MUNICIPAL LIABILITY UNDER 42 U.S.C. 1983

HEARINGS

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

S. 584, S. 585, and S. 990

MUNICIPAL LIABILITY UNDER 42 U.S.C. 1983

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MUNICIPAL LIABILITY UNDER 42 U.S.C. 1983

WEDNESDAY, MAY 6, 1981

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 2:20 p.m., in room 2228, Dirksen Senate Office Building, Senator Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senators Thurmond and Grassley.

Staff present: Steve Markman, general counsel; Peter Ormsby, professional staff member; and Kim Beal, assistant clerk.

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

Senator HATCH. We will open this hearing of the Judiciary Subcommittee on the Constitution.

I apologize, to begin with, for being late. I am chairman of the Labor and Human Resources Committee—the full committee—and we have just been marking up six bills. We started at 9 o'clock this morning, and all amendments were hotly contested. We reported five of the six out, and the sixth one we failed to report on a vote to 8-8. So you can see that when I say things are hotly contested they really are. We just finished that committee markup, and it went longer than we thought it would go.

The purpose of this hearing is to consider the extent of municipal liability under the Civil Rights Act of 1971, now 42 U.S.C. 1983. The Civil Rights Act of 1971 has been extremely important in providing a remedy for individuals whose constitutional or civil rights have been violated under the color of State law.

At the outset of these hearings, I want to reiterate my strong commitment to the enforcement of the constitutional rights of all citizens.

However, I do feel that litigation under section 1983 has evolved in some ways to the strong detriment of State and local governments while doing little or nothing to further individual constitutional or civil rights.

Even a cursory observation reveals that many of our cities find themselves in precarious financial situations. I have received a great deal of bipartisan support for my bills, S. 584 and S. 585, from State and local government officials who claim that section 1983 litigation is creating an increasing drain on their treasuries and lessening their ability to serve the public. During the course of

these hearings, we will hear testimony regarding the burden that section 1983 litigation is placing on these municipalities.

The Civil Rights Act of 1971 was passed during the post-Civil War reconstruction era to protect newly freed blacks from violations of rights secured by the "Constitution and laws." The act was specifically designed to counter the activities of the Ku Klux Klan and was formerly referred to as the Ku Klux Klan Act.

Two years ago, in *Monell* v. *New York Department of Social Services,* at 436 U.S. 658—a 1978 case—the Court overruled a nearly two-decade-old precedent that local government units could not be held liable in damages for violation by their employees of a person's civil or constitutional rights.

I believe that municipalities are proper defendants in section 1983 cases, and I do not wish to see a return to the pre-Monell status of municipal immunity, but recent Supreme Court interpretations combined with the effect of the Civil Rights Attorney's Fees Awards Act of 1976 have created a situation in which municipalities are burdened with section 1983 litigation in ways which I feel are not justified by important policy considerations.

Last summer, in *Maine* v. *Thiboutot,* the Supreme Court interpreted the "and laws" language in section 1983 to mean that local governments were liable for violations of any Federal laws. Although the ultimate impact of this decision cannot be fully determined, I cannot believe that the 42d Congress, in passing the Ku Klux Klan Act, intended to make municipalities liable for Federal statutes such as the Federal Insecticide, Fungicide, and Rodenticide Act; the Federal Noxious Weed Act of 1974; and the Wild Free-Roaming Horses and Burros Act. I feel that S. 584 would solve many of the problems created in the *Thiboutot* decision.

During the hearings, we will consider whether exceptions should be made in S. 584 to make municipalities liable, at least for equitable relief, for statutes aiding impoverished individuals such as the Social Security Act.

In *Owen* v. *City of Independence,* the Court ruled that cities shall not have a "good faith" defense in section 1983 actions. This means that local governments are liable for violations of constitutional law which have not been decided yet. S. 585 would provide cities with a "good faith" defense in section 1983 actions.

The subcommittee will also want to consider the implications of *Owen* on local governments and whether language should be added to S. 585 to provide equitable relief in such cases.

I believe that section 1983 litigation is increasingly immobilizing our municipalities. The evolution of section 1983 has occurred with little congressional response. These important hearings will consider the status of section 1983 litigation, including policy considerations which the Supreme Court has neglected in its recent interpretations, and possible approaches to ease the burden on State and local governments while insuring the important rights of individuals.

[S.584 and S. 585 as introduced by Senator Hatch and S. 990 introduced by Senator Mathias follow:]

97TH CONGRESS
1ST SESSION

S. 584

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.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 26 (legislative day, FEBRUARY 16), 1981

Mr. HATCH 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.

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".

Senator HATCH. Thank you, Senator Thurmond.

Today, we have two witnesses we will call on—Prof. Charles Abernathy and Prof. Steven H. Steinglass—and then a panel of city attorneys.

At this time, we will call Prof. Charles Abernathy as our first witness.

Professor Abernathy is an associate professor of law at the Georgetown University Law Center. He teaches civil rights law and has written a casebook on that subject.

At the same time, perhaps we can have Steven H. Steinglass come and take his position beside Professor Abernathy.

Steven H. Steinglass is an associate professor of law at the Cleveland-Marshall College of Law, Cleveland State University. Professor Steinglass is representing the National Legal Aid and Defender Association.

We are happy to have both of you gentlemen and experts with us today, and we certainly look forward to hearing what you have to say.

I have one problem. I have to leave for about 10 minutes. Because of the conflicts in schedules and five committees that I am on, I have no choice other than to leave for about 10 minutes. Rather than delay this any further, I would like you to begin. If you finish, Professor Abernathy, then, Professor Steinglass, I would like you to take up, and then I will come back with some questions. I will try to be back within 10 minutes. But, if you do not mind, I would like to start so that we can get this matter going and then come back with the questions that I will have.

