S. HRG. 99-957

# MUNICIPAL LIABILITY

## HEARING

BEFORE THE

## SUBCOMMITTEE ON THE CONSTITUTION

OF THE

## COMMITTEE ON THE JUDICIARY
## UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON

## S. 436

A BILL TO AMEND SECTION 1979 OF THE REVISED STATUTES (42 U.S.C. 1983), RELATING TO CIVIL ACTIONS FOR THE DEPRIVATION OF RIGHTS, TO LIMIT THE APPLICABILITY OF THAT STATUTE TO LAWS RELATING TO EQUAL RIGHTS, AND TO PROVIDE A SPECIAL DEFENSE TO THE LIABILITY OF POLITICAL SUBDIVISIONS OF STATES

SALT LAKE CITY, UTAH
FEBRUARY 12, 1986

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# MUNICIPAL LIABILITY

WEDNESDAY, FEBRUARY 12, 1986

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
*Salt Lake City, UT.*

The subcommittee met, pursuant to notice, at 9:30 a.m. in the City and County Building, Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Staff present: Randall R. Rader, chief counsel and staff director.

## OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. It is a pleasure to welcome you to this hearing of the Senate Subcommittee on the Constitution. The subcommittee will today begin an investigation of the threats to towns, cities, counties, and States posed by extensive liability under 42 U.S.C. 1983.

To put this hearing in context, it would help to review briefly, the history of this law. On March 23, 1871, President Grant called upon Congress to enact legislation to counter many of the abuses of the Klu Klux Klan in the Antebellum South. Although swiftly enacted, the 1871 act, now cited as 42 U.S.C. 1983, was rarely used for nearly a century. In 1961, the Supreme Court broadly construed the statute to permit Federal court actions even where adequate State remedies exist. In the case of *Monroe* v. *Pape,* 365 U.S.C. 167, this case revived the statute as a protection for individuals whose constitutional or civil rights may be violated under color of State law. This beneficial aspect of the revival of the 1871 act was clouded, however, by a host of unanticipated side effects.

The first side effect of a broad reading of section 1983 was a dramatic increase in the Federal court caseload. Between 1976 and 1984, the number of section 1983 suits increased approximately 110 percent. This single section of the United States Code accounts for 28,000 cases annually or 10 percent of the entire Federal caseload. Chief Justice Burger and Justice Powell explain the significance of this unprecedented increase in section 1983 cases.

This litigation is a heavy burden on the Federal courts to the detriment of all Federal court litigants, including others who assert that their constitutional rights have been infringed.

This burden is exacerbated by large categories of section 1983 litigation bearing very little relation to traditional concepts of civil rights. The lofty concept of civil rights is diluted by suits contend-

ing that a student's grade point average was wrongfully reduced from 95.478 to 95.413 out of a 100, or that a pet owner's dog was wrongfully detained by the local dogcatcher. Moreover, the Department of Justice estimates that over 18,000 section 1983 suits, 64 percent of the total, are filed by prisoners. One imprisoned felon in Missouri filed over 500 cases in a 5-year period, an average of 2 per week. This type of litigation hardly advances the civil rights intended to be protected in 1871.

Perhaps the most disturbing side effect of the broad reading given to section 1983 however, has been the threat to State and local governments. In 1980, the Supreme Court ruled that a municipality is absolutely liable for violations regardless of the good faith of its officers. *Owen* v. *City of Independence,* 445 U.S. 622.

In addition to serious arguments that this ruling is inconsistent with the legislative history of the 1871 act and Supreme Court precedent, the rationale that municipal liability will deter constitutional violations does not apply where the municipality is acting with good faith that its conduct is legal.

Nonetheless, one Utah town with 60 registered voters was recently held liable for $2.7 million in damages in a dispute over construction permits. In the neighboring State of Arizona, the town of South Tucson was forced into bankruptcy after losing a multimillion-dollar action involving a policeman's use of force. An alternative to crippling or fatal liability is insurance, but in the face of this litigation landslide, municipal liability insurance rates have recently increased 200 to 700 percent. According to news accounts, some Utah towns will have to forego street improvements or impose hiring freezes to meet the hikes in liability insurance caused by lawsuits that are difficult to characterize as vindicating vital civil rights.

In an effort to focus the protections of section 1983 on deprivations of constitutional rights dealing with equality and human dignity and to correct some abuses of the 1871 act, I have introduced S. 436. Now this legislation attempts to accomplish this objective in several ways:

It would limit this vital civil rights action to violations of laws guaranteeing equal rights and thus relieve municipalities from potential liabilities for violations of the Federal Noxious Weed Act of 1974 or the Wild Horse and Burro Act or hundreds of other obscure Federal Laws.

It would restore a good faith defense for municipalities.

It would require exhaustion of adequate State administrative and judicial remedies as a precondition for bringing a Federal court action.

It would establish a uniform statute of limitations for section 1983 actions.

