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ARTICLES

THE ADA'S JOURNEY THROUGH CONGRESS

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The ADA is an example of what happens when a bill's "sponsors are so eager to get something passed that what passes hasn't been as carefully written as a group of law professors might put together."

-Justice Sandra Day O'Connor (March 2002)[1]

The ADA "was the product of two years of careful research, drafting and negotiation between disability-rights lawyers and business community lawyers."

-Professor Chai Feldblum[2]

The Americans with Disabilities Act ("ADA") is truly landmark legislation for individuals with disabilities because it reflects the

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1. Charles Lane, *O'Connor Criticizes Disabilities Law as Too Vague*, WASH. POST, Mar. 15, 2002, at A2.

2. *Id.* Professor Chai Feldblum is a legislative lawyer who helped draft ADA (March 2002).

first time that the private sector has been generally subject to many of the nondiscrimination rules that had been applied to the publicly-financed sector for nearly thirty years. It is the culmination of more than two decades of law reform efforts by the disability community.

Nonetheless, the story of the passage of the ADA can reveal two conflicting stories. On the one hand, it is a story of Congress demonstrating a very strong commitment to increasing the rights of individuals with disabilities. When attempts were made to cut back on these rights, especially for individuals with Human Immunodeficiency Virus ("HIV") infection, Congress refused to compromise. On the other hand, it is a story of blatant homophobia with some members of Congress feeling comfortable using labels like the "homosexual lobby" to describe the supporters of this legislation. With respect to the homophobia, Congress caved quickly by explicitly excluding from coverage all conceivable sexual minorities.

Despite the fact that Congress demonstrated an unwavering commitment to drafting a statute with a broad definition of disability, that clearly covered HIV infection, the courts have reacted with considerable ambivalence. The judiciary has often acted as if some of the *failed* amendments were successful. The ADA is *not* a piece of legislation in which members of Congress tried to sneak in language and hide its true meaning. Instead, it was legislation created as part of a careful and deliberate debate in which everyone generally agreed about the meaning of the statute. (And that agreement included a decision to exclude sexual minorities from potential coverage.) The clarity of this legislative history should cause it to be given weight by the judiciary.

Nonetheless, some members of the Supreme Court have insisted that the courts should ignore legislative history.[3] They have often interpreted the ADA more narrowly than could have possibly been contemplated by Congress.[4] It may be true that *some* statutes do not have a clear, genuine underlying purpose. But the ADA is *not* one of those statutes. From its earliest incarnation in 1988 to the ultimately passed version in 1990, Congress considered an unabashedly liberal piece of legislation that broadly protected the disability community. As with any piece of legislation, there were

3. Justice Scalia's hostility to the use of legislative history is well documented. *See generally* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997). Justices Thomas and Kennedy, however, have also rejected the use of legislative history. *See, e.g.*, Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 219 (1994); Negonsott v. Samuels, 507 U.S. 99, 100 (1993); Pub. Citizen v. United States Dep't of Justice, 491 U.S. 440, 470-73 (1989). Justice O'Connor has sometimes joined opinions that minimize the relevance of legislative history. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 467 (1991).

4. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999) (refusing to consider the relevance of the legislative history of the ADA when interpreting the meaning of the word "disability"). Justice O'Connor authored this opinion.

compromises as part of the enactment process. But none of those compromises undercut the basic broad scope of this historic legislation. No one who voted for (or against) this legislation understood it to have anything other than this broad purpose.

The ADA, in that sense, is unlike any other major piece of civil rights legislation enacted by Congress because there was no serious opposition. The Republican administration worked with a Democratic Congress to enact legislation that would strengthen the rights of the disability community. It was drafted carefully with much more detail than has existed in any other civil rights statute. Ahistorical descriptions of the ADA by Justice O'Connor and others should not cause us to forget the purposeful history that resulted in the drafting of this historic legislation.

I. FROM NATIONAL COUNCIL ON THE HANDICAPPED TO 1988 BILL

The legislative history of the ADA actually starts in 1985 when the D.C. District Court denied a motion to dismiss a Rehabilitation Act claim, finding that transsexuals could be covered by the Rehabilitation Act and, in 1986, when another D.C. District Court decision denied a motion to dismiss a Rehabilitation Act claim, finding that transvestites could be covered by the Rehabilitation Act.[5]

The first case was an unpublished decision by Judge Pratt of the D.C. District Court. In what Judge Pratt describes as a "sad case," "Jane Doe" had her job offer rescinded after she informed her new employer, the United States Postal Service, that she would be undergoing sex reassignment surgery and would prefer to begin employment dressed as a woman.[6] The position continued to be rescinded even after she offered to delay her surgery and continue to dress like a man. She brought a cause of action under both Title VII and the Rehabilitation Act.[7] Her Title VII claim failed even though the supervisor clearly denied her employment because of her intention to change her gender from male to female.[8] Having dismissed her Title VII claim, the court then considered her Rehabilitation Act claim. The court denied the defendant's motion to dismiss finding that the Rehabilitation Act was not intended to cover only "traditionally recognized handicaps."[9] Her case was therefore permitted to go forward to trial. There is no record of whether Doe was ultimately successful in her Rehabilitation Act

5. *See* Blackwell v. United States Dep't of Treasury, 656 F. Supp. 713, 715 (D.D.C. 1986), *aff'd in part, vacated in part by* 803 F.2d 1183 (D.C. Cir. 1987); Doe v. United States Postal Serv., No. CIV.A.84-3296, 1985 WL 9446, at *5 (D.D.C. June 12, 1985).

