the terms of the option would have to meet several conditions. These conditions are based on rules provided in prior law for either restricted stock options or qualified stock options (IRC sections 422 and 424).

DEDUCTION FOR LOSS IN VALUE OF MOTOR CARRIER OPERATING RIGHTS—S. 702

S. 702, introduced by Senator BAUCUS for himself and several cosponsors, allows a deduction with respect to motor carrier operating rights which have lost value as a result of last year's trucking deregulation bill—the Motor Carrier Reform Act of 1980.

Under the Interstate Commerce Act of 1935, the ICC granted a limited number of permits and certificates to motor carriers and freight forwarders. These operating rights were necessary to operating a trucking business. Substantial amounts were paid for these rights. They were bought and sold in connection with other assets of a trucking company, and were used as a source of loan collateral. They typically represented a substantial portion of the carrier's assets.

The Motor Carrier Reform Act of 1980—last year's trucking deregulation bill—substantially eased restrictions on granting operating rights. As a result, the ICC, following an opinion of the Financial Accounting Standards Board, has required that the value assigned to certificates of authority in the regulated books of motor carriers be written down to zero immediately.

Under tax rules, a deduction is allowed for certain business losses not reimbursed by insurance or otherwise (IRC section 165). However, it is uncertain whether losses due to a termination of a monopoly right is deductible under section 165.

S. 702 provides the deduction would be allowed ratably over a 36-month period for taxpayers who held motor carrier operating rights on July 1, 1980. The amount of the deduction would be the greater of $50,000 or the total adjusted bases of all motor carrier operating rights held by the taxpayer on July 1, 1980.

ST. PAUL, MINN., PORT AUTHORITY REVENUE BONDS—S. 738

S. 738, introduced by Senator DURENBERGER, would permit the Port Authority of the City of St. Paul, Minn., to advance refund prior issuance of industrial revenue bonds.

Bonds issued by the Port Authority of St. Paul more than 5 years ago contained many restrictive covenants to facilitate marketing the bonds. These restrictions are no longer necessary for the marketing of the bonds. For example, the most serious restriction is the requirement that an additional reserve fund be maintained. This means that major revenue of the port authority is restricted to this fund, rather than being available for the port authority's economic development program.

An advance refunding of these bonds would permit deletion of these restrictions. However, restrictions contained in IRC section 103(b) on advance refunding bar use of this procedure. Under these restrictions, interest on an advance refunding issue is tax exempt only if substantially all the proceeds are used to provide qualified public facilities which are required to be generally available to the general public.

S. 738 contains a limited exception to these provisions, intended to be limited to the Port Authority of St. Paul. In addition, S. 738 limits any debt service savings resulting from the refunding to proper corporate purposes of the issuer, and bars using it to reduce obligations of private companies using the facilities being financed by the refunding.

COMMITTEE ON ENERGY AND NATURAL RESOURCES

Mr. McCLURE. Mr. President, I would like to announce for the information of the Senate and the public the scheduling of a public hearing before the Committee on Energy and Natural Resources to consider the following nominations: W. Kenneth Davis to be Deputy Secretary, Department of Energy; Joseph J. Tribble to be Assistant Secretary for Conservation and Renewable Energy, Department of Energy; Rosslee Green Douglas to be Director, Office of Minority Economic Impact, Department of Energy; and Edward E. Noble to be Chairman of the Board of the U.S. Synthetic Fuels Corporation.

The hearing has been scheduled for Wednesday, May 13, beginning at 10 a.m. in room 3110 of the Dirksen Senate Office Building.

For further information regarding this hearing, you may wish to contact Mr. Charles Trabandt at 224–7141.

SUBCOMMITTEE ON GOVERNMENTAL EFFICIENCY AND THE DISTRICT OF COLUMBIA

Mr. MATHIAS. Mr. President, I would like to announce that the Subcommittee on Governmental Efficiency and the District of Columbia of the Governmental Affairs Committee will hold a hearing on S. 1040, a bill to increase the amount authorized to be appropriated as the annual Federal payment to the District of Columbia. The hearing will be held on Monday, May 11, 1981, at 9:30 a.m. in room 3302 of the Dirksen Senate Office Building.