Professor Abernathy?

STATEMENT OF PROF. CHARLES ABERNATHY, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, D.C.

Mr. ABERNATHY. Thank you, Senator.

I am appearing here today in a nonadversarial role. I do not represent any organization, and my views, of course, do not necessarily represent those of Georgetown University Law Center.

I have prepared a written statement which I have given to the subcommittee, but I would like today to speak a little more simply on the issues which are presented here because they are very complex, and even speaking simply I think that the subcommittee will be able to discern the problems that face it with these two bills.

S. 584 AND LAWS

Let me begin with S. 584, which seeks to change the "and laws" language of section 1983 so that only equal rights laws violations would be covered by that statute, not violations of all Federal/State regulatory laws.

JURISDICTION

Some background is necessary here. Until 2 years ago, this entire issue was a minor jurisdictional problem. Whenever a plaintiff wished to sue under one of these Federal/State regulatory statutes,

it simply amended or appended to a constitutional claim this Federal statutory claim.

The problem was that the Federal statutory claim usually could not meet the $10,000 amount requirement of section 1331. Section 1983 suits for constitutional claims, however, did not need to meet a dollar amount requirement under section 1343. Therefore, the pendent jurisdiction technique was really a way to get these Social Security Act cases and Federal/State regulatory loss cases into Federal court. This pendent jurisdiction technique was approved by the Court in *Hagans* v. *Lavine.*

The "and laws" language came up in a slightly different guise in these cases. It was basically seen as a way to avoid even using the pendent jurisdiction technique employed in *Hagans.*

The claim was that under the jurisdictional counterpart to section 1983—that is, section 1343 of title 28—that Social Security Act cases were equal rights laws cases, and so that no dollar amount requirement should be necessary for them at all. The Court rejected this approach in *Chapman* v. *Houston Welfare Rights Organization.*

THE MAINE DECISION

There is a second element in this background, and that is the *Maine* decision. The *Maine* case read the "and laws" language of section 1983, as opposed to the equal rights laws language of section 1343—the jurisdictional provision—to include these other statutes, such as the Social Security Act cases, and there resulted an anomaly.

There was a Federal cause of action through section 1983 for these kinds of cases, but there was no Federal jurisdiction under section 1343 to hear them. Pendent jurisdiction cases, however, could be maintained.

SECTION 1331 AMENDED

Third and finally in this background, Congress last year moved to eliminate the anomaly by amending section 1331 to remove the dollar amount entirely for Federal questions. Now, section 1983 cases under the "and laws" language can be brought in Federal court without regard to dollar amount.

This is the background of problems into which S. 584 steps.

I would like to outline three concerns—which I think the subcommittee will hear—raised about S. 584. These are: First, what I shall call the cause of action problem—it is basically a concern that plaintiffs have—second, I will discuss the damages problem, a defendant's concern—and, third, I will discuss the attorney's fees problem, which is one for both plaintiffs and defendants.

IMPLIED CAUSE OF ACTION

Let me begin with the cause of action problem. Persons who support the decision in *Maine* v. *Thiboutot* are pleased because now they have a secure Federal statutory claim for cases which formerly were brought only under pendent jurisdiction.

One might wonder why these persons would be afraid of S. 584. The argument goes, I suppose: Why do they not simply revert to

their *Hagans* v. *Lavine* approach where they used pendent jurisdiction, and they can still bring these kinds of cases—there is no need to worry about S. 584?

Well, I will have to go back to one of my background points here. The problem is that section 1331 has been amended to do away with the dollar amount requirement, and therefore there is no occasion for a plaintiff to use the pendent jurisdiction technique of *Hagans*.

Again, one might ask: So why are plaintiffs worried? Why do they not simply sue on that other Federal regulatory statute itself under section 1331 and they are in Federal court? That is precisely the problem which concerns the plaintiffs.

The pendent jurisdiction technique obscured the fact that the Court in these cases was really implying a private cause of action for what were essentially regulatory or governing-of-State-action type statutes. The Court rather blithely treated the problem of whether plaintiffs could actually sue to enforce these statutes.

Since these cases were first decided—and *Rosado* v. *Wyman* was the first one which really faced the issue and discussed it in some detail—the Court has decided *Cort* v. *Ash*, which makes it plain that Federal courts in the future will be much more reluctant to imply causes of action for private persons under these Federal regulatory statutes, and, of course, that is precisely what the plaintiffs fear will happen if S. 584 is passed.

They are afraid that their Federal regulatory statute claims, now stripped of the veneer of the constitutional claim under the *Hagans* approach, will have to face the *Cort* v. *Ash* test, and they are afraid the Court will not imply a private right of action. They will, in short, be out of court.

I personally think that this would not happen. If I were on the Court, I would not rule that way. It seems to me *Rosado* v. *Wyman* settles the issue. But I can see why plaintiffs are worried. They do not want to face the problem at all.

THE PROBLEM OF DAMAGES

Second, let me discuss the damages problem, a worry particularly for defendants in these cases. Under the *Hagans* approach of pendent jurisdiction, defendants essentially did not have to worry about damages. Relief primarily was injunctive relief, and that was all that the courts talked about.

The principal cases reaching any issue concerning monetary liability, such as the *Edelman* case, held that in the context of States, sovereign immunity protected the State. That would not protect local governments, of course, but the Court has never faced that issue.

The problem for municipalities and other defendants under the "and laws" language insofar as it leads us to a damage remedy under section 1983 is that they will now be liable for monetary relief, for which previously under the *Hagans* approach they would not have been liable.

Notice that my friend today who is speaking here with me notes that there may be APA-like review—that is essentially what some persons argue for—for these regulatory statutes if 1983 is read to include the "and laws" language. But even under APA-like review

there would be no damage remedy, and that is really what bothers local governments.