6. *Doe*, 1985 WL 9446, at *1-2.

7. *Id.*

8. *Id.* at *2.

9. *Id.* at *3.

claim after a trial.

The second case—*Blackwell v. United States Department of Treasury*[10]—received even more attention although the plaintiff was not ultimately successful. The plaintiff, William A. Blackwell, alleged that he was denied employment with the Treasury Department because he wore "feminine clothing" to each of two job interviews.[11] Rather than fill the position with Blackwell (who was entitled to priority consideration under the RIF program), the second interviewer closed the position. Blackwell argued that he was not hired because he was a transvestite. Blackwell survived a motion to dismiss with the court finding that transvestites can qualify as disabled under the Rehabilitation Act.[12] The case then proceeded to trial. The Treasury Department argued in defense that the interviewer perceived Blackwell to be a homosexual, not a transvestite, and that the interviewer could not have engaged in unlawful discrimination without Blackwell bringing his disability to the interviewer's attention.[13] The court overlooked the testimony that the first interviewer openly discussed Blackwell's appearance with him, and asked him if "there was objection to his life-style."[14] The interviewer, however, testified that by "life-style," she was only referring to his perceived homosexuality, not his transvestitism.[15] The trial court apparently found this testimony to be credible and entered judgment for the Treasury Department.[16] On appeal, in an opinion written by Ruth Bader Ginsburg, the D.C. Circuit affirmed the judgment dismissing the complaint while vacating the lower court's discussion that required the plaintiff to give precise notice of his handicapping condition.[17] Blackwell had also offered a Title VII theory of discrimination, arguing that he was a victim of sex discrimination (since his job was apparently conditioned upon a "male" appearance). Like every other court that has considered this theory of discrimination, the D.C. Circuit rejected this argument, finding that Congress did not intend Title VII to cover such causes of action.[18]

Even though Blackwell was not successful, his case brought significant response from Congress. In May 1988, when Congress was considering overriding President Ronald Reagan's veto of the

10. 656 F. Supp. 713 (D.D.C. 1986), *aff'd in part, vacated in part by* 803 F.2d 1183 (D.C. Cir. 1987).

11. *Id.* at 714.

12. Blackwell v. United States Dep't of Treasury, 639 F. Supp. 289, 290-91 (D.D.C. 1986).

13. *Blackwell*, 656 F. Supp. at 715.

14. *Id.* at 714.

15. *See id.*

16. *Id.* at 715-16.

17. Blackwell v. United States Dep't of Treasury, 830 F.2d 1183, 1184 (D.C. Cir. 1987).

18. *Id.* at 1183.

Civil Rights Restoration Act, Senator Helms spoke at length about court decisions finding that the Rehabilitation Act covered "transvestism and other compulsions or additions [sic], which churches or religious schools might once have felt comfortable in regarding as moral problems, not medical handicaps."[19] Senators Harkin and Kennedy stated that the moral majority had created a massive campaign against the Restoration Act, arguing that it reflected the "intent of Congress with regard to the inclusion of homosexuality as a protected classification under the present law."[20] (Of course, no Senator was ever able to cite a case in which a court had found that homosexuals were covered by the Rehabilitation Act.) These arguments against the Restoration Act were not successful. The vote to override President Reagan's veto was seventy-three to twenty-four.[21]

This debate about "transvestism" during discussion of the Civil Rights Restoration Act was quite a distraction for Congress. The purpose of the Civil Rights Restoration Act of 1988 was to overturn the Supreme Court's decision in *Grove City College v. Bell*.[22] *Grove City* was a very technical decision about the meaning of the term "program or activity" as found in Title IX, Title VI, and section 504. The Supreme Court had interpreted that term narrowly which, in turn, limited the application of those federal statutes.[23] The Civil Rights Restoration Act overturned that decision so that all the activities of an entity receiving federal financial assistance would be subject to these statutes, not simply the unit receiving federal financial assistance. *Grove City* was a sex discrimination suit brought under Title IX; it did not even directly involve the Rehabilitation Act. But its holding would apply to suits brought under section 504 of the Rehabilitation Act. The *Grove City* decision did *not* in any way affect the definition of disability, and the Civil Rights Restoration Act made no mention of the definition of disability. It merely defined the term "program or activity" to clarify the scope of the entities covered by these federal statutes.[24] Senator Helms used the *Blackwell* case to argue against the Civil Rights Restoration Act by claiming that if this bill were to become law then schools and day care centers would "be prohibited from refusing to hire a transvestite . . . ."[25] He did not ask Congress to amend the definition of disability to exclude transvestites from coverage; instead, he asked Congress to sustain President Reagan's veto of the entire Civil Rights Restoration Act. Although, as we will see,

19. 134 CONG. REC. S2400-01 (daily ed. Mar. 17, 1988).
20. 134 CONG. REC. S2683 (daily ed. Mar. 21, 1988).
21. *See* Helen Dewar, *Congress Overrides Civil Rights Law Veto*, WASH. POST, Mar. 23, 1988, at A1.
22. 465 U.S. 555 (1984).
23. *Id.* at 572-74.
24. *Id.*
25. 134 CONG. REC. S2400 (daily ed. Mar. 17, 1988).