For further information, contact Margaret Sims of the subcommittee staff at 224–4161.

AUTHORITY FOR COMMITTEES TO MEET

COMMITTEE ON ENERGY

Mr. BAKER. Mr. President, I ask unanimous consent that the Committee on Energy be authorized to hold a business meeting today at 2 p.m.

The PRESIDING OFFICER. Without objection, it is so ordered.

PUBLIC LANDS SUBCOMMITTEE

Mr. BAKER. Mr. President, I ask unanimous consent that the Public Lands Subcommittee of the Committee on Energy be authorized to hold hearings today on the land and water conservation fund amendments.

The PRESIDING OFFICER. Without objection, it is so ordered.

ADDITIONAL STATEMENTS

ISRAEL IS 33 YEARS OLD

● Mr. LEVIN. Mr. President, on May 7, the State of Israel will celebrate the 33d anniversary of her rebirth. The significance of this Day of Independence will not be lost on those who will participate in this celebration; its date comes just 1 week after Israel memorializes the holocaust.

These two events are inextricably linked. Yet today we do not dwell on the tragedies of the past. Instead, we join in commemorating what is one of the greatest achievements in modern history.

After centuries of dispersal, the 1948 Declaration of Independence and the Ingathering of the Exiles followed what was clearly the darkest period in contemporary history for mankind, and for the Jewish people in particular. It was against all probabilities that Israel reemerged—conceived in the hearts of Jews throughout the world, born in the chamber of the United Nations, and reaching mature adulthood despite wars, calls for its destruction, and economic woes of staggering proportions.

What we see today, Mr. President, is a country rooted not only in 33 years of modern history, but in 5,741 years of tradition. What we see is a country which has used its resources not only to defend itself from external forces, but to build a nation—a nation that not only gives her people a place to live, but nurtures them physically and spiritually. In her 33 most recent years, Israel has absorbed hundreds of thousands of immigrants, built whole cities to settle them, and constructed universities, museums, and concert halls for their enlightenment. She has grown flowers and fruit in the sands of the south, developed fish ponds and lush farms in the valleys of the north, and watched industry spring up throughout the country. And despite the hostile environs of climate and surroundings, she has brought forth this intellectual, agricultural, and industrial development within the framework of stable democratic institutions consistent not only with her heritage, but with ours as well.

Mr. President, Israel is a mosaic—a mixture of people from almost one hundred different lands. She is a diversity of traditions, of cultures, and of opinions, yet with a strength that flows from one heart, Jerusalem, the city of peace. As she approaches her 33d year, it is fitting that we pay tribute to the miracle of her existence, and take pause to remember the horrors which preceded her founding. Her continued well-being and security constitute the best hope that such tragedies will never occur again.●

GRANT LITIGATION AND SECTION 1983

● Mr. HATCH. Mr. President, In *Maine v. Thiboutot*, 100 S.Ct. 2502 (1980), the Supreme Court expanded 42 U.S.C. 1983, the major Federal civil rights statute, to make State and local governments potentially liable in the hundreds of cooperative programs they engage in with the Federal Government.

Grant programs are just one of the areas which are affected by the decision in Thiboutot. Recently, both the Intergovernmental Relations Subcommittee of the Senate Governmental Affairs Committee and the Intergovernmental Relations and Human Resources Subcommit-

tee of the House Committee on Government Operations held hearings to discuss grant reform, particularly the role of the courts in grant programs. Testimony was given at both hearings that the Thiboutot decision is contributing to the current problems in the Federal grant system.

Prof. George D. Brown of Boston College Law School, who specializes in intergovernmental relations, suggested passage of my bill, S. 584, as a first step to remedy the problems associated with grant litigation. Mr. President, I ask that an excerpt of Professor Brown's statement before the Intergovernmental Relations and Human Resources Subcommittee on April 9, 1981 be printed in the RECORD. Professor Brown's excellent analysis points out some of the reasons that Congress should pass S. 584.

