

LEGISLATIVE COMMITTEE MINUTES

SB36

Bill as Introduced

SB 36 - AS INTRODUCED

2019 SESSION

19-1014
08/04

SENATE BILL

36

AN ACT creating a cause of action for certain constitutional deprivations of right.

SPONSORS: Sen. French, Dist 7

COMMITTEE: Judiciary

ANALYSIS

This bill creates a cause of action for certain constitutional deprivations of right.

Explanation: Matter added to current law appears in ***bold italics***.
Matter removed from current law appears [~~in brackets and struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Nineteen

AN ACT creating a cause of action for certain constitutional deprivations of right.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 1 New Section; State Liability. Amend RSA 354-B by inserting after section 6 the following
2 new section:

3 354-B:7 Liability of State or Public Entities. Any state or public entity acting under color of
4 New Hampshire law which subjects or causes to be subjected any citizen of New Hampshire or other
5 person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities
6 secured by the new Hampshire constitution shall be liable for any actual damages to the injured
7 party. Any such action shall be filed in the superior court where appropriate venue exists or federal
8 district court. Any claim under this section brought in federal district court shall be a supplemental
9 claim to a federal claim. This lawsuit shall be brought no later than 3 years after the violation.
10 Reasonable attorneys' fees and costs shall be awarded to a person who prevails in any action or
11 proceeding seeking to enforce this section.

12 2 Effective Date. This act shall take effect upon its passage.

Committee Minutes

SENATE CALENDAR NOTICE

Judiciary

Sen Martha Hennessey, Chair
Sen Shannon Chandley, Vice Chair
Sen Melanie Levesque, Member
Sen Sharon Carson, Member
Sen Harold French, Member

Date: January 17, 2019

HEARINGS

Tuesday		01/22/2019	
(Day)		(Date)	
Judiciary		SH 100	9:00 a.m.
(Name of Committee)		(Place)	(Time)
9:00 a.m.	SB 34		relative to the applicability of certain DWI prohibitions.
9:15 a.m.	SB 50		relative to testing to determine alcohol concentration.
9:35 a.m.	SB 51		establishing a commission to study expanding mental health courts statewide.
10:00 a.m.	SB 36		creating a cause of action for certain constitutional deprivations of right.

EXECUTIVE SESSION MAY FOLLOW

Sponsors:

SB 34

Sen. French
Rep. Sylvia

Rep. Forsythe

Rep. Hill

Rep. Plumer

SB 50

Sen. Chandley
Rep. Pantelakos

Sen. Carson
Rep. Welch

Rep. Fields

Rep. Murphy

SB 51

Sen. Morgan
Sen. Fuller Clark

Sen. Rosenwald
Sen. Kahn

Sen. Sherman
Sen. Carson

Sen. Hennessey

SB 36

Sen. French

Jennifer Horgan 271-2609

Martha S. Hennessey
Chairman

Senate Judiciary Committee
Jennifer Horgan 271-3092

SB 36, creating a cause of action for certain constitutional deprivations of right.

Hearing Date: January 22, 2019

Time Opened: 10:19 a.m.

Time Closed: 10:51 a.m.

Members of the Committee Present: Senators Hennessey, Chandley, Levesque, Carson and French

Members of the Committee Absent : None

Bill Analysis: This bill creates a cause of action for certain constitutional deprivations of right.

Sponsors:
Sen. French

Who supports the bill: Senator French; Dan McGuire, NH Liberty Alliance; Gilles Bissonnette, ACLU; Marissa Chase, NHAJ; Alvin See; Rick Lehmann

Who opposes the bill: Margaret Byrnes, NH Municipal Association; Elizabeth Sargent, NH Association of Chiefs of Police

Summary of testimony presented in support:

Senator French

- US citizens live under the protections of two constitutions, the US Constitution and the State Constitution.
- If a person's US Constitutional rights have been violated, they have the right to sue in a federal court.
- It is not the same under the State Constitution.
- This will allow someone to recoup damages in the state courts if their State Constitutional rights are violated.