Congress eventually caved to his request to exclude transvestites from coverage, it also voted to override the President's veto.

Despite losing the argument in the context of the Civil Rights Restoration Act, Helms persisted. When Congress considered the Fair Housing Act Amendments in 1988, Senator Helms insisted on an amendment stating that the term "handicap" shall not "apply to an individual solely because that individual is a transvestite."[26] That amendment was accepted in the Senate by a vote of eighty-nine to two with the negative votes coming from Senators Cranston and Weicker.[27] This is the same language that Helms later offered under the ADA.[28] Thus, by the time the transvestite exception was offered under the ADA, the Senate was already on record as having acquiesced under the Fair Housing Act. There was little point in objecting to this highly popular language when there was no record of a transvestite even prevailing under section 504.

The transvestite issue, however, was only one distraction while Congress generally considered the ADA. An examination of this general history shows that although Congress quickly caved on coverage of sexual minorities under the ADA, it had an overwhelming commitment to cover individuals with HIV infection.

The first draft of the ADA was the culmination of work by several important commissions. President Ronald Reagan had created the National Council on the Handicapped, an independent federal agency whose fifteen members were appointed by President Reagan and confirmed by the Senate. They issued two reports: Toward Independence (1986) and On the Threshold of Independence (1988). President Reagan had also created the Commission on the Human Immunodeficiency Virus Epidemic which had authored a report in 1988. The HIV Commission found that omnibus civil rights legislation was needed to prevent disability discrimination, and that such legislation should cover HIV-related discrimination.[29] The importance of protecting people with HIV infection from disability discrimination is found in every major report and speech surrounding the passage of the ADA, beginning in 1988.[30]

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26. 134 CONG. REC. S10,520 (daily ed. Aug. 1, 1988).
27. *See* 134 CONG. REC. S10,493 (daily ed. Aug. 1, 1988).
28. 135 CONG. REC. S10,776 (daily ed. Sept. 7, 1989).
29. The Commission stated:

> Comprehensive Federal anti-discrimination legislation, which prohibits discrimination against persons with disabilities in the public and private sectors, including employment, housing, public accommodations and participation in government programs should be enacted. All persons with symptomatic or asymptomatic HIV infection should be clearly included as persons with disabilities who are covered by the anti-discrimination protections of this legislation.

H.R. REP. NO. 101-485, pt. 2, at 48 (1990) (quoting REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY EPIDEMIC 123 (1988)).

30. Senator Harkin referenced the HIV Commission's work when he introduced the ADA on May 9, 1989. *See* 135 CONG. REC. 8506-07 (1989).

Senator Weicker (R. Conn.) introduced S. 2345 in the Senate on April 28, 1988. (Like many politicians who became active supporters of the ADA, Weicker had a personal experience with disabilities issues; he had a child with Down's syndrome.) This version of the ADA was co-sponsored by thirteen other Senators including Harkin (D. Iowa), Simon (D. Ill.), Stafford (R. Vt.), Kennedy (D. Mass.), Dodd (D. Conn.), Matsunaga (D. Haw.), Chafee (R. R.I.), Kerry (D. Mass.), Packwood (R. Or.), Leahy (D. Vt.), Inouye (D. Haw.), Cranston (D. Cal.), and Dole (R. Kan.). The original sponsors therefore included five Republicans and nine Democrats, reflecting the bipartisan nature of this legislation throughout its consideration. Before the end of the legislative session, S. 2345 had twenty-seven co-sponsors.[31]

Senator Weicker spoke in favor of the legislation when he introduced it on April 28, 1988. His opening remarks, unfortunately, were not entirely accurate in describing the proposed bill. He said that "the definition of 'physical or mental impairment' in this bill, . . . is a verbatim repetition of the definition of the same phrase in section 504 regulations."[32] In fact, the definition of "disability" (which was then termed "on the basis of handicap") was much broader than had existed under any previous federal (or state) law. An individual had only to demonstrate that he or she was treated differently "because of a physical or mental impairment, perceived impairment, or record of impairment."[33] The term "physical or mental impairment" only required proof of a "physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more systems of the body," or "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."[34] (It also contained a "perceived impairment" and "record of impairment" category.)

Senator Harkin mentioned their work again on September 7, 1989 when a new version of the ADA was introduced in the Senate. *See id.* at 19,801. Senator Kennedy also mentioned their work. *See id.* at 19,807.