And, as Senator Hatch mentioned earlier, the theory is that damages can rob local governments of the money they need to carry out important goals, often goals which are even related to the very statutory program the Federal Government has in mind.

THE PROBLEM OF ATTORNEY'S FEES

Third, let me reach the issue of attorney's fees. Of course, if a suit can be brought under section 1983 and its "and laws" language, then attorney's fees will be available under section 1988, the Attorney Fees Award Act of 1976.

To cities, this is just one more form of monetary liability. To plaintiffs, on the other hand, it makes cases possible by making it possible to secure an attorney.

I would just like to add as a note here that the constitutionality of extending the attorney's fees section to claims brought under the "and laws" language of 1983 has not been settled. That was the *Maher* v. *Gagne* case which was decided last term reserving that issue.

RECOMMENDATIONS ON S. 584

Let me attempt to resolve some of these concerns that I have pointed out with respect to S. 584. I will consider three possible routes that the subcommittee might want to take.

First, let me consider that the subcommittee may want to do nothing for a while. It may simply wait. The *Maine* decision is unclear. The Court may, for example, restrict its decision to Federal laws—"and laws"—for which the Court has already implied a private right of action. If that is, in fact, the way it interprets the "and laws" language, then the decision in the "Maine" case becomes much less important because it is not then a broad APA-like review provision.

If the Court does not take that route, it seems to me that the subcommittee may later want to do something in this area. I think it is unlikely that Congress would want to allow APA-like review of all Federal statutes.

If we look back over the last 10 or 15 years, this is precisely the issue that Congress has tried to avoid when it failed to put any provision into most of these statutes concerning private rights of action. Congress simply did not want to face that issue.

If the Court takes the wide reading of *Maine*, Congress now would be forced to settle that issue, and I take it that the subcommittee would have to act in some way.

PROVIDE FOR SOCIAL SECURITY ACT CASES

Second, if Congress does proceed, it seems to me necessary that the Congress will certainly want to permit some change in the language now proposed by the subcommittee so that Social Security Act cases and others of those previously recognized benefits-type cases allowed under *Hagans* will also be pursuable now under section 1983. This would, after all, only preserve the status quo.

It seems to me obvious that one of the things Congress had in mind when it amended section 1331 was to permit such cases, and such cases were, of course, permitted under *Hagans*.

So, if we simply want to preserve the status quo, some provision ought to be made for Social Security Act cases and beneficiary-type cases. I think there are sound policy reasons for this as well since, of course, these are the kinds of cases in which beneficiaries depend very greatly upon the Federal Government and prompt review in a judicial forum of any denial of benefits would be especially helpful to protect these persons.

The other Federal regulatory statutes, such as the Rodents Act mentioned earlier, seem to me to implicate beneficiary interests less severely.

POSSIBLE LIMITS ON RELIEF

Finally, the subcommittee may want to consider, along with its "and laws" changes, limiting the relief granted in these cases to injunctive relief. As I mentioned earlier, the Social Security Act cases which have proceeded are primarily injunctive relief cases, and in light of the damaging liability which would be occasioned by granting monetary relief, granting injunctive relief alone would also preserve the status quo.

With respect to attorney's fees, it seems to me that there also may be something which can be done other than changing the "and laws" language, as is proposed in S. 584. For example, one of the problems here is that municipalities feel that lawyers tend to run up their fees excessively.

OFFERS IN JUDGMENT

One of the possible solutions here is to amend section 1983, or perhaps even the Federal Rules of Civil Procedure, to overrule an earlier Supreme Court decision which would permit offers in judgment by defendants so that attorney's fees would not continue to accrue after a reasonable settlement had been offered.

S. 585—LIMITED MUNICIPAL IMMUNITY

Let me now turn to S. 585 and the good faith immunity which is proposed for municipalities. This bill essentially adopts Justice Powell's view in the *Owen* case. I think one of the reasons there may be some controversy over this provision is that there is much misunderstanding about precisely what the good faith immunity is.

The phrase "good faith" is, in fact, a misleading name for this immunity. There are actually two elements to the good faith immunity such as the Court recognized in *Wood* v. *Strickland*. One is the subjective good faith element.

Senator HATCH. Professor Abernathy, the five bells have rung. We have a rollcall vote. I am going to run over and vote. I have asked Senator Grassley to leave earlier so he can come back and continue to take your testimony.

I would like you to continue, and we will just be back as soon as we can. But if you will continue, and then, Professor Steinglass, if you will continue right afterwards, we will appreciate it.

Mr. ABERNATHY. Certainly.

I had just outlined the good faith element in the good faith immunity. That demands, really, that defendants not have acted in a belligerent or bad faith way in harming plaintiffs. There is also an objective element to good faith. That is, defendants are charged with knowing settled constitutional law.

ONLY APPLICABLE WHERE LAW UNSETTLED

So the application of a good faith immunity in the municipal areas such as proposed in S. 585 is really a very narrow immunity. Immunity would only apply when there is this subjective good faith and, most importantly, objectively the city had acted in an area where constitutional law was unsettled.

This is a very narrow immunity because, for the most part, constitutional law contains quite a few settled ideas, despite what it may appear at times. For example, there would be no immunity, I assume, in a situation where a city-owned gas utility cuts off service to persons without a hearing because it is already settled that that is a due process violation.

Similar ideas would apply in the racial discrimination area where ideas are faily well settled and also in first amendment cases where we have a fairly good collection of cases setting out free speech principles.

In short, S. 585 is by no means an absolute immunity for municipalities.