Former Representative McGuire (NH Liberty Alliance)

- In 2018, Constitutional Amendment 1 received 83% of the vote and gave individuals the ability to go to court when their municipality violated the Constitution or State law in their spending.
- This bill is about the violation of constitutional rights.
- It is hard to see under what circumstances the court would deny a lawsuit on this, but they have in the past.
- Senator Chandley asked why this is not already law.

- It is the same concept as Constitutional Amendment 1 where the court would say someone did not have standing against a municipality because they were no different than anyone else.
- Senator Levesque asked for instances this bill would rectify.
 - If someone was not allowed to vote or were denied their gun rights.

Rick Lehmann (Lehmann & Associates) (provided written testimony)

- Most rights in the federal and state constitutions overlap, but there is a little bit on the state side that does not.
- The NH Constitution provides more protections under the search and seizure laws, equal treatment on the basis of sex, eminent domain, privacy, and more.
- To the extent that there is overlap, aggrieved people can go to federal or state court, but they can only collect damages on the federal claims.
- The NH Supreme Court has declined to take this up and create a cause of action.
- The federal courts won't grant claims under the state constitution; they may hear an injunctive claim but not one for damages.
- If someone is arguing that there is not a significant gap that this bill would address then that would mean that there should be no additional claims and no additional costs under this bill.
- In 1983, under *State v Ball*, the NH Supreme Court found that NH rights against search and seizure were broader than those under the US Constitution.
- The NH Supreme Court stated that when someone presents a claim in court they can present an independent state constitutional basis for their argument on top of and in addition to the federal constitutional claim.
- The NH Supreme Court decided to address the state constitutional claim first because the federal courts have no right to reverse a NH court decision that is based on a NH court's interpretation of the State Constitution.
- By creating this cause of action, it ensures that constituents have the right to vindicate their rights that the NH citizenry has enacted.
- The state and municipal bodies are full of people who go out and do their jobs well. However, some things are going to go wrong because people are human and even good people have bad days.
- It is inappropriate for an individual to bear the cost of the harm done by government without giving them the chance to have their rights vindicated and addressed in court.
- Senator Levesque asked for an example besides *State v Ball* where this would have helped someone who tried to go to court.
 - *State v Ball* allows people to go to federal court for violations of their constitutional rights. This addresses if someone falls into an area where the state affords them more rights under state constitution, but not under the federal constitution.
- Senator Levesque asked if individuals in those situations have no recourse.
 - The state constitution always has to cover the federal constitution and they are coextensive.

- Senator Carson asked if this tries to recognize those individuals who fall into the broader rights afforded by the state constitution and offer them some form of recourse.

- That is correct.

- Would recommend adding the word 'person' to line 3.

Giles Bissonnette (ACLU) (provided written testimony)

- This is about government accountability.
- If a state or local government entity does something that causes harm to an individual, that person has little recourse unless they can bring a claim under the federal constitution.
- What good are the independent protections of the State Constitution if a person cannot sue for damages when those protections are violated.
- This bill creates parity with the federal Constitution for remedy.
- The federal Constitution provides the floor for rights while the state constitution provides the ceiling, and there is some space in between that floor and ceiling.
- *Marquay v. Eno* was an equal protection case where students alleged that school employees failed to report sexual misconduct and the court declined to create a private right of action.
- Under this bill an individual still must prove harm in order to bring a case forward, as it is not presumed.
- Municipalities would still have the ability to defend themselves in the courts under this law.