31. 134 CONG. REC. 2383 (1988). Before the end of the legislation session, additional co-sponsors were John McCain (R. Ariz.), 134 CONG. REC. S5251 (daily ed. Apr. 29, 1988); Donald Riegle (D. Mich.), 134 CONG. REC. S6652 (daily ed. May 25, 1988); Quentin Burdick (D. N.D.), 134 CONG. REC. S10,309 (daily ed. July 28, 1988); Daniel Patrick Moynihan (D. N.Y.), *Id.*; Pete Wilson (R. Cal.), *Id.*; David Durenberger (R. Minn.), 134 CONG. REC. S10,514 (daily ed. Aug. 1, 1988); Timothy Wirth (D. Colo.), 134 CONG. REC. S11,105 (daily ed. Aug. 8, 1988); Claiborne Pell (D. R.I.), 134 CONG. REC. S11,475 (daily ed. Aug. 10, 1988); Brock Adams (D. Wash.), 134 CONG. REC. S12,036 (daily ed. Sept. 8, 1988); Ted Stevens (R. Ala.), *Id.*; Barbara Mikulski (D. Md.), *Id.*; Rudy Boschwitz (R. Minn.), 134 CONG. REC. S12,588 (daily ed. Sept. 15, 1988); Carl Levin (D. Mich.), 134 CONG. REC. 13,481 (daily ed. Sept. 28, 1988).

32. 134 CONG. REC. 9377 (1988).

33. S. 2345, 100th Cong. § 3(1) (1988).

34. *Id.* at §3(2)(A), (B).

Interestingly, the only inaccurate descriptions of the ADA occurred in 1988 when the ADA was not likely to pass Congress. By the time Congress seriously considered the ADA, members of Congress appear to have become well informed about the statute.

In the House, Representative Tony Coelho (D. Cal.) introduced H.R. 4498, the ADA, on April 29, 1988. (Coelho, himself, was a victim of discrimination because of his epilepsy.[35]) There were forty-seven co-sponsors in the House. The list, however, was less bipartisan than in the Senate. Republican co-sponsors included Silvio Conte (R. Mass.), James Jeffords (R. Vt.), Constance Morella (R. Md.), Claudine Schneider (R. R.I.), and Christopher Shays (R. Conn.). Before the end of the legislative session, the number of co-sponsors grew to 125. (When the ADA was re-introduced in 1989, the sponsor list was more bipartisan.)

The chief Republican sponsor in the House was Silvio Conte (R. Mass.). He spoke in favor of the legislation on April 29, 1988. Like Senator Weicker, he claimed that the definitions in the bill, including the definition of disability, drew on the definitions already in section 504 which "assures consistency, clarity and enforceability."[36] His remarks, however, were not offered live on the House floor. No live debate occurred at that time.

The text of the ADA was identical in both the Senate and House. The 1988 bill was not divided into titles like the final bill. Instead, it had sections banning different types of discriminatory activities. Section 4 prohibited discrimination in employment, housing, public accommodations, transportation, or telecommunication. Section 5 prohibited discrimination in access to services or programs; prohibited architectural and other barriers; and made it unlawful to: (1) refuse to grant reasonable accommodations, (2) impose disqualifying selection criteria, and (3) engage in associational discrimination because of someone's relationship to an individual with a disability. Section 6 prohibited discrimination in housing (which was not retained in the final bill). Section 7 provided limitations on the duties of accommodation and barrier removal. Section 8 required various entities to promulgate regulations to enforce the ADA. Section 9 provided the rules with respect to enforcement.

Each of these sections was stronger than the ultimately enacted bill. The definition of "reasonable accommodation" made no mention of the defense of undue hardship (or any other cost defense).[37] It

35. *See* 136 CONG. REC. 10,856 (1990) (remarks by Rep. Hoyer about Coelho).

36. 134 CONG. REC. 9604 (1988).

37. "The term 'reasonable accommodation' means providing or modifying devices, aids, services, or facilities, or changing standards, criteria, practices, or procedures for the purpose of providing to a particular person with a physical or mental impairment, perceived impairment, or record of impairment the equal opportunity to participate effectively in a particular program, activity, job, or

provided for reasonable accommodations for all categories of individuals with disabilities including individuals with "perceived" or "record of" impairments.

The section on architectural barriers was very broad. It made no distinction between new, altered, or existing structures. It also specifically mentioned communication and transportation barriers that were not listed in the finally enacted ADA. The architectural barriers section provided that it: "shall be discriminatory (A) to establish or impose; or (B) to fail or refuse to remove; any architectural, transportation, or communication barriers that prevent the access or limit the participation of persons on the basis of handicap."[38]

The defenses that were provided in this section were minimal. This early version of the ADA also included considerably stronger language with respect to the removal of communication barriers than the final bill; it permitted the Federal Communications Commission to require "the provision and maintenance of devices such as Telecommunications Devices for the Deaf ("TDD"), visual aids such as flashing alarms and indicators, decoders, and augmentative communication devices for nonvocal persons such as language symbol or alphabet boards."[39] Ultimately, the only communication device that was mandated by the ADA was the provision of telephone relay services for individuals with hearing impairments.