TECHNICAL PERFECTIONS

Let me suggest, before I go on to examine the merits and concerns of the provision, that there should be some technical perfections made on this bill so as to bring in line with the express intentions of its author.

As it is now drafted, it defeats an entire suit—damages as well as injunctive relief. As I read the floor statement, the author's purpose is only to bring this immunity into line with the official immunities recognized for individual officers, and that, of course, is a good faith immunity only against damages.

The reason for this is obvious: If there were complete immunity, there could be no injunctive relief even to stop the threat of continuing violations.

This perfection could easily be taken to the bill by simply adding the language "for damages" so that S. 585 would read, "no action for damages shall be maintained."

Let me suggest another technical perfection. The bill uses the phrase "political subdivision," which I think is probably too vague a term. As the subcommittee is aware, local governments are covered under Section 1983, but State and State-level agencies are not. The problem is discussed in the *Lake Country Estates* case decided by the Supreme Court a few years ago.

"Political subdivision," the language used in 585 now, may be read in the future impliedly to bring some of these now uncovered State-level agencies under section 1983 and to leave them only with good faith immunity. I assume that that would not be the author's intent—to expand section 1983—and in line with preserving the author's intent I would suggest that that technical perfection be

made. Alternative words could be something along the lines of "Governmental units covered under subsection A." I think that would take care of the problem.

Now let me turn to the merits of S. 585. I find the reasons given for this bill to be somewhat persuasive, given the very narrow scope of the immunity involved—that is, an immunity only where constitutional law is unsettled.

DETERRENT EFFECT

First, I value very greatly under section 1983 the deterrent effect which the statute creates, and where constitutional law is unsettled it seems to me that there is not a very great deterrent effect in holding a municipality or defendants liable except to the extent that we deter local governmental units from the very act of governing. I think the act of governing is a strong governmental interest and should not be so constricted.

It also seems that in this situation the cost to the city from guessing wrong may be very high—as I shall discuss shortly—and so it may be that the balance of equities when the law is unsettled calls for the city to be protected while it goes about the task of governing.

EFFECT ON LAW REFORM

I am also concerned that failure to recognize local governmental immunity may also hurt constitutional law reform in this area where, by definition, constitutional law is unsettled. If courts are aware that every ruling for plaintiffs will involve dollar liabilities, the courts may be very reluctant to extend constitutional protections so as to bind cities in ways which they were not bound previously.

This problem has arisen before in the context of the good faith immunity for individual officers. I call your attention to the *Wood* case where the Court refused to extend an absolute liability to school officials. The *Wood* case was followed shortly afterwards by the Supreme Court's decision in the *Ingraham* case where the Court placed very few restrictions on school officials in dealing with their students. It seems to me those two cases must be looked at as a pair.

EFFECT ON DAMAGES

Similarly, refusing to recognize an immunity may also skew the Court's rulings on the measure of damages in section 1983 cases. The Court has already taken a fairly wary look at the issue of damages in the *Carey* case, and I am afraid if municipalities were liable under the "and laws" provision the Court might go out of its way to make the damages issue much narrower than it is already due to the *Carey* decision.

EFFECT ON VICTIM

Despite these agreements with the principles underlying S. 585, I nevertheless have some trouble resolving these issues because the application of the immunity will necessarily make the victim bear

the entire cost of the city's wrong. There will be no spreading of these costs throughout the city's tax base.

CLARIFYING WHEN MUNICIPALITY LIABLE

Let me therefore suggest several alternatives which may have less all or nothing consequences. First, let me recall to the subcommittee's attention that municipalities are not always and automatically liable for all the unconstitutional or statutory violations of every individual employee.

Only when an official policy or custom is made at the city level so that the Court can fairly assume that the city itself should be responsible will a city be held responsible under section 1983. As you might imagine, this is a fairly vague line, and one of the things the subcommittee might want to consider is removing this vagueness.

Senator Mathias has proposed a bill, this Congress labeled S. 990, which would accomplish precisely this goal. If some certainty were introduced into municipal liability, such as S. 990 would do, then the city would be able much better to plan its liability to take steps to deter liability by its employees.

INSURANCE

In short, the city could undertake two very important tasks: one, risk management; and, two, and relatedly, find an insurer. The reason no insurance policies are available today is that insurance underwriters are extremely reluctant to step into an area where the municipality's liabilities are so vague.

With some certainty, the entire area might become insurable and, as a consequence, municipalities would be protected from inordinate judgments but victims, at the same time, could be made whole.

LIMIT ON DAMAGES

Let me suggest that, rather than the all-or-nothing municipal immunity approach, the subcommittee might want to take a look at placing a monetary limit on the damage recoveries available under section 1983.

I have mentioned in my written testimony, for example, the figure $50,000 exclusive of medical fees. This figure seems to be a high enough one that would cover most personal damages arising in a section 1983 case while, at the same time, not bankrupting local governments.

Alternatively, the subcommittee might also want to amend section 1983 so that in certain topical areas where damages are likely to be very high, damages not be awarded but only injunctive relief would be available.

We should remember in this regard that section 1983 is not just a statute for poor people. It can be used whenever anyone's constitutional and "and laws" rights are at stake, and that applies to companies and corporations as well.

LAND USE PROBLEMS

In this regard, we have one overriding problem. That is the problem of land use controls by municipal government, a problem which has received much Supreme Court attention lately. This is an area where damage liabilities could, in fact, be astronomical.

I am not worried about police misconduct cases because the damages there ordinarily run less than $10,000—they are very slight. The imposition of costs on a municipality would not be great. On the other hand, in a land zoning case the damages might be in the millions of dollars, and for small municipalities around the country faced with problems raising their taxes these might, in fact, be very onerous burdens.