Summary of testimony presented in opposition:

Margaret Byrnes (NH Municipal Association)

- Not opposing the bill because there are no reasonable arguments for creating this claim under the law.
- Concerned that adding this basis for a claim under the law would add costs at the local and state level, which ultimately will be borne by the tax payers.
- Many claims that would fall under this can already be addressed in the federal courts.
- There are additional rights under the State Constitution, but there are already bases in the law for these types of claims to be brought in federal court.
- Is not seeing a major gap that this bill is trying to address in the law.
- Constitutional Amendment 1 had to do with taxpayer standing. As under the law an individual must have their own individual concrete harm to bring a claim and taxpayer standing was general harm.
- This bill is different because it is talking about individuals who already have concrete individual claims.
- Senator French asked if it is fine to protect US Constitutional rights in, but not the NH Constitutional rights because of the cost.
 - It is not that there are no reasonable arguments for this bill, simply must reinforce that this could create local and state cost for the taxpayers.
- Senator French asked if it is the cost to the taxpayer is what she is objecting to.
 - Correct.

Date Hearing Report completed: January 28, 2019

Speakers

Testimony



AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

New Hampshire

18 Low Avenue
Concord NH 03301
(603) 224-5591
aclu-nh.org

Devon Chaffee
Executive Director

**Statement by Gilles Bissonnette, ACLU-NH Legal Director
Senate Judiciary Committee
Senate Bill 36
January 22, 2019**

I submit this testimony on behalf of the American Civil Liberties Union of New Hampshire (“ACLU-NH”)—a non-partisan, non-profit organization working to protect civil liberties—including the constitutional rights guaranteed under the New Hampshire Constitution—for over 50 years. Senate Bill 36 creates a cause of action for damages when a state or local governmental agency violates the New Hampshire Constitution and, in so doing, causes harm to a person. This is an important bill necessary to promote government accountability. We respectfully urge the Committee to vote SB36 *ought to pass*.

SB36 is Critical to Ensuring Government Accountability

Currently, if a state or local government agency violates the New Hampshire Constitution and, as a result, causes damage to a person, that person has little recourse to seek damages in the courts. *See Marquay v. Eno*, 139 N.H. 708, 721 (1995) (our constitution does not specify remedies for its violation; noting that a claim could not be brought under the New Hampshire Constitution for violation of equal protection where students alleged that school employees failed to report sexual misconduct). Put another way, if a state or local governmental entity harms someone in violation of the New Hampshire Constitution, often little can be done. This is a significant loophole that may come as a surprise to most people in New Hampshire. After all, what good are the independent protections of our New Hampshire Constitution if a citizen cannot sue for damages when those protections are violated and damage is caused? Indeed, there is less of an incentive for a local governmental entity to comply with the New Hampshire Constitution if it can never be held accountable in court for a lack of compliance. SB36 remedies this problem and, in so doing, will make local governments more accountable.

This bill also creates parity with the federal system for remedying violations of the United States Constitution. If a state or local agency violates the federal Constitution and causes damage, there is an ability to bring a claim for damages arising out of such damage. *See* 42 U.S.C. § 1983. This bill creates a similar system for violations of the New Hampshire Constitution. Providing this relief under the New Hampshire Constitution is important because the New Hampshire Constitution often provides separate and independent protections that do not exist under the Federal Constitution. These rights, for example, include greater protections against searches and seizures (Part I, Article 19) and greater protections ensuring equality for women (Part I, Article 2).

It is expected that local government agencies will oppose this bill out of a fear of liability. But, under this position, municipalities are effectively arguing that, even if a municipality unquestionably violates the New Hampshire Constitution and creates harm, they should not be liable. This is bad policy that undermines the protections provided under the New Hampshire Constitution. Of course, municipalities will have the ability to defend themselves in court to argue that they did not, in fact, violate the New Hampshire Constitution and cause harm. In addition, local government entities can avoid liability altogether by not violating the New Hampshire Constitution.

For these reasons, the ACLU-NH supports SB36, and we respectfully urge members of this Committee to vote *ought to pass* on this bill.