The enforcement section of the 1988 bill was also very strong. It provided that:

> Any person who believes that he or she or any specific class of individuals is being or is about to be subjected to discrimination on the basis of handicap in violation of this Act, shall have a right, by himself or herself, or by a representative, to file a civil action for injunctive relief, monetary damages, or both in a district court of the United States.[40]

The exhaustion of administrative enforcement procedures was only required for actions involving employment discrimination. Claims of discrimination involving barriers to access at public accommodations could be brought by private citizens for monetary damages. In contrast, the bill that was finally enacted permitted private parties who had accessibility complaints to obtain only injunctive relief, a weaker remedy.

The only aspects of the 1988 bill which appeared weaker than the ultimately enacted bill were two-fold. First, the 1988 bill only

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other opportunity." S. 2345, at § 3(5).

38. *Id.* at § 5(a)(2).

39. *Id.* at § 8(h)(3).

40. *Id.* at § 9(b).

referenced thirty-six million Americans being disabled.[41] Later versions referenced forty-three million Americans (although they contained a narrower definition of disability!). Second, the 1988 bill used the same definition of "public accommodations" as found in Title II of the Civil Rights Act of 1964.[42] The ultimately enacted bill used a broader definition.

There was widespread support for the 1988 bill in the Senate, with twenty-seven Senators ultimately co-sponsoring the legislation. Nonetheless, as expressed by Senator Dole (who was a sponsor), some of the sponsors had reservations about the details of this bill. The major problem with the 1988 version of the ADA was that it departed from the framework used for nearly thirty years under section 504 by failing to embody its basic definition of disability and by not using the undue hardship defense that had become basic to interpretations of section 504. Even on the day when the ADA was first introduced, Senator Dole, a key proponent of the ADA, spoke in favor of the need for such a bill but also stated that compromises were needed that would weaken the bill:

> I have reservations about many aspects of this bill including the elimination of the undue hardship criteria for reasonable accommodation, clarification on what constitutes a public accommodation and what such public accommodations would be required to do under the retrofitting provisions of this bill, what do we mean by transportation services and what is the scope of the provisions of this bill to intrastate transportation systems.[43]

Discussion of the ADA continued on April 29, 1988, with Senator McCain joining the list of co-sponsors.[44] He, too, spoke of reservations, while he supported the bill:

> While I have some reservations about portions of the bill—among which are the elimination of "undue hardship" for reasonable accommodation, clarification of what constitutes a public accommodation and which public accommodations would be required to retrofit in order to come into compliance with the bill, and how the bill defines transportation services and what is the scope of the bill's provisions with regard to intrastate transportation systems.[45]

This theme of reservations continued on May 16, 1988 when Senator Riegle spoke in favor of the bill:

> We need to consider carefully whether we should eliminate the

41. *Id.* at § 2(a)(1).
42. *Id.* at § 4(a)(3).
43. 134 CONG. REC. 9386 (1988).
44. *Id.* at 9542.
45. *Id.* at 9543.

> undue hardship criteria for reasonable accommodation, as this bill proposes.
>
> We also need to consider the considerable expenses that businesses, and state and local governments would be required to incur under this bill. These entities may need federal assistance to facilitate compliance, and I believe the Federal Government may have to share the responsibility in this regard.[46]

On June 6, 1988, Senator Weicker tied passage of the ADA to recommendations of the Presidential Commission on HIV.[47] This speech continued a theme throughout consideration of the ADA that it would be a helpful response to the Acquired Immune Deficiency Syndrome ("AIDS") crisis.

Discussion of the ADA heated up in the House after President Reagan's disparaging remark about candidate Michael Dukakis' reported mental illness. On the floor of the House, Representative Coelho commented: "[L]ast week, President Reagan made a wisecrack about 'invalids.' As a person with epilepsy, I resent the callous attitude exhibited by the Reagan-Bush administration toward those with disabilities, of which this remark is symptomatic."[48] Shortly thereafter, on August 11th, presidential candidate Bush supported the ADA. Ultimately, President Bush instructed his administration to work with Congress to enact disability legislation. Enactment of the ADA may therefore be credited, in part, to President Reagan's "invalid" statement.

Representative Owens (D. N.Y.) spoke in favor of the ADA on August 11, 1988. He said that both parties "are in agreement on at least one major item on our agenda for future legislation. While the Democratic convention will endorse this piece of legislation, both candidates are on record for having endorsed it also."[49] His comment reflected candidate Bush's endorsement of the ADA.

II. MAY 9, 1989 BILL: IMPORTANT COMPROMISES

Acquiescing in part to the reservations from some of the sponsors of the 1988 bill, Senator Harkin introduced a revised ADA in the Senate on May 9, 1989. (Senator Weicker was no longer in the Senate. Like Senator Weicker, Senator Harkin has a personal connection to disability issues. His brother, Frank, is deaf, and his nephew is a quadriplegic. On the day that the Senate passed the ADA, Senator Harkin began his remarks by using sign language to

46. *Id.* at 11,182.
47. *Id.* at 13,476.
48. *Id.* at 21,425.
49. *Id.* at 22,212-13.

thank his brother Frank.[50]) Representative Coelho again introduced the House version.[51] As in 1988, Coelho supported the ADA through extended remarks in the Congressional Record; his comments were not offered live in the House.[52] At this stage in deliberations concerning the ADA, there was little discussion on the floor of the House.