The excerpt follows:

EXCERPTS

III. THE ROLE OF THE FEDERAL COURTS IN THE OPERATION OF THE GRANT SYSTEM—A HIDDEN ISSUE IN GRANT REFORM

I mentioned earlier the explosion in grant litigation. The major component of that explosion is suits by third parties to block or alter the award or administration of Federal funds. There are two reasons for the growth of such suits. The first is the increasing number of grant conditions—especially "cross-cutting" ones—and the resultant increase in putative beneficiaries. The second reason is a climate of extraordinary judicial receptivity to third party suits. Let me use as an illustration the recent Supreme Court decision in *Maine* v. *Thiboutot*, 100 S.Ct. 2502 (1980). That case involved the scope of 42 U.S.C. § 1983, which provides that:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

This testimony utilizes Thiboutot as a departure point for an examination of the impact of third party suit on the functioning of the grant system. It begins with a critical analysis of the decision itself. I then argue that third party suits have serious negative consequences for the grant system. In conclusion, it is suggested that Congress should overturn Thiboutot, but that this is only the first step in an overall review of the role of the Federal courts in Federal aid programs.

(1) THIBOUTOT—MAKING IT LOOK EASY

A. The decision: *Maine* v. *Thiboutot* involved a challenge by welfare recipients to a reduction in their payments, which they asserted violated a federal statute. The action was brought in state court, resulting in a ruling favorable to plaintiffs. On certiorari the state sought review of a ruling by its Supreme Judicial Court that plaintiffs were entitled to attorney's fees under the Civil Rights Attorney's Fee Awards Act of 1976. According to the Supreme Court the case presented two issues "(1) whether § 1983 encompasses claims based on purely statutory violations of federal law, and (2) if so, whether attorney's fees under § 1988 may be awarded to the prevailing party in such an action." In a somewhat cursory opinion, Justice Brennan, writing for a six man majority, answered both questions in the affirmative.

In resolving the coverage issue he emphasized the "plain language" of § 1983, i.e., its reference to "laws," in addition to the Constitution. He also relied on numerous cases such as *Edelman* v. *Jordan*, 415 U.S. 651 (1974), which appeared to rest on the premise that § 1983 extended to statutory claims. Finally, he analyzed the legislative history as inconclusive, arguing that when Congress added the words "and laws" to § 1983's predecessor it might have envisaged only equal rights laws, or it might have had a broader purpose.

As for attorney's fees, having decided that the original challenge was a § 1983 action, Justice Brennan invoked the plain language of § 1988 to affirm the holding that an award was proper ("Since we held that this statutory action is properly brought under § 1983, and since § 1988 makes no exception for statutory 1983 action, § 1988 plainly applies to this suit.")

In a sharp dissent Justice Powell chastised the majority for deciding the matter "almost casually," and took issue with them both on legislative history and on the weight of prior decisions. Of particular significance for this hearing is his elaboration of the serious policy and programmatic arguments against extending § 1983 to all statutory claims. He noted that states and localities are engaged in "literally hundreds" of cooperative programs with the federal government. He emphasized the broad scope of grant programs, and predicted a vast increase in third party grant litigation.

Part of Justice Powell's objection to this impact of Thiboutot rested on federalism grounds: the spectre of the federal courts overseeing a broad range of state and local activities. He was also disturbed by the potential for a vast increase in damage claims against government grantees and their officials for violations of grant conditions. In the case of municipalities, he noted that the combined effect of Thiboutot and *Owen* v. *City of Independence* 100 S. Ct. 1398 (1980), could be strict liability for such violations.

B. The problems: Opinions on Thiboutot differ. Professor A. E. Dick Howard of the University of Virginia was quoted in Time Magazine as follows: "I have problems with taking a statute aimed at discrimination against blacks at a time when government didn't care about handing out benefits, and applying it 100 years later in a totally different age." On the other hand, the Harvard Law Review has gushed with praise: "At little expected cost, the Thiboutot holding offers the promise that all state and local officials will be both held accountable for past deprivations and deterred from committing future errors. These ends will be served best if Thiboutot plaintiffs are able to recover damages. Only then will effective compensation and deterrence take place", 94 Harv. L. Rev. 230 (1980). With respect, I think the Review is wrong.

