TESTIMONY OF SENATOR DOMENICI BEFORE THE CONSTITUTION SUBCOMMITTEE ON S. 584 AND S. 585

● Mr. DECONCINI. Mr. President, the Senate Committee on the Judiciary's Subcommittee on the Constitution has held a series of hearings recently on two bills introduced by the distinguished Senator from Utah (Senator HATCH) who is also the chairman of the subcommittee. These two bills, S. 584 and S. 585, have as their purpose the limitation of liability of local governments. Recent Supreme Court decisions have expanded that liability dramatically and it has become a cause of great concern to local government officials. Last week my distinguished friend and colleague from New Mexico (Senator DOMENICI) testified before the subcommittee and he was most eloquent in his discussion of the issues and ultimate support for the bills. As ranking minority member of the Constitution Subcommittee, I felt his testimony fairly stated the issues and offered constructive remedies, and I would like to share his thoughts with all my colleagues.

I ask that the statement of Senator DOMENICI before the Constitution Subcommittee on S. 584 and S. 585 be printed in the RECORD.

The statement follows:

STATEMENT BY SENATOR PETE V. DOMENICI

Mr. Chairman, it is a pleasure for me to appear before your subcommittee today to express my support and views with respect to the proposed amendments to 42 U.S.C. Section 1983. From the outset, my interest in this legislation stems particularly from my experience as Chairman of the City Commission and ex officio Mayor of Albuquerque, New Mexico.

Recent state and federal judicial decisions have significantly expanded beyond its intended purpose, the coverage of Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. Section 1983. Specifically, in *Maine* v. *Thiboutot*, 448 U.S. 1 (1980), the Supreme Court last Term broadly construed Section 1983 to authorize suits redressing violations by state officials not only in cases of deprivation of constitutional and statutory equal rights but also with respect to rights created by *any* federal statute. In *Owen* v. *City of Independence*, 445 U.S. 622 (1980), the Court—departing from the previous strict construction of that section—broadly interpreted Section 1983 to impose strict liability on municipalities for constitutional violations rejecting any form of qualified immunity for municipalities.

Taken together, these decisions dramatically expand—without firm legal and policy support—the liability of state and local officials in such a way as to disturb the balance between the important public interests contemplated by the original legislation and the legitimate fiscal and administrative interests of state and local governments. As a former mayor, I am particularly concerned that this balance be maintained. In the face of the existing imbalance triggered by recent judicial activity, I am co-sponsoring legislation, pending in the Senate Judiciary Committee, which—while not compromising the original intent of Section 1983 to protect the constitutional and statutory equal rights of an individual—will effectively limit its reach.

The first bill, S. 584, is designed to amend Section 1983 by replacing the unqualified phrase "and laws" with more specific language "and by any law providing for equal rights of citizens or of all persons within the jurisdiction of the United States." In *Maine* v. *Thiboutot, supra*, the Court—although broadly interpreting the phrase "and laws" to include all federal laws—admitted that "legislative history does not permit a definitive answer" with respect to its construction and invited clarification from Congress. This amendment seeks to provide that clarification. It would limit the liability of local and state officials to actions clearly found to deprive citizens of rights secured by the Constitution and by those laws which provide for equal rights—not for violations of any and all federal statutes. While protecting the intended civil and constitutional rights of individuals, this amendment to Section 1983 will prevent the harassment of state and local officials which would otherwise result from the unintended broader interpretation. It will also save countless dollars for state and local governments which would otherwise be required to defray the entire burden of liability for violations of statutory "civil rights" even when federal officials are involved equally with state officials in the administration of the affected program. Absent the amendment, literally hundreds of cooperative regulatory and social welfare enactments—including management laws and grant programs—may be affected.

The second bill, S. 585, provides that municipalities and other political subdivisions of a state shall have a good faith defense, or qualified immunity, in Section 1983 actions. This amendment is responsive to the Court's misdirected decision in *Owen* v. *City of Independence, supra*, and the more recent Supreme Court decision in *City of Newport* v. *Fact Concerts, Inc.*, 49 U.S.L.W. 4860 (June 26, 1981), which admits that the "contours of municipal liability under § 1983 . . . are currently in a state of evolving definition and uncertainty." This amendment seeks to provide additional certainty with respect to municipal liability under Section 1983.