One of the solutions here would be to do what some States have done and to allow only injunctive relief in land use cases. You might, for example, take a look at the *City of Tiburon* case and the *Fred French Investment Company* case. Those were from California and New York and show the way that the State courts have faced that problem.

There may be other similar topical areas that the subcommittee might want to look into.

CONCLUSION

Finally, I would like to stress that S. 584 and S. 585 are reasonable and moderate alternatives to the Court's current construction of section 1983 if some minor changes can be made to accommodate valid criticism that the subcommittee is likely to encounter during these hearings.

S. 584, in particular, may be prematurely offered in light of the problems with interpreting the *Maine* decision. But that bill would prove satisfactory if some way could be found to accommodate Social Security Act cases and other beneficiary-type cases seeking injunctive relief.

S. 585, given the very narrow problem on which it focuses—municipal liability only and only where constitutional law is unsettled—will undoubtedly draw strong support from local governments during these fiscally difficult times, and if it can be technically perfected as I suggested earlier, it is readily defensible, although I think the subcommittee might want to consider some of the alternatives which have less than the all-or-nothing quality that I have discussed earlier.

Thank you.

Senator HATCH. Thank you, Professor Abernathy. Without objection, your prepared text will be included at this point.

[Material follows:]

STATEMENT OF STEVEN H. STEINGLASS, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, WASHINGTON, D.C.

Mr. STEINGLASS. Mr. Chairman and distinguished members of the Subcommittee on the Constitution, I want to thank you for the opportunity to testify before you today.

I am an associate professor of law at the Cleveland-Marshall College of Law in Cleveland, Ohio, and am a member of the bar of the State of Wisconsin and the State of Ohio. I appear today in behalf of the National Legal Aid and Defender Association and its access to justice project to testify on S. 584 and S. 585.

I have submitted for the record a written statement, and I will try to summarize its highlights now.

The National Legal Aid and Defender Association is a private, nonprofit organization devoted to the support and development of quality legal services for low-income persons. Its membership consists of over 2,700 organizations throughout the country that provide representation in civil and criminal cases.

We oppose both S. 584 and S. 585, two proposals that we believe will seriously limit the ability of victims of illegal Government action to obtain redress.

S. 584 would limit the applicability of 42 U.S.C. section 1983 by eliminating certain private causes of action to redress violations of Federal statutory law. S. 585, on the other hand, would not eliminate any causes of action. Rather, it would shield local governments that have violated Federal statutes or the Constitution by providing them a qualified immunity. This would permit local governments to avoid accountability for the actions they have taken.

In addition, S. 585, as currently drafted, whether intentionally or not, would extend to injunctive actions. Thus, if enacted as drafted, it would permit local governments involved in continuing illegal activity, albeit in good faith, to continue to violate the law.

S. 584

S. 584 would have far-reaching consequences in the relationship between individuals and their Government. It would cut off completely private enforcement of certain Federal statutes regardless of how flagrant or intentional the violation of Federal law might have been. As presently drafted, it would make unavailable both damages and injunctions in many statutory cases.

To understand the significance of this proposal, one has to go back to the decision in *Maine* v. *Thiboutot*, a 1980 decision of the U.S. Supreme Court, and to section 1983 of title 42.

Section 1983 provides a cause of action for the violation under color of State law of any right, privilege, or immunity secured by the Constitution and laws. Unlike most civil rights statutes, it confers no substantive rights. Rather, it provides a procedural vehicle to make possible private enforcement of Federal rights which have been violated.

In *Thiboutot*, the Supreme Court affirmed the decision of the Supreme Judicial Court of Maine that the unmodified phrase "and laws" in 1983 extended to title IV-A of the Social Security Act. This decision, and particularly Justice Powell's dissent, is apparently responsible for the attention that recently has been focused on the meaning and scope of 1983.

In his opinion, Justice Powell suggested that somehow the commonsense reading of the phrase "and laws" to include the Social Security Act constituted an expansion of 1983 and, hence, the Federal statutes that could be enforced under it.

Despite precedent to the contrary as well as practice to the contrary, he argued that "and laws" really meant only laws providing for equal rights. And, since the Social Security Act has been held not to provide for equal rights, *Thiboutot*, Justice Powell suggested, was wrongly decided.

He also raised the spectre of State and local officials being harassed by the resulting litigation as new cases are filed in the already overburdened courts.

We believe that a careful analysis of the law governing 1983 shows that the concerns of the dissent are misplaced. S. 584 would seriously reduce the power of individual Americans vis-a-vis their Government. By removing the availability of a judicial forum, it would immunize illegal actions of State and local governments, no matter how intentional or knowing the violations of Federal statutes might have been.

The question is not whether State courts or Federal courts will hear these cases. State and Federal courts have concurrent jurisdiction over 1983 actions, and it has become commonplace for litigants to file such cases in State courts.

In fact, *Thiboutot*, the very case that focused attention on many of these problems, was a State court case. Therefore, the question is whether any court—State or Federal—will be able to hear actions based on alleged violations of certain Federal statutory rights.

Despite the discussion so far, this topic should not be seen as abstract and complex. Perhaps I can try to identify a number of situations in which 1983, because of the interpretation of the phrase "and laws", has been the vehicle for vindicating rights of individuals who have grievances against their State or local government.

For example, aged, blind, and disabled applicants for public assistance benefits in Illinois were not provided benefits within required time periods. The phrase "and laws", if deleted from section 1983, has the potential of depriving such individuals of an action for injunctive relief.

Similarly, migrant farmworkers in Florida who were denied appropriate services by the State Employment Service would no longer be assured a statutory cause of action.

Also no longer assured a statutory cause of action would be New York residents denied essential medical services under medicaid.