Lehmann Law Office, PLLC

835 Hanover Street, Suite 301

Manchester, N.H. 03104

(603) 731-5435

rick@nhlawyer.com

Testimony in Support of SB 36

Richard J. Lehmann

January 22, 2019

I. Introduction

In New Hampshire we are justifiably proud of our state's Constitution. Our Constitution is based in large part on the writings of John Adams and it was adopted by the people of our state before the United States of America existed as a constitutional entity. When you were sworn in you took an oath to protect it and the people of our state have seen fit to amend it many times, most recently in the November 2018 elections. Yet despite the importance of our Constitution, New Hampshire citizens have no right to bring a suit to recover damages caused by a violation of their constitutional rights. SB 36 would change that.

II. New Hampshire Citizens Enjoy Dual Protections Guaranteed Independently By Both The United States and New Hampshire Constitutions.

New Hampshire has been a leading state in developing a body of state constitutional law independent of the federal Constitution and judiciary. In 1983, then-Supreme Court Justice Chuck Douglas wrote an opinion called *State v. Ball*. That case involved a relatively minor criminal case involving the possession of marijuana that wouldn't even be a crime today. *State v. Ball* is probably the single most important constitutional law case the New Hampshire Supreme Court ever decided, not because of the importance of the underlying case but rather because of its statement about the importance of the New Hampshire Constitution and its discussion of the manner in which our state Supreme Court would interpret it.

In *Ball*, our Supreme Court emphasized four main points:

(1) Our federal system divides government power and corresponding protection from governmental abuse of that power, between the national government and the governments of the fifty states;

(2) Federal courts will ensure that state law does not provide less protection of individual rights than the United States Constitution requires, but our state Constitution may offer greater protection than its federal counterpart;

(3) In order to provide their citizens with the full measure of protection that this system allows, state supreme courts have a duty to *independently*, interpret their own state constitutions, in addition to deciding cases based on the United States Constitution; and

(4) State supreme court interpretations of state constitutions are not subject to review by federal courts, including the United States Supreme Court, except to determine if states have failed to protect federal constitutional rights.

State v. Ball is the single most cited case in the history of the New Hampshire Supreme Court. As of this writing, the justices on our Supreme Court have written decisions relying on the principle set out in *Ball* in 656 cases, most recently on December 21, 2018. Virtually all of these references stand for the proposition that New Hampshire residents have constitutional protections stemming not only from the Bill of Rights to the United States Constitution but also an equally important set of rights arising entirely and independently from the New Hampshire Constitution.

III. Despite The Importance Of Our State Constitution, Under Current Law There Is No Civil Remedy For A Violation Of State Constitutional Rights.

Despite the importance and independence of our state constitutional protections, our law provides no independent right to seek money damages to compensate people for their losses. Aggrieved parties have asked the New Hampshire Supreme Court to recognize a cause of action for money damages, but our court has so far declined allow such claims to be heard.

The only remedy available to a person who has had his or her constitutional rights violated is that evidence seized in violation of those rights cannot be used against the person in a criminal prosecution. This is an entirely unsatisfactory remedy, as it provides absolutely no protection to someone who experiences a violation of rights but who is not facing criminal prosecution. Not all constitutional violations occur in criminal investigations and a violation that occurs to someone who turns out to be innocent and is therefore not prosecuted is a violation with no remedy.

IV. *Ubi Jus Ibi Remedium* – No Right Without A Remedy

Lawyers don't use latin very much anymore, and with good reason. But the existence of this well-worn maxim reflects that this is an important idea that a person who does not possess the ability to vindicate her or his own rights does not truly have rights at all. The New Hampshire Constitution reflects this idea in Part I, Article 14, which reads:

[Art.] 14. [Legal Remedies to be Free, Complete, and Prompt.] Every subject of this State is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.
June 2, 1784

Remarkably, despite this constitutional statement, there is no civil remedy for injuries caused by a violation of a person's constitutional rights. SB36 seeks to remedy this.