As far as precedent is concerned, if the matter were as clear as the majority thinks, one wonders why the lower courts in scores, perhaps hundreds, of cases have engaged in painstaking analysis to determine whether a cause of action could be implied under a particular grant statute. Whenever the defendant was a state or local grantee it would seem that the plaintiff could simply have invoked § 1983 as an express cause of action. It is hard to believe that the lower courts, and litigants, simply missed the point. Indeed, the Court itself seemed to treat the issue as open in a 1979 case. *Southeastern Community College* v. *Davis*, 442 U.S. 397, 404, n.5 (1979).

There is also a serious separation of powers problem with the Thiboutot analysis. The Court's result takes away, retroactively, the remedial issue from the Congresses which have enacted some 500 grant programs. It is important to recognize that Congress has, on occasion, grappled with the question of third party challenges to grantee practices. The best example is the 1976 amendments to the State and Local Fiscal Assistance Act of 1972 (General Revenue Sharing.) Congress was dissatisfied with the Office of Revenue Sharing's administration of the program and with inconsistent court decisions on the ability of third parties to sue. The amendments establish a complaint mechanism, and provide for a private action as follows:

"Whenever a state government or a unit of local government, or any officer or employee thereof acting in an official capacity, has engaged or is engaging in any act or practice prohibited by this Act, upon exhaustion of administrative remedies, a civil action may be instituted by the person aggrieved in an appropriate United States district court or in a State court of general jurisdiction."

It is not clear why Congress bothered to provide for private suits if, as Justice Brennan said in Thiboutot, it was well aware of the Court's "many pronouncements on the scope of § 1983."

Thiboutot will almost certainly mean more third party suits, especially since attorney's fees are now available. The decision also opens up the relatively unexplored issue of damages in grant litigation. In his dissent, Justice Powell identified "unemployment, medicaid, school lunch subsidies, food stamps and other welfare benefits" as "particularly inviting subjects of litigation . . ." Since denial of a benefit essential to health or even to life itself could lead to serious and demonstrable harm his prediction may prove correct. In a somewhat similar vein, Professor Richard Cappalli has explored the possibility of "senior citizen torts," "children's dietary torts," and "poor people's torts." Federal Grants and the New Statutory Tort: State and Local Officials Beware!, 12 Urb. Law. 445, 452–53 (1980).

Whatever the meaning and impact of Thiboutot, it is clear that the decision is one more in a string of victories for plaintiffs, the net result of which is to increase substantially the bringability and the volume of third party grant litigation. For example, standing has virtually disappeared as an obstacle; and the jurisdictional amount has been abolished altogether in federal question cases. These developments have occurred at the same time that an increasing drum beat of criticism is being leveled at the grant system itself. The ACIR report is a good example of this criticism. Some of the critics have noted the role which litigation plays in contributing to these conditions and to the overall complexity of federal grant programs. Let us turn now from Thiboutot to a general consideration of the impact of third party litigation on the functioning of the grant system.

(2) Third Party Litigation—Good or Bad?

A. The case for: The arguments in favor of suits by third parties attacking the award or administration of federal grants are straightforward and somewhat self-evident. Justice Harlan's opinion in *Rosado* v. *Wyman*, 397 U.S. 397 (1970), suggests two purposes which such suits further: making certain that Congress' will is not ignored by grantees, and protecting the individual beneficiaries of federal aid programs. These justifications overlap, but can be examined separately.

Congress attaches conditions to federal aid in order to achieve what it perceives as national objectives. This is true both as to program specific conditions, which prescribe how the money is to be spent, and "cross-cutting" conditions, which further values such as non-discrimination or environmental protection. The very presence of any

string represents a potential displacement of the grantee's freedom to choose, in that the grantee might well not have chosen to follow the course of conduct "mandated" by the string. That is why Congress imposed the condition in the first place. There is thus an inherent potential for grantee evasion and disobedience of virtually all grant conditions. Among the examples of motivation might be a desire to cut costs, legitimate disagreement over how best to operate a program, or an outright desire to convert federal dollars to uses other than those intended by Congress. Allowing third parties to sue to enforce grant conditions is an essential tool to help keep the grantees honest.