This bill had strong bipartisan support. In the Senate, it was co-sponsored by twenty-five Democrats and nine Republicans.[53] In the House, it was co-sponsored by seventy-four Democrats and eleven Republicans. Nonetheless, this version of the ADA did not have the support of Senators Dole or Hatch. Senator Dole's absence from the list of sponsors is particularly important because he had sponsored the 1988 version of the ADA. Presumably, Senator Dole understood that the ADA now stood a serious chance of passage and was withholding his support until some compromises were made on the bill's language. Both Hatch and Dole joined the list of sponsors on August 2, 1989, the day that the Senate Committee on Labor and Human Resources met to markup the bill.[54] Dole's support as a co-sponsor was presumably in exchange for concessions during the markup of the bill.

Attorney General Thornburgh spoke in favor of the new bill, but made it clear that the accessibility title needed serious revision to limit its scope and protection. Nonetheless, the version of the ADA that was considered on May 9, 1989 was very similar to the version that was ultimately enacted. It was more conventional than the 1988 version in that it tracked the language of section 504 but applied that language to the private sector. The findings section continued to reflect a broad mandate to protect individuals with disabilities. In fact, Congress now raised the estimate of the number of individuals with disabilities from thirty-four million to forty-three million.[55] The definition of disability, however, was narrowed to reflect the definition in use under section 504 of the Rehabilitation Act. The 1989 bill used the ultimately enacted language in which disability means "a physical or mental

50. 136 CONG. REC. 17,369 (1990).

51. 135 CONG. REC. 8601 (1989).

52. *Id.* at 8712.

53. When Senator Harkin introduced the bill, he stated that the bill had thirty-two co-sponsors and then named those thirty-two colleagues. In fact, the bill had thirty-four co-sponsors and also included Senator Rudy Boschwitz (R. Minn.) and John Heinz (R. Pa.). Presumably, the last two co-sponsors were added at the last minute and that fact was not communicated to Senator Harkin in a timely manner. Without Boschwitz and Heinz, the bill is somewhat less bipartisan in its support.

54. Senator Hatch had a personal connection to these issues. In the final day of consideration, he paid tribute to his brother-in-law, Raymond Hansen, who contracted polio and worked up to the day he died despite needing the assistance of an iron lung. 136 CONG. REC. 17,375 (1990).

55. *See* S. 933, 101st Cong. § 2(a)(1) (1989).

impairment that substantially limits one or more of the major life activities of such individual."[56]

Like the ultimately enacted bill, the ADA was now divided into sections. Title I contained the general prohibition against discrimination. Title II was the employment title. Title III was the public services titles. Title IV was the public accommodations title. Title V was the telecommunications relay services title. Title VI was the miscellaneous title.

Acquiescing to Senator Dole's request (even before he joined the list of sponsors), the undue hardship defense became a part of this version of the bill, reflecting the case law and regulations under section 504. The employment title contained an undue hardship defense.[57]

The public accommodations title was changed somewhat from the 1988 version. Here, Congress was writing on a virtual clean slate because section 504 did not contain a parallel to the public accommodations title. The closest parallel was Title II of the Civil Rights Act of 1964 but the Civil Rights Act's model of racial anti-discrimination did not have a close parallel to the ADA's need to make facilities accessible to individuals with disabilities.

The 1988 version of the public accommodations provisions had simply used the definition of public accommodations found in Title II of the Civil Rights Act of 1964. That definition, however, focused only on places like restaurants and hotels. The disability community, however, argued that it needed access to other types of facilities like supermarkets, pharmacies, doctor's offices, and recreational facilities. In response to these arguments, the 1989 version of the ADA *broadened* the definition of public accommodations that appeared in the 1988 version. Public accommodations were defined as all privately operated establishments "that are used by the general public as customers, clients, or visitors; or that are potential places of employment."[58] The bill then provided an inclusive list of covered entities that was not intended to be a complete list.[59]

While broadening the definition of public accommodations, the 1989 version of the ADA also made a distinction between existing and new structures. Existing structures were only required to meet a "readily achievable" standard.[60] New facilities, however, were

56. *Id.* at § 3(2)(A).
57. *Id.* at § 202(b)(1).
58. *Id.* at § 401(2)(A)(i).
59. The entities included were: "auditoriums, convention centers, stadiums, theaters, restaurants, shopping centers, inns, hotels, and motels, . . . terminals used for public transportation, passenger vehicle service stations, professional offices of health care providers, office buildings, sales establishments, personal and public service businesses, parks, private schools, and recreation facilities." *Id.* at § 401(2)(B).
60. *Id.* at § 402(b)(4)(A).

required to be accessible unless it was "structurally impracticable."[61]

Finally, the enforcement section in the 1989 bill for the public accommodations title was stronger than existed under Title II of the Civil Rights Act of 1964. Under the Civil Rights Act, plaintiffs are only able to obtain injunctive relief. The disability rights community argued that injunctive relief would not be sufficient to create accessibility at places of public accommodation. In 1989, they therefore successfully argued for the public accommodations title to contain the stronger remedies found in the Fair Housing Act.[62] Compensatory damages were available under this enforcement scheme.