Similarly, unemployed workers in California who were denied payment of unemployment compensation and Illinois families denied foster care benefits were plaintiffs who claimed that their statutory rights were violated by State or local officials and that Federal officials had not taken effective action to enforce Federal law. These individuals sought judicial relief and were permitted to maintain private actions to enforce their Federal statutory rights.

We have reviewed carefully the background of 1983 and developments before and since the *Thiboutot* decision and have concluded that S. 584 should be opposed for the following reasons:

First, *Thiboutot* is not a departure from existing law. To be sure, this case represents the first time the Supreme Court squarely addressed the phrase "and laws" in section 1983 and reached a definitive conclusion as to its meaning. However, 1983 actions to enforce Federal statutes not providing for equal rights have been a feature of 1983 litigation for many years.

More than 30 years ago, Judge Learned Hand found a statutory cause of action authorized by section 1983 to protect the employment rights of a public school teacher whose absences were caused by Federal jury service. Since the landmark decision in *Monroe* v. *Pape* in 1961, statutory-based 1983 actions have been a small but significant part of 1983 litigation.

Because *Thiboutot* only clarifies that which most litigants and many lower courts knew— namely, that 1983 authorized a cause of action to enforce Federal statutory rights—and because of the importance of private enforcement in this area, we welcomed the Court's decision in *Thiboutot*.

However, because *Thiboutot* is not a departure from prior law and certainly not from prior practice, any legislation to overturn it would also affect those other statutes that have been enforced through 1983.

Thus, we see the impact of S. 584 going far beyond the provisions of the Social Security Act before the Court in *Thiboutot*.

Second, much of the concern about the implications of *Thiboutot* is based on an incorrect reading of the decision. The phrase "and laws" in 1983, when given its literal construction, does not, by itself, permit litigation to enforce violations of Federal statutory law. Such a construction is necessary but is not sufficient to permit private enforcement.

Thus, *Thiboutot* only addresses the first step in determining whether private enforcement is available. The second step involves an inquiry concerning the specific Federal statute at issue.

Where Congress has expressed its intention to preclude private enforcement, that decision will govern. As Justice Powell acknowledged in *Thiboutot*, 1983 will not authorize a private action in cases where Federal statutes provide an exclusive remedy for violation of its terms.

In many ways, section 1983 can be looked at as a State and local analog to the Administrative Procedure Act, which authorizes judicial review of actions of Federal agencies. Like the APA, section 1983 should be viewed as presuming the availability of judicial review.

Where Congress is silent on the availability of judicial review, it should be presumed to be available under 1983. However, where Congress precludes such judicial review, it should, of course, not be permitted, despite the language of the APA or the language of section 1983.

Since *Thiboutot* does not, by itself, result in an expansion of Federal statutes that may be privately enforced through 1983, those who fear that the decision authorizes private enforcement of all Federal statutes are simply mistaken, and our review of post-*Thiboutot* cases in which lower courts have found some statutes enforceable under 1983 and other Federal statutes not enforceable confirms this view.

Third, we believe legislation at this time to amend section 1983 to modify the phrase "and laws" is inadvisable because the law is unclear and in a state of flux. Courts are reaching different conclusions as to the availability of private enforcement of specific statutes. Because of this uncertainty, it is not possible to determine precisely what impact S. 584 would have.

Therefore, legislation at this time would not clarify the law but would lead to serious confusion as to the availability of private enforcement, and unless Congress was willing to undertake a statute-by-statute analysis to determine whether the limitation on 1983 would eliminate private enforcement we believe that S. 584 should not be considered.

Fourth, predictions made concerning the implications of *Thiboutot* on caseload appear to be without basis. We are not aware of statistics on the precise number of statutory 1983 cases that are being filed. We do not believe it is likely to become a significant burden on the Federal or the State courts.

We note however, based on the 1980 Annual Report of the Administrator of the United States Courts, that in the year ending June 30, 1980, there were only 170 cases filed against State and local governments described as welfare cases.

Thus, 12 years after the 1968 decision in *King* v. *Smith*, in which the Supreme Court first permitted a 1983 action to enforce title IV-A of the Social Security Act, an average of less than one-half case per district court judge per year is being filed. This hardly suggests the existence of a burden which requires legislative action.

Fifth, we have not seen and are not aware of any harassment that has taken place with respect to statutory-based 1983 actions, and, in any event, the Federal courts retain appropriate tools to deal with frivolous actions, including the awarding of attorney's fees against plaintiffs and attorneys who commence or maintain such actions.

Sixth, the limitation on statutory 1983 actions will not, we believe, result in such disputes being kept out of court. The proposed amendment to 1983 does not in any way limit the range of constitutional issues that plaintiffs may raise, and an unintended but inevitable result of the elimination of private enforcement of Federal statues would be an increase in efforts to frame the same dispute in constitutional terms.

In addition, suits against Federal officials who have failed to enforce statutory rights are also likely to increase. Thus, passage of S. 584 will probably not reduce and may even expand the volume of litigation and will certainly result in an increase in constitutional-based decisions.

Finally, we wish to speak to the importance of private enforcement in this area. We suggest no disrespect for the ability, commitment, or fidelity to the law of members of the Federal bureaucracy when we suggest that it is inappropriate to give them exclusive responsibility for enforcing Federal law.

It would be surprising, indeed, if this Congress, committed as it is to helping get Government off the backs of the people, denied the American people the ability to enforce privately their rights.

S. 584 will say to citizens who have been injured by local government action that their only recourse is to complain to the Federal

bureaucracy. Such a concentration of power in the hands of the bureaucracy is unwise and impractical. There are many reasons why a Federal official will choose not to bring enforcement action against a State or local government alleged to have violated Federal law.