It is also important to focus on the types of person likely to bring such suits. In many instances, they will be individuals or groups with little clout in the grantee's political processes. Examples include welfare recipients such as the Thiboutot plaintiffs, racial minorities, classes such as the handicapped, low income persons generally, or those promoting a locally unpopular cause such as environmental protection. (The typical case would be one in which the overwhelming majority of a community wants to build a federally aided facility, but a small group of environmentalists seeks to block it.) A fundamental premise which underlies much of the present grant system is that state and local governments cannot be counted on to respond adequately to such interests. Thus, third party grant suits represent one more instance of the federal courts serving as "the primary and powerful mechanisms for vindicating every right given by the Constitution, the laws, and treaties of the United States" *Steffel* v. *Thompson*, 415 U.S. 452, 464 (1974) (Brennan, J.).

B. The counter-arguments.

1 The traditional objections: Grant litigation has not lacked critics Dissenting in Rosado, Justice Black expressed a strong preference for the administrative process as the initial point for resolution of third party grievances against grantees. He noted that Congress had established detailed provisions for review by H.E.W. of state compliance. Thus, Justice Black saw third party grant disputes as strong case for invoking the doctrine of primary jurisdiction. A second objection to grant litigation might be based on federalism principles drawn from cases such as *Rizzo* v. *Goode* 423 U.S. 362 (1976). It may be undesirable for the federal courts to thrust themselves deeply into the everyday spending decision of states and localities.

Whatever force these objections may have, the Supreme Court has, explicitly and implicitly, rejected them in a virtually unbroken line of precedent stretching from 1968 to Thiboutot. However, one can outline a new and somewhat different set of objections to third party grant litigation. They are liable to be presented with considerable force as a full scale debate on the future of the grant system moves to center stage. These objections are rooted in, and are part of, a fundamental disenchantment with the system in its present form.

2. The grant system—out of control? The ACIR report makes a strong case for the proposition that the system is "overheaded." Problem of effectiveness, efficiency, costliness and accountability are widespread. The ACIR's gloomy assessment is shared, in varying degrees, by many others, including the Office of Management and Budget, the grantee community, and members of Congress.

The problems outlined by the ACIR are serious enough as is. They could lead to worse consequences. One, albeit unlikely, might be a complete dismantling of the grant system, given President Reagan's campaign pledge to "transfer, whenever possible, federal programs back to state and local governments along with the tax sources to pay for them. . . ." If this transfer takes the form of block grants, as seems more likely, the loss to current program beneficiaries may not be great. But if the federal government simply gives up programs, there is no guarantee that states and localities will assume them. In some cases constitutional and statutory limits on taxing and spending may prohibit it. On the other hand, if the system simply remains as it is, potential grantees may forego federal funding. After all, 80 per cent of all grant funds are in 25 programs. There are 524 other programs. There is, in fact, a growing tendency to stay away from federal funds because of the very kinds of problems the ACIR mentioned. If the critics' view of the system is accurate, sweeping reforms will be necessary. For purposes of this testimony, however, it is important to examine the extent to which, if any, grant litigation has helped create the present situation.

3. The courts as part of the problem: Some analysts have suggested that the rising tide of grant litigation is one of the causes of the current problems of the grant system. There are several ways in which third party suits might lead to the type of difficulties cited by the ACIR.

The most obvious is the costs of grant suits. There are the costs of defending the suit. Many such cases are, in effect, brought by independently financed advocacy groups who relish the thought of litigating at the appellate level, and ideally, in the Supreme Court. Thus the litigation, apart from its inherent complexity, is likely to be protracted. Many third party grant suits are brought to stop a federally funded project. Even if the defendant ultimately prevails on the merits, the project may have been substantially delayed. This can increase project costs dramatically. In many instances plaintiffs do win, or a settlement is reached. This can bring into play attorney's fees—since under Thiboutot, grant suits are now § 1983 suits—and, of course, the costs of compliance. These costs will vary widely, depending on the type of suit, but can be quite expensive.

