sup> The latest figures from the Administrative Office indicate there has been a decrease of twenty-one per cent in private civil cases filed in the eighty-six United States district courts, August through December, 1958, compared with August through December, 1957.

If Congress had gone one step further and had written into the Act a provision that a corporation should be deemed a citizen not only of a state where incorporated but also of *any* state where it had a principal place of business, Congress would have succeeded in divesting from federal court

<sup>22</sup> *St. Louis & S.F. Ry. v. James*, 161 U.S. 545 (1896); *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809).

<sup>23</sup> [July-Sept. 1959] DIRECTOR OF ADMIN. OFFICE OF U.S. COURTS QUARTERLY REP. 12.

jurisdiction a very substantial number of cases having large corporations as parties. However, both the Judicial Conference<sup>24</sup> and Congress rejected such a proposal.<sup>25</sup>

Congress seems to indicate in the legislation as passed that a corporation comes within the definition of "principal place of business" when it receives more than half of its gross income within a single state. The committee report states:<sup>26</sup>

Although the Committee disapproves of legislation to make a corporation a citizen of any State where it does business, it recognizes that there is a need for legislation to prevent frauds and abuses of the Federal jurisdiction, and it has concluded that there is a method that will properly prevent them. A corporation which receives more than half of its gross income from business within a single State is so closely tied to the local commercial fabric of that State as to be properly considered a citizen thereof, even though it may have been incorporated elsewhere.

Some years will have to pass before it can definitely be determined how much relief the Act will afford federal trial courts in giving corporations dual citizenship.

### *Senior Judges Bill*

In 1957, as a result of recommendation of the Judicial Conference of the United States in 1955, Congress passed an Act which is commonly known as the "Senior Judges Bill."<sup>27</sup> Although federal judges are appointed for life, they are eligible to retire at full pay for life after fifteen years service at age sixty-five, or at age seventy after ten years service. As Senior Judges they are permitted to retain precisely all their powers, their chambers and personnel, if they are able and willing to perform a substantial amount of judicial service. In the past United States judges have been

<sup>24</sup> Spaniol, 1958 U.S. Code Cong. & Ad. News 2603, 2605.

<sup>25</sup> H.R. REP. NO. 1937, 82d Cong., 2d Sess. (1952). Cf. S. REP. NO. 939, 72d Cong., 1st Sess. (1931).

<sup>26</sup> 1958 U.S. Code Cong. & Ad. News 2614.

<sup>27</sup> 28 U.S.C. § 294(d) (1958). It provides, in essence, that the Chief Justice of the United States shall maintain a roster of retired judges of the United States who are willing and able to undertake special judicial duties from time to time outside their own circuit, in the case of a retired circuit or district judge, or in a court other than their own, in the case of other retired judges, which roster shall be known as the roster of senior judges. Any such retired judge of the United States may be designated and assigned by the Chief Justice to perform such judicial duties as he is willing and able to undertake in a court outside his own circuit, in the case of a retired circuit or district judge, or in a court other than his own, in the case of any other retired judge of the United States. Such designation and assignment to a court of appeals or district court shall be made upon the presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises and to any other court of the United States upon the presentation of a certificate of necessity by the chief judge of such court.

reluctant to retire, and many have continued to serve on the courts during their eighties and nineties.<sup>28</sup>

Because many federal judges are recruited from state courts and from government service, the average age of federal judges is considerably higher than that of state judges. Consequently, many district and circuit judges are elderly. The problem of getting federal judges to retire is one which has been dealt with over the years without success. Most judges do not wish to be known as "retired" judges.<sup>29</sup> It was the hope of the Judicial Conference and of Congress that many judges who have reached retirement age, but who wish to continue serving in a judicial capacity, would be willing to retire, extending their functions as they desired under the Act.

According to the "Senior Judges Bill," a retired judge must indicate to the Chief Justice of the United States his willingness to have his name placed upon the roster of Senior Judges, and such retired judges must also indicate the judicial duties they are willing to undertake in any court of the United States. Upon presentation of a Certificate of Necessity by the Chief Judge of any court, the Chief Justice may designate and assign a Senior Judge for service.

Although the law has been in effect for only a short period of time, nevertheless, there are indications that this Act may materially increase the number of active trial judges. A large number of judges have now requested their names be placed upon the roster of Senior Judges, and many of these judges have been assigned to the various courts by the Chief Justice for service. According to records kept by the Administrative Office of the United States Courts for the fiscal year 1958, twenty-five retired judges tried 473 cases and spent 794 days in court—an average of 31.4 days per judge. During the same period in the Southern District of California, Central Division, eight judges spent 907 days in court—an average of 113.4 days per judge.

District judges now on the senior judges roster and available for duty come from all parts of the United States, and the amount of work they will perform during fiscal 1959 will be substantially more than that performed during fiscal 1958.

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<sup>28</sup> One district judge wrote to the Senate Committee studying this problem, as follows: "When I eventually reach retirement age I shall very much dislike being considered as a 'retired judge' past his days of usefulness. I shall want to go on working, because my great happiness is and always has been in the field of law. The phrase 'retired judge' rather connotes one who is senile, useless and ready for the spade."

<sup>29</sup> A judge, age eighty-five, recently retired as chief judge and in his letter of resignation to the Chief Justice said: "That there be no misunderstanding, I desire to emphasize the fact that I am not retiring from active duty on the court. On the contrary, I am . . . looking forward with pleasure to the congenial work of writing opinions." *Los Angeles Daily Journal*, Jan. 13, 1959, p. 1.

There is a possibility that the combined effect of the "Senior Judges Bill" of 1957 and the "Diversity of Citizenship Bill" of 1958 may materially relieve the pressure for appointment of new federal judges and, consequently, mitigate the present demand for the creation of new judicial positions. As time goes on and more and more judges reach the age of retirement and discover retirement does not end judicial service, the number of active Senior Judges will probably be greatly increased. Wherever serious congestion exists in the federal courts it may be alleviated by assignment of Senior Judges rather than appointment of new judges. While many judges and courts are seriously overburdened, it is a fact that other judges and other courts have comparatively little work.<sup>80</sup> There is sufficient work before the federal courts at the present time to utilize all Senior Judges who wish to work. They are now in a position to serve as traveling judges and work where they are most needed.

### *Conclusion*

There appear to be only three possible solutions relative to congestion in the federal courts:

1. Appointment of additional judges.
2. Restriction of the number of cases filed in federal courts.
3. More efficient utilization of present judge power.

The first solution has been tried and found ineffective. The Judicial Act of 1958 is an act restricting the jurisdiction of the federal courts, which may materially lessen the number of cases filed. The Judicial Act of 1957 is an act designed to use more effectively the present judge power of the federal court.

On the problem Chief Justice Warren, in an address before the Assembly of the American Bar Association in Los Angeles in August, 1958, had this to say:

While more judges are essential to enable us to keep pace with the growing population, we cannot expect our real strength to flow merely from expanding the judiciary. That has been done in the past, and it has been found not adequate. Our strength must come mainly from improved methods of adjusting case loads, dispatching litigation for hearing, resolving complicated issues, eliminating non-essential ones, increasing court room efficiency and through dispatch in decision-making and appeal.

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<sup>80</sup> [July, 1957-June, 1958] DIRECTOR OF ADMIN. OFFICE OF U.S. COURTS ANN. REP. I-16.