Certainly, it represents a far greater strain on sensitive Federal/State relations for the Federal Government to begin administrative or litigative enforcement against State or local government than for individuals to continue to be permitted to seek judicial review of actions of local governments.

We believe that a fundamental precept of responsible and responsive government must be the assurance that the courts will be open to persons seeking redress. We see no justification in singling out Federal statutory programs and insulating them from judicial review.

If Congress believes there are specific programs for which judicial review would be inappropriate, it should address those statutes. If Congress believes there are specific abuses concerning 1983, it should address those specific problems. It should not act in an across-the-board manner without carefully examining the precise impact of such action.

Nothing about the American judicial system has been as important as its willingness to open its doors and provide a hearing for those who claim to be aggrieved. S. 584, we regret, has the potential of doing serious damage to that right, and we respectfully urge the members of the subcommittee and the Chair to reject the proposal.

S. 585

I would now like to turn briefly to S. 585, which would create a good-faith immunity for political subdivisions of the State in actions brought pursuant to section 1983.

The bill would apply not only to damage actions but also to claims asking for declaratory and injunctive relief. We have serious questions about the propriety of creating immunity for local governments that have violated the law with respect to injunctive relief.

We are not sure whether the creation of such immunity in injunctive cases is consistent with the intention of the Chair, especially in light of some of the opening comments, but we would urge the subcommittee to limit any legislation so as to not erect any immunity whatsoever with respect to suits for injunctive or declaratory relief.

With respect to actions for damages, our views in opposition to S. 585 are based on the somewhat simple belief that local governments should be liable to persons whose rights they violate. Rights without remedies are no rights at all.

Liability under 1983 accomplishes the objectives of government responsibility in two ways: First, it guarantees that persons who have been injured as the result of the violation of their rights will be compensated. Second, it deters future illegal action by putting a clear and certain price on it.

The liability of local government in 1983 actions is a limited one. Local governments are only liable for their official action, and the

courts have introduced several important safeguards into the standard applied in 1983 cases.

First, the Supreme Court has specifically rejected the application of the doctrine of respondent superior under which a local government could be held liable for acts of its agents or employees.

Second, neither the *Monell* nor the *Owen* case limit in any way the personal immunities enjoyed by individual municipal officials and employees. Mayors and members of school boards continue to have a good-faith immunity, judges, prosecutors, and local legislators retain their absolute immunity.

Finally, neither of the Supreme Court's recent decisions in this area affects the determination of damages under 1983. An injured party must still be able to prove actual injury proximately caused by a defendant acting under color of State law. A plaintiff whose rights were violated but who cannot establish actual loss will not be entitled to anything more than nominal damages.

We know the argument is made that local governmental immunity is necessary or our cities and counties will be bankrupt. Although Owen is barely a year old, the already substantial body of law interpreting it offers no support for this claim.

To be sure, figures can be presented to you demonstrating the amount of damages that litigants have sought in actions against State and local officials, but as most lawyers know, the mere prayer for relief is far different than the ability to actually prevail in litigation. I do not think that allegations or claims for relief in complaints, often put there for public relations or publicity purposes, should influence this subcommittee in considering the proposal to adopt a qualified immunity for municipalities.

We see the assignment of liability that is possible under the law as it has presently been interpreted as an appropriate mechanism to allocate the costs to the community as a whole.

The Supreme Court in Owen carefully attempted to balance the needs of the injured person, the individual official, and the public. The individual who was injured is to be compensated. The individual officeholder is to be immune where he or she acted in good faith. The community as a whole is to provide compensation for the people who are injured by Government action which is found to be illegal.

In conclusion, we do not believe that convincing evidence has been put forward to this point to suggest the Supreme Court's decision in *Owen* v. *City of Independence* has put an undue strain on local government. While cities and counties may not like to be sued—certainly a universal and understandable feeling—that alone cannot justify the extraordinary step of erecting a good faith immunity and, in effect, putting their actions above the law.

We urge you to think carefully about this problem, and we respectfully suggest that there is no compelling need to act at the present time on this proposal.

Thank you very much.

Senator HATCH. Thank you. We appreciate the testimony of both you fine professors.

Professor Steinglass, without objection, we will insert your prepared text at this point.

[Material follows:]

Senator HATCH. Let me start with you, Professor Steinglass. Do you feel that the effect of S. 584 and S. 585 would undermine constitutional or civil rights other than when the municipality acted in good faith and neither knew nor should have known that they were violating the Constitution?

Mr. STEINGLASS. S. 584 would not have any effect with respect to constitutional rights because, as you are aware, it preserves the action in constitutional cases. So, S. 584 would not in any way lessen constitutional rights.

I think the problem with respect to S. 585 is different—and here we must talk about how things really are. Under S. 585, in order for an individual injured by illegal Government action to recover they would have to show either subjective bad faith or that the municipality or the officials in the municipality knew or should have known that the action was illegal. It seems to me that is a very, very difficult burden to place on a plaintiff.

While there is a certain superficial attractiveness to saying that anyone who acts in good faith should not be held liable, the reality of that is to largely immunize local government for actions that they take. So I do believe that constitutional rights would be adversely affected because of the difficulty of meeting that burden.

It is not very difficult for a lawyer to go before a court and say that even though there is a lot of law in this area, the Supreme Court has never definitively resolved the issue, and therefore the municipal official cannot be said to have known that what he or she was doing was illegal. With respect to proving subjective bad faith, this may be done from time to time, but by and large I do not think local officials act with bad faith, and I do not think litigants would be able to show bad faith very often.

Senator HATCH. If Congress were to determine that section 1983 litigation is creating an unjustifiable burden on municipalities, what course do you feel it would be best to pursue to reduce that burden without comprising individual constitutional or civil rights?