Another aspect of the cost issue is the availability of damages from the grantee and its officials—an open issue after Thiboutot. The issue of damages in grant litigation is beginning to receive scrutiny. As noted, the Harvard Law Review favors damage awards. Professor Richard Cappali, in the article cited above, offers a diametrically opposed analysis. He argues that compensating those hurt by incorrectly administered grant statutes will divert scarce resources away from programmatic ends. He also views such awards as increasing the chances governments will opt out of grant programs.

Third party litigation also contributes to the complexity and difficulty of administering grant programs. Issues in the suit itself will frequently be baffling to officials not trained in the law. More serious are the effects of the pendency of the suit on the grantee's decisionmaking processes. Take the case of a nearly bankrupt city which decides to close a federally aided facility as part of an overall austerity drive. Minority plaintiffs sue to enjoin the shutdown on the ground that it will discriminate against them in violation of Title VI of the Civil Rights Act of 1964. If the district court grants temporary relief does the city then make other cuts, or hold its breath and hope to prevail on appeal, assuming the appellate court acts expeditiously? Suppose the district court denies relief, but the plaintiffs appeal. Again, what happens to the municipal budgetary process? One answer might be to rely on the advice of the relevant grantor agency. But the federal courts may not agree with the agency. In the widely discussed Hartford community development litigation the grantee defendants were in compliance with H.U.D. guidelines. Nonetheless, the district court and court of appeals overruled H.U.D.

Despite the possibility of such a result, grantees are likely to insist on elaborate guidance and written assurances of compliance before doing anything. To the extent that they have flexibility, they are likely to be exceedingly timid in exercising it. The following quotation from a Community Development case shows a rare judicial awareness of these problems:

"Allowing a private right of action under the HCDA could cause the Act to lose much of its vitality by making local officials apprehensive to applying for grants because of fears of costly lawsuits. Extensive litigation under HCDA may encourage communities to engage in low-profile activities aimed at minimal compliance with the program requirements, perfunctory environmental assessment and relocation assistance—in short, evading major problems and major controversies whenever possible. For these reasons, protracted litigation could spell serious delay and loss of an opportunity to improve this nation's communities." Montgomery Neighborhood Association v. H.U.D. (unpublished N.D. Ala., Nov. 21, 1978, slip opinion at 4, No. 77-54-N).

Third party suits also aggravate the accountability component of grant programs. Contemporary intergovernmental relations are already loaded with opportunities for finger pointing and buck passing. Litigation complicates the question of who's in charge here. Is it the feds, the grantee, or the judge?

Grant suits can also frustrate the achievement of program goals. Take the case of an economic development project involving federal, local, and private funds, which is attacked on the grounds of inadequate citizen participation. If the court agrees with the plaintiffs and grants an injunction, the resultant delay will drive up costs. The public funds may no longer be sufficient. The developer may pull out. Which would Congress have preferred: the project without the participation, or the participation without the project? The court is not in any position to make such tradeoffs. It must enforce the grant conditions as they are written.

In sum, third party grant suits may well be a major component of what is wrong with the grant system. It is naive for their proponents to trumpet "the promise of Thiboutot" without recognizing the negative consequences. It would be equally naive for grantees, and their allies, to assert that all of their grant related activities should be shielded from judicial review in the interest of a "smoother" system.

IV. THE CONGRESSIONAL RESPONSE

A. Overturning Thiboutot: The role of the courts in the grant system is certain to come under close scrutiny in the Ninety-Seventh Congress. One of the first issues, of course, will be whether to overturn the Thiboutot decision. Senator Orrin Hatch has filed legislation to do so. (S. 554) As the analysis presented in the first half of this testimony suggests, there are a number of excellent reasons to enact it. Congress may simply view the holding that all grant suits are § 1983 suits as wrong. Alternatively, it may be apprehensive about Thiboutot's possible impacts on the grant system, and conclude that one need not wait for them to materialize before acting. Overturning the decision does not present any far reaching constitutional issues of Congress' power over the jurisdiction of the federal courts. Thiboutot involved interpretation of a federal statute, in particular, its relationship to other federal statutes Indeed, Justice Brennan suggested that those unhappy with the decision address their arguments to Congress.●