The most important weakening compromise in the 1989 version of the ADA came in the telecommunications title. It was weakened to make no reference to TDD's or other alternative communication devices. Instead, the telecommunications title only required the provision of telecommunication relay services.[63]

Although Congress would make further changes before enacting the ADA into law, the basic framework was set in the 1989 version that was supported by the Republican administration and Democratic Congress. The most significant changes would occur in the public accommodations title. In the 1989 version, the ADA contained the Fair Housing Act remedies that included compensatory damages. At passage in 1990, it contained the remedies found in Title II of the Civil Rights Act which only included injunctive relief in private causes of action. The 1989 version contained a very broad definition of public accommodations, which was broader than the definition found in Title II of the Civil Rights Act. The 1990 version still contained a broader definition of public accommodations than existed under Civil Rights Act Title II, but the definition was somewhat narrower than the definition found in the 1989 version.

The legislative debate on May 9, 1989 reflected the legislative debate throughout the consideration of the ADA in that there was no real opposition to enactment of the legislation. Senator Harkin introduced the ADA in the Senate, with thirty-three co-sponsors, about one-fourth of whom were Republicans. Some of the points that he emphasized were that the ADA would make public transportation more accessible so that individuals with disabilities could be mainstreamed into public life. Further, he noted that there was considerable discrimination against individuals who were HIV-positive and that the ADA should help to remedy that discrimination. Finally, he emphasized that the average cost of reasonable accommodations is modest and that the ADA should help reduce people's dependencies on public benefits by allowing them to

61. *Id.* at § 402(b)(6).
62. *See id.* at § 504(a).
63. *See id.* at § 502(a).

enter the workplace.

After Senator Harkin introduced the ADA, Senator Kennedy spoke offering his support for the bill. Senator Durenberger then spoke, offering more moderate support for the ADA. He emphasized the importance of ending discrimination at the workplace and providing accessible transportation. Nonetheless, he expressed modest reservations. He asked whether rural areas might have trouble complying with some aspects of the ADA. (Senator McCain spoke later, agreeing with this concern.) Senator Durenberger also stressed that the federal government should not impose mandates on state and local government without providing financial assistance. Finally, he suggested that it was important that the ADA not impose rules on religious entities. Of the three concerns raised by Senator Durenberger, one was ultimately addressed by Congress when it provided various religious exceptions to the ADA in the version that was reported out of Committee and ultimately enacted into law.

III. AUGUST 1989 VERSION

The ADA was then referred to the Senate Committee on Labor and Human Resources which held four days of hearings. On August 2, 1989, the Senate Committee on Labor and Human Resources met to markup the bill. Senator Harkin offered a substitute version that included an amendment proposed by Senator McCain concerning technical assistance.[64] Senator Hatch offered and then withdrew an amendment that would have extended the scope of coverage to include Congress. This version was reported favorably from Committee in a sixteen to zero vote, again reflecting that there was no substantial opposition to the ADA. The Committee submitted a report on the ADA. (The coverage of Congress, however, proved to be a thorny issue that ultimately stalled passage of the ADA by a few weeks. This issue had emerged more than a year before final passage.)

Representatives Hoyer and Mineta spoke in favor of the ADA in the House on August 3, 1989. They indicated that it had 220 co-sponsors in the House, as well as the support of the President, and was therefore likely to become law.[65]

The August 1989 version of the ADA contained some important changes from the May 1989 version. Senator Durenberger summarized those changes which included:

- the new version eliminated rules that would have arguably permitted individuals to file lawsuits because they speculated that they might face discrimination;

64. The technical assistance provision required the Attorney General to develop and implement a plan to assist entities covered under the Act to understand their responsibilities. *Id.* at § 506(a)(1).

65. 135 CONG. REC. 18,647 (1989).

- the new version weakened the reasonable accommodation language so that entities making good faith efforts to provide reasonable accommodations would not be penalized;
- the new version provided clearer definitions of terms such as reasonable accommodation, undue burden, and readily achievable;
- the effective date for the employment provision was extended from twelve to eighteen months; the effective date was phased in for employers with fewer than twenty-five employees;
- the penalties for the public accommodation title were reduced to injunctive relief for private lawsuits; and
- the time period for accessible buses was extended.[66]

Private clubs and religious organizations were also exempted as requested by Senator Durenberger in earlier remarks.