The suggestions embodied in S. 436 may not be the only worthy recommendations to restore section 1983 to its intended purposes. For instance, the subcommittee may wish to consider limiting punitive damages to truly egregious cases or eliminating the act as a basis for prisoners' claims. In any event, the testimony of today's expert witnesses will be important to the Senate Judiciary Committee's review of this issue. We look forward to their advice.

During the last several years I have traveled around the State and met with my advisory groups, which are basically made up of local government leaders all over the State. I found that this was the No. 1 issue in most towns and municipalities. They are concerned and have been frightened by the fact that some of them cannot afford liability insurance and that liability insurance rates have really escalated to such an unprecedented rate. It's not just here. There are many other areas of law in malpractice which are a perfect illustration as well.

Doctors are not practicing their profession because they just plain do not want to pay $60,000 to $90,000 a year in malpractice insurance. There are many inequities and difficulties that we hope we can resolve. I am not a great believer that the government can resolve all difficulties, but I am a great believer that something has to be done with regard to these section 1983 cases. We are hopeful that the testimony that will be presented here today will help us to understand what needs to be done in these cases.

[Text of S. 436 follows:]

II

99TH CONGRESS
1ST SESSION

# S. 436

To amend section 1979 of the Revised Statutes (42 U.S.C. 1983), relating to civil actions for the deprivation of rights, to limit the applicability of that statute to laws relating to equal rights, and to provide a special defense to the liability of political subdivisions of States.

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IN THE SENATE OF THE UNITED STATES

FEBRUARY 7 (legislative day, JANUARY 21), 1985

Mr. HATCH (for himself and Mr. THURMOND) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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# A BILL

To amend section 1979 of the Revised Statutes (42 U.S.C. 1983), relating to civil actions for the deprivation of rights, to limit the applicability of that statute to laws relating to equal rights, and to provide a special defense to the liability of political subdivisions of States.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 1979 of the Revised Statutes (42 U.S.C. 1983) is amended by striking out "and laws" and inserting in lieu thereof the following: "and by any law providing for equal rights of citizens or of all persons within the jurisdiction of the United States".

SEC. 2. Section 1979 of the Revised Statutes (42 U.S.C. 1983) is amended by inserting "(a)" before "Every" and by adding at the end thereof the following new subsections:

"(b) In any action brought under this section, damages shall not be awarded against any government entity if the court finds that the officials thereof were acting in good faith.

"(c) An action brought pursuant to this section shall be forever barred unless the complaint is filed within 18 months after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within 9 months after the disability ceases.

"(d) In an action brought pursuant to this section, the Federal Court shall not have jurisdiction unless the person filing such action has exhausted all administrative and judicial remedies available. Such person shall not be deemed to have exhausted all remedies available, within the meaning of this section, if he has the right under any regulation or law of the State to raise, by any available procedure the question presented.".

Senator HATCH. Our first witness will be Utah's attorney general, David Wilkinson.

I might say at the outset of this hearing that the subcommittee will make all written statements a part of the record. Therefore, you do not have to read your statements. In fact, we prefer that you summarize them. This will enable each of the witnesses to condense his or her remarks to approximately 10 minutes. This will also permit the subcommittee to pose questions to each of the witnesses.

Attorney General Wilkinson, we are happy to have you here today.

**STATEMENT OF HON. DAVID WILKINSON, ATTORNEY GENERAL FOR THE STATE OF UTAH, ACCOMPANIED BY CARLIE CHRISTENSEN, STAFF LAWYER**

General WILKINSON. Senator Hatch, I'm honored to have been invited once more to appear before you as chairman of this subcommittee of the Judiciary Committee. I'd like to introduce to you Carlie Christensen, a lawyer on my staff who assisted me with my written preparation, which I will not read, or at least will not read all of.

You have noted that I have been before you several times before in Washington. One of those times was a hearing just on section 1988. The earlier time was a hearing on section 1983, but you may remember that even at that hearing I commented on the fact that section 1988 was the mechanism which fueled section 1983 litigation. And that certainly many, perhaps all of the abusive, outrageous section 1983 claims could be avoided if we can do something about section 1988.

Now, this is a hearing on section 1983, may I just give you one more horror story about section 1988 before getting into the subject.

Senator HATCH. Yes.

General WILKINSON. I understand that Senator DeConcini made an attempt to be here, but obviously there were reasons he could not be here. But in his home State of Arizona, within the last 6 or 12 months, I have recently learned there was a lawsuit where the plaintiff was the ACLU, and it was a lawsuit that was brought by the prison project of the ACLU. Now, the prison project of the ACLU is a nationwide undertaking, and they won at least part of their section 1983 case in Arizona. It had to do with overcrowding in the prison there, and received an award of $475,000.

Now, the State of Arizona, through their solicitor general in the Arizona attorney general's office, who is very close to Senator DeConcini incidentally, advises me that they are positive, although they can't prove it, that a good part of the research that went into that award of $475,000 was research that had been conducted by that prison project for all of its cases, nationwide. And the possibility for duplication of awards is just too apparent to overlook.

So the next time you talk to your colleague about section 1988, you might ask him to speak with the Arizona attorney general or their solicitor general about that recent award of almost a half million dollars.