Mr. STEINGLASS. Initially, what I would say is that actions based on Federal statutes should be given a great deal of respect and should not be cut away or reduced.

If Congress was to find that 1983 actions were, in fact, bankrupting the cities or, in fact, presenting intolerable burdens on the ability of local governments to do their jobs, then I think there would be a stronger argument for legislation like S. 585 with respect to damage actions. I think S. 585 goes further than one need go to protect municipalities.

It is difficult to come up with alternative language in terms of an immunity that might provide more protection than is presently there but not creating the full good faith immunity that seems implicit in S. 585.

But I think that, as a policy matter, if Congress was to find there was an intolerable burden, not just in theory but in practice, you might want to look at something like S. 585 but you would have to work on the language because it is much too broad an immunity in damage actions, and, as indicated earlier, I think it is wholly inappropriate in injunctive actions, although, again, we are not sure it is your intent to apply it in injunctive cases.

Senator HATCH. How do you feel the awarding of attorney's fees in 1983 is affecting litigation in that area, and would you recommend any change in the awarding of attorney's fees?

Mr. STEINGLASS. I think the availability of attorney's fees has clearly affected litigation. What it has done is enabled many persons who would not otherwise be able to retain attorneys to obtain them, and I think that is an important and healthy development.

I think it is far too early to make a judgment as to whether the overall impact of the availability of attorney's fees is a good or a bad thing. Our bias certainly is that it is a good thing because it enables people who might not otherwise have access to lawyers to first get the keys to the courthouse door. But I think we need a lot more evidence and information before we can make any conclusion as to that.

Senator HATCH. Thank you.

Professor Abernathy, some groups have claimed that these bills, S. 584 and S. 585, represent a step backward for civil rights advances that have been made. In your opinion, are these fears justified?

Mr. ABERNATHY. They represent a step back from where we are today. I am not sure they represent a step back from where we were a few years ago.

I suggested earlier that if a change could be made in S. 584, in particular, to allow for Social Security Act and other beneficiary-type cases to be brought we would really be preserving the status quo before *Maine* was decided. That, to me, sounds like a pretty good place to be.

S. 585 is a little bit harder to predict. One of the problems we have always had in the civil rights area is that individual officials who have been sued are often judgment-proof, so that even when one obtains a $500,000 verdict—that I have only heard of in one case—there is no way to actually recover more than $5,000 or $10,000 from an individual employee of the State. So S. 585 would limit the recoveries which are available now under *Owen*.

Senator HATCH. Do you feel the *Cort* v. *Ash* test the Court has developed to determine the number of implied rights of action in Congress silent statutes is preferable to assuming that any statute has an automatic cause of action? If so, what arguments do you feel support this decision?

Mr. ABERNATHY. I do support the use of the *Cort* test rather than reading the "and laws" language to apply to all Federal statutes that regulate State officials.

This is primarily a statutory interpretation problem. Congress passed these statutes, and Congress is the one to decide whether all of them should be vindicated in private actions in Federal court or not.

It seems to me, looking back over the history of these statutes in the last 15 years, Congress remained silent on whether it wanted them to be enforced by private actions in Federal court, and that is the reason we have the *Cort* v. *Ash* test.

One of the things that bothers me about the *Maine* decision is that if it is read broadly to include even those statutes for which the Court has not implied a private right of action under *Cort*, then

it does too much—it attributes more to Congress than Congress intended.

Senator HATCH. Senator DeConcini asked me to ask you this question, Professor Steinglass. You noted that only one-half case per Federal district court judge has been filed in the less than 1 year since Thiboutot. Since we have over 500 district court judges, that means over 250 cases have been filed already. Is this an ominous sign that a greater flood of them are coming?

And, I might add, as of February 1981, at least $4 billion in claims have been filed against cities, as a result of Thiboutot I guess.

Mr. STEINGLASS. My statement was that since 1968 when the Supreme Court decided *King* v. *Smith*, which was the first case that expressly allowed a 1983 action to enforce a statutory claim, 12 or 13 years have elapsed, and now we still only see less than one-half case per Federal judge. I think that is the date to which I was referring.

Certainly for the last 12 or 13 years, litigants involved in social security benefit cases have assumed that 1983 was available to authorize for cause of action.

As far as the $4 billion figure to which you just referred is concerned, I do not believe there is any suggestion in the testimony that I saw from the people who are testifying following us that those cases were statutory cases. My understanding is that they were talking generally about 1983 litigation and were not restricting their figures or their surveys to statutory cases. They will correct me, I am sure, if I am wrong.

Frankly, I cannot think of any case—and I am sure they will correct me also if I am wrong—in which a municipality has been held liable for damages for violations of a Federal statutory right. Obviously, such cases would be more likely to have come up in the last couple of years, but I am not aware of cases like that, and I do not think that is a real problem.

Senator HATCH. Thank you.

We appreciate the efforts both of you have put forward. Of course, as you know, these bills are controversial bills, and we will really pay attention to many of the things that you have said—in fact, everything you have said. I think your testimony has been very helpful to the Senate on this matter.

Thank you for coming, and we appreciate the effort.

Mr. ABERNATHY. Thank you, Mr. Chairman.

Mr. STEINGLASS. Thank you.

Senator HATCH. We will now hear from a panel of city attorneys who are representing the National Institute of Muncipal Law Officers. These attorneys have a special expertise on this subject since they defend municipalities in section 1983 litigation.

NIMLO is represented by Roy D. Bates, city attorney, from Columbia, S.C.; Marvin J. Glink, corporation counsel of Naperville, Ill.; and Roger F. Cutler, city attorney, Salt Lake City, Utah—from my own hometown.

We are happy to have you all here. If you would come up and each of you take one of these microphones, we would appreciate it. We are happy to welcome you here.