V. Why Is This Needed?

Federal law contains a specific statute, 42 U.S.C. §1983, creating a civil cause of action for violation of constitutional rights. Opponents of this bill will say, correctly, that most violations of state constitutional rights are also violations of federal constitutional rights and that those rights can be vindicated in federal court. This fact should not dissuade you from providing your constituents with an ability under state law to vindicate their state constitutional rights in state court. First, New Hampshire should simply make good on its promise to its citizens to allow them to enforce their rights and obtain a remedy because it is the right thing to do. Second, as the Supreme Court stated in *Ball*, our state and federal constitutional rights are not necessarily co-extensive. In areas where our state constitution provides greater protection than the federal Constitution, there is currently no opportunity for a citizen to have a violation of his or her rights addressed in any court of law. Finally, we do not know what the future holds. If the people of the state enact constitutional protections that do not exist under federal law, the people of New Hampshire should be able to enforce those rights. If the United States Supreme Court rolls back federal constitutional protections, we should be able to continue to enforce our constitutional rights at the same level here in New Hampshire, and not allow our constitutional protections to be limited by the Supreme Court in Washington.

Richard J. Lehmann (Bar No. 9339)
Lehmann Law Office, PLLC
835 Hanover Street
Suite 301-A
Manchester, N.H 03104
(603) 731-5435
rick@nhlawyer.com

Voting Sheets

Senate Judiciary Committee

EXECUTIVE SESSION

Bill # SB36

Hearing date: _____

Executive session date: _____

Motion of: OTP

VOTE: 6-0

<u>Made by</u> Hennessey <input checked="" type="checkbox"/>	<u>Seconded</u> Hennessey <input type="checkbox"/>	<u>Reported</u> Hennessey <input type="checkbox"/>
<u>Senator:</u> Chandley <input type="checkbox"/>	<u>by Senator:</u> Chandley <input type="checkbox"/>	<u>by Senator:</u> Chandley <input type="checkbox"/>
Carson <input type="checkbox"/>	Carson <input type="checkbox"/>	Carson <input type="checkbox"/>
Levesque <input type="checkbox"/>	Levesque <input type="checkbox"/>	Levesque <input type="checkbox"/>
French <input type="checkbox"/>	French <input checked="" type="checkbox"/>	French <input type="checkbox"/>

Motion of: consent

VOTE: 5-0

<u>Made by</u> Hennessey <input type="checkbox"/>	<u>Seconded</u> Hennessey <input checked="" type="checkbox"/>	<u>Reported</u> Hennessey <input type="checkbox"/>
<u>Senator:</u> Chandley <input type="checkbox"/>	<u>by Senator:</u> Chandley <input type="checkbox"/>	<u>by Senator:</u> Chandley <input type="checkbox"/>
Carson <input type="checkbox"/>	Carson <input type="checkbox"/>	Carson <input type="checkbox"/>
Levesque <input type="checkbox"/>	Levesque <input type="checkbox"/>	Levesque <input type="checkbox"/>
French <input checked="" type="checkbox"/>	French <input type="checkbox"/>	French <input type="checkbox"/>

<u>Committee Member</u>	<u>Present</u>	<u>Yes</u>	<u>No</u>	<u>Reported out by</u>
Senator Hennessey, Chairman	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator Chandley, Vice-Chair	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator Carson	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator Levesque	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator French	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>

*Amendments: _____

Notes: _____

Committee Report

STATE OF NEW HAMPSHIRE
SENATE
REPORT OF THE COMMITTEE
FOR THE CONSENT CALENDAR

Tuesday, March 19, 2019

THE COMMITTEE ON Judiciary

to which was referred **SB 36**

AN ACT creating a cause of action for certain constitutional deprivations of right.