Such immunity would still leave the municipality liable for bad faith or unreasonable constitutional deprivations. It would obviate, moreover, the need for costly damage judgments to be paid for by local and state governments where officials have acted in good faith but, because of strict liability, would be held liable. Finally, it would avoid the undesirable result of strict liability for municipalities described by the dissent in *Owen* v. *City of Independence*, 445 U.S. at 668–59:

"The Court now argues that local officials might modify their actions unduly if they face personal liability under § 1983, but that they are unlikely to do so when the locality itself will be held liable. *Ante*, at 655–656. This contention denigrates the sense of responsibility of municipal officers, and misunderstands the political process. Responsible local officials will be concerned about potential judgments against their municipalities for alleged constitutional torts. Moreover, they will be accountable within the political system for subjecting the municipality to adverse judgments. *If officials must look over their shoulders at strict municipal liability for unknowable constitutional deprivations, the resulting degree of governmental paralysis will be little different from that caused by fear of personal liability.* Cf. *Wood* v. *Strickland*, 420 U.S., at 319–320; *Scheuer* v. *Rhodes*, 416 U.S., at 242." (Emphasis added.)

This amendment strikes an equitable balance between two very important considerations—the constitutional rights of individuals and the ability of local governments to serve all the people. In so doing, it attempts to meet the undesirable policy consequences which, left unchanged, the existing law will cause.

The state of the law with respect to municipal liability under Section 1983 is clearly in present need of clarification by Congress. Two additional Supreme Court decisions involving municipal liability under Section 1983, handed down last month, underscore most recently the inadequacy of a piecemeal judicial construction of this legislation of the post-Civil War reconstruction era.

In *City of Newport* v. *Fact Concerts, Inc.* 49 U.S.L.W. 4860 (June 26, 1981), the Court—after reviewing the legislative history of Section 1983—determined that Congress did not intend to abolish the doctrine of municipal immunity from punitive damages. Likewise in *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 49 U.S.L.W. 4783 (June 25, 1981), without either party raising the issue, the Court determined that, where a State official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, Congress intended not only to foreclose implied private actions but also to supplant any other remedy which otherwise would be available under Section 1983. While welcome, these recent decisions point up the need for clear Congressional clarification and direction with respect to Congress' original intention in passing this legislation.

Absent Congressional action, these judicial decisions, and no doubt others, will continue the uncertainty concerning interpretation of Section 1983 and severely impair the ability of local and state governments to serve the people. This it will continue to do under the mistaken "guise" of protecting the constitutional rights of individuals. I am, accordingly, urging immediate action on these two amendments to Section 1983.●

ETSI LEGISLATION

● Mr. ABDNOR. Mr. President, today our Nation faces an energy environmental dilemma as we attempt to look inward to meet our energy needs and find ourselves faced with the possibility that meeting those needs will impose irreversible scars on the face of our country. In my State of South Dakota we are acutely aware of the problem because of the energy-hungry looks attracted by the vast reserve of coal which our neighboring States of the West are fortunate to possess.

While I recognize the need for energy independence, I am also very determined that it be achieved without upsetting the delicate balance of nature that exists in many areas of the West. Two measures, Senator EXON, Senator ZORINSKY, Senator PRESSLER and I are introducing today address one aspect of this problem—the use of ground water to transport coal in a slurry pipeline. The first bill would establish new policy to govern Federal involvement in promoting such uses of ground water; and the second addresses the specific problem South Dakota, Montana, and Nebraska are facing.

Under the first bill no rights-of-way across Federal land could be granted for a coal slurry line without the approval of each State whose ground water would be affected and under which lies the aquifer to be utilized as a source of water by the proposed pipeline.

The problem with existing law is that it is not designed to deal with the present circumstances, in which water may be pumped out from under one State from wells in another State, mixed with coal, and exported 1,800 miles across several States, for the benefit of citizens