Your opening statement Senator, has stolen the thunder from the first two or three pages of my prepared statement. I suspect one of the reasons for that, is that my speech writer and your speech writer both had a common source, an article that appeared in the Cumberland Law Review, which——

Senator HATCH. I am sure you have plenty of thunder.

General WILKINSON. That's a very fine article incidentally. But let me get to the specifics of S. 436. The amendments to section 1983 contained in S. 436, will not, in our view, compromise the original intent of section 1983, but will further its purpose while eliminating many of the unintended and adverse side effects which have resulted from the court's expansive interpretation of the act. The amendments you propose will provide a degree of certainty and uniformity to section 1983 cases which will free the court system from the burden of resolving each case upon its unique set of facts and will deter fruitless litigation over issues which can be settled by congressional determination.

Finally and perhaps most importantly, the amendments will ease the liability stronghold placed on State and local government officials by limiting Federal judicial oversight of programs administered at the State and local government level and by eliminating the undesirable consequence of the *Owens* decision to which you referred, which requires local officials to anticipate the ad hoc creation of constitutional and civil rights by the Federal judiciary.

In Utah, section 1983 has been used as a basis for litigating claims primarily in the areas of public entitlement programs, prison conditions, and constitutional challenges to State law. More recently section 1983 in Utah has been advanced as a basis for challenging the management and operation of various social service programs administered by State and local governments. The enhancement of the proposed amendments in your bill, would substantially impact the amount of litigation in these areas, and indeed would diminish that litigation.

For example with respect to public assistance programs, the wrongful or erroneous denial of benefits had been equated with a violation of Federal laws, specifically the Social Security Act, and consequently a violation of section 1983.

Once such a violation is established, the Federal court can order various forms of relief, including restoration of benefits, modification of State policy and procedures, notification to all members of the plaintiff class who were wrongfully denied benefits and the payment of attorney's fees.

The Federal court, however, is precluded by the 11th amendment from awarding benefits to plaintiffs on a retroactive basis. The amendments to section 1983 you propose, would affect this scenario in two respects:

First, by modifying the laws language, contained in section 1983 to read: "and by any law providing for equal rights." The Social Security Act could no longer be used as the means of establishing a violation of section 1983. And thus any injury sustained as a result of violating the act could be redressed by the Federal courts without the requisite finding of a civil rights violation and more importantly, without the necessity of awarding attorney's fees.

Second, an amendment to section 1983 requiring the aggrieved assistance recipient to exhaust his or her State remedies would have the salutory effect of allowing the State the first opportunity to correct any error which it might have made in the administration of the program, or the determination of eligibility, and at the same time afford the assistance recipient, perhaps the most significant form of relief, the retroactive payment of benefits.

The Supreme Court, Senator Hatch, has repeatedly invited Congress to address some of the failings of section 1983. I believe the proposed amendments in your bill are responsive to some of those concerns. Our office strongly endorses S. 436 and we applaud your efforts and the efforts of the subcommittee to provide meaningful legislative reform in a very complex and troublesome area of the law. And I might add that last sentence applies to your efforts to do something about section 1988 as well.

Senator HATCH. Thank you. In his dissent in the *Thiboutot* case, Justice Powell predicted that section 1983 claims would be appended solely for the purpose of getting attorney's fees, under 42 U.S.C. 1988. You mentioned that. I am aware that the National Association of Attorneys General has completed a study which includes examples of where attorney's padded their meritorious State law complaints with weak or meritless civil rights claims in order to obtain additional fees.

Have you seen evidence of this as well?

General WILKINSON. Before we respond to that, may I just say about the National Association of Attorneys General report. We are a very diverse group. Actually 55 attorneys general from the States and territories. And politically we are very diverse. There is no one issue which brings us together more than the issue of section 1988, and that is evident from the report which you have and Mr. Rader has examined carefully, and I'm sure you have too, drafted really by a conservative attorney general from the State of Washington and his staff and also a very liberal attorney general, General Bellotti from the State of Massachusetts and his staff.

To answer your question specifically, I'd have to ask Ms. Christensen if in her experience that is happening in Utah. I know this happened in many other States.

Senator HATCH. You might also want to give us your opinion about the changes in the Thiboutot doctrine, envisioned by S. 436.

Ms. CHRISTENSEN. I'll be very candid, Senator. I think the experience in Utah in some respects pales by comparison to what goes on in many other jurisdictions. We have certainly seen isolated instances of the plaintiffs bar padding some of their complaints with pendant State claims in order to receive the benefit of section 1988.

However, I don't see the abuses perhaps in our State, that may exist across the country. I certainly think that the proposed amendments will cure some of the problems which were the result of the interpretation the Supreme Court gave section 1983 in the *Thiboutot* case.

Senator HATCH. Thank you. As we mentioned earlier, the Supreme Court on the *Owen* case denied municipalities any good faith defense. Doesn't *Owen* in effect, require municipal officers to predict the outcome of court decisions?