Having considered the same, the committee recommends that the Bill

OUGHT TO PASS

BY A VOTE OF: 5-0

Senator Harold French
For the Committee

This bill creates a cause of action for certain constitutional deprivations of right. If an individual's US Constitutional rights are violated, they have the right to sue in federal court, but it is not the same under the State Constitution. The enactment of this bill addresses that discrepancy by allowing people to recoup damages in state courts if their State Constitutional rights are violated.

Jennifer Horgan 271-2609

FOR THE CONSENT CALENDAR

JUDICIARY

SB 36, creating a cause of action for certain constitutional deprivations of right.

Ought to Pass, Vote 5-0.

Senator Harold French for the committee.

This bill creates a cause of action for certain constitutional deprivations of right. If an individual's US Constitutional rights are violated, they have the right to sue in federal court, but it is not the same under the State Constitution. The enactment of this bill addresses that discrepancy by allowing people to recoup damages in state courts if their State Constitutional rights are violated.

Docket of SB36

Docket Abbreviations

Bill Title: creating a cause of action for certain constitutional deprivations of right.*Official Docket of SB36.:*

Date	Body	Description
1/14/2019	S	Introduced 01/03/2019 and Referred to Judiciary; SJ 4
1/17/2019	S	Hearing: 01/22/2019, Room 100, SH, 10:00 am; SC 7
3/19/2019	S	Committee Report: Ought to Pass, 03/27/2019; Vote 5-0; CC SC 15
3/27/2019	S	Sen. French Moved to Remove SB 36 from the Consent Calendar; 03/27/2019; SJ 10
3/27/2019	S	Special Order to the beginning of the regular calendar, Without Objection, MA; 03/27/2019; SJ 10
3/27/2019	S	Ought to Pass: RC 23Y-0N, MA; OT3rdg; 03/27/2019; SJ 10
4/1/2019	H	Introduced 03/20/2019 and referred to Judiciary HJ 11 P. 73
4/2/2019	H	Public Hearing: 04/18/2019 01:00 pm LOB 208
4/18/2019	H	Full Committee Work Session: 04/30/2019 11:00 am LOB 208
4/23/2019	H	Executive Session: 05/14/2019 10:00 am LOB 208
5/16/2019	H	Majority Committee Report: Ought to Pass with Amendment #2019-1931h for 05/23/2019 (Vote 12-7; RC) HC 25 P. 10
5/16/2019	H	Minority Committee Report: Ought to Pass with Amendment #2019-1922h
5/23/2019	H	Lay on Table (Rep. Walz): MA DV 179-174 05/23/2019 HJ 16 P. 40

NH House

NH Senate

Other Referrals

Senate Inventory Checklist for Archives

Bill Number: SB 36

Senate Committee: Judiciary

Please include all documents in the order listed below and indicate the documents which have been included with an "X" beside

Final docket found on Bill Status

Bill Hearing Documents: {Legislative Aides}

Bill version as it came to the committee

All Calendar Notices

Hearing Sign-up sheet(s)

Prepared testimony, presentations, & other submissions handed in at the public hearing

Hearing Report

Revised/Amended Fiscal Notes provided by the Senate Clerk's Office

Committee Action Documents: {Legislative Aides}

All amendments considered in committee (including those not adopted):

___ - amendment # ___ ___ - amendment # ___

___ - amendment # ___ ___ - amendment # ___

Executive Session Sheet

Committee Report

Floor Action Documents: {Clerk's Office}

All floor amendments considered by the body during session (only if they are offered to the senate):

___ - amendment # ___ ___ - amendment # ___

___ - amendment # ___ ___ - amendment # ___

Post Floor Action: (if applicable) {Clerk's Office}

___ Committee of Conference Report (if signed off by all members. Include any new language proposed by the committee of conference):

___ Enrolled Bill Amendment(s)

___ Governor's Veto Message

All available versions of the bill: {Clerk's Office}

___ as amended by the senate ___ as amended by the house

___ final version

Completed Committee Report File Delivered to the Senate Clerk's Office By:

Committee Aide

Date

Senate Clerk's Office dm