None of these changes was substantial. They did not undermine the drafters' basic intentions to provide clear and comprehensive coverage against disability discrimination. The report of the Senate Committee on Labor and Human Resources (along with the floor debate) made it clear that Congress maintained its intention to provide broad coverage.[67] For example, the Committee's report made it clear that it intended the term "disability" to be interpreted broadly. It specified that the term included: "orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, infection with the Human Immunodeficiency Virus, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, drug addiction, and alcoholism."[68] The courts, however, have not consistently held that each of these categories of individuals is disabled.[69]

The report also commented on the meaning of the term, "major life activity," noting that it includes functions such as "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[70] Nonetheless, the Supreme Court has questioned whether "working" should be

66. *Id.* at 19,811.

67. S. REP. NO. 101-116, at 20 (1989).

68. *Id.* at 22.

69. *See, e.g.*, McKenzie v. Dovala, 242 F.3d 967 (10th Cir. 2001) (psychological impairment); Krocka v. City of Chicago, 203 F.3d 507 (7th Cir. 2000) (psychological impairment); Matlock v. City of Dallas, No. CIV.A.3:97-CV-2735, 1999 WL 1032601 (N.D. Tex. Nov. 12, 1999) (hearing impairment); Pacella v. Tufts Univ. Sch. of Dental Med., 66 F. Supp. 2d 234 (D. Mass. 1999) (monocular vision and severe myopia); Todd v. Academy Corp., 57 F. Supp. 2d 448 (S.D. Tex. 1999) (epilepsy).

70. S. REP. NO. 101-116, at 22.

considered a major life activity for the purposes of the ADA.[71]

Because the committee vote was unanimous, there was no Minority Report. Senator Hatch submitted additional views as part of the Committee's report. His statement reflected that the current version of the ADA reduced the penalties, narrowed the breadth of coverage of public accommodations, and relaxed the standards imposed on the private bus industry.[72] He noted, however, that he reserved the right to pursue further changes on the Floor.

Senator Hatch expressed some concerns that did not lead to any changes in the bill. For example, he noted that a small grocery store would not be covered by the ADA with respect to employment but would be covered with respect to its treatment of its customers. He indicated that he favored a small business exemption for the public accommodations title. That change, however, was never accepted by Congress. Ultimately, Title III did include a phase-in provision for small businesses. He also objected to the provision that permits the Attorney General to seek civil penalties. That provision remained in the bill, nonetheless. Moreover, Senator Hatch objected to the requirement that the private bus industry purchase lift-equipped vehicles (over a specified time period). Although the time period for compliance was relaxed, the basic rules were not changed during consideration of the ADA.

IV. SEPTEMBER 7, 1989: BILL PASSES SENATE

Debate resumed on September 6, 1989 in the Senate on the Committee's version of the ADA with no substantive discussion occurring on that day. Nonetheless, the bill received negative publicity in the form of a *New York Times* editorial which asked whether the ADA was a blank check for the disabled.[73] The editorial

71. *See* Murphy v. United Parcel Serv., 527 U.S. 516, 523 (1999).

72. S. REP. NO. 101-116, at 96.

73. This is an excerpt from the New York Times editorial:

> With surprisingly narrow public scrutiny, Congress is moving swiftly to extend broad civil rights protection to the nation's 40 million disabled citizens. The sentiment is laudable: to bring the disabled closer to the mainstream of American society. But the legislation is vague; not even its defenders are able to calculate its benfits [sic] and costs. Those costs could be monumental. The proposal thus requires patient, unemotional examination.
>
> That won't be easy. The bill was unanimously approved by the Senate Labor and Human Resources Committee last month, and though it still awaits hearings in four separate House committees, it commands strong bipartisan support in both House and Senate and the endorsement of President Bush. As one skeptic put it, "No politician can vote against this bill and survive."
>
> The bill would ban discrimination in employment in all businesses with more than 15 workers. That's caused no controversy. What it has is a provision requiring nearly every retail establishment, large or small, old and new—barber shops, banks, restaurants, movie

did not actually oppose the ADA but encouraged the Office of Management and Budget to estimate the costs and benefits of the legislation before final passage. It also encouraged Congress to be more precise about the accessibility obligations that it was imposing on businesses. In the days that passed, this editorial was frequently cited by the bill's opponents to argue that the ADA was unduly expensive and vague. The final committee reports on the ADA did include extensive cost estimates.

The Senate debated, amended, and voted on the ADA on September 7, 1989. Its basic outline was reflected in the Labor and Human Resources Committee Report. Senator Harkin explained that all the key compromises were already reflected in this version of the ADA and no further, substantial changes were expected.

> Senator Kennedy and I are committed to this compromise. We will oppose all weakening amendments. We will also oppose any amendments that are intended to strengthen the substitute, if these amendments do not have the support of the administration and Senator Dole. We are pleased that the administration and Senator Dole share this commitment. We hope that other Senators will understand how fragile this

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theaters—to be accessible to the disabled. The legislation does not spell out how. But in many cases it would mean building ramps, widening doorways, modifying restrooms. Elevators would be required in all new buildings of more than two stories.

The bill would also require bus companies to include lifts, specially designed restrooms and other facilities on all new buses built five to six years after enactment. The bill calls for a study—after the bill is passed, not before—to determine how much this would cost the companies.

The bus companies are angry. Most businessmen are simply fretful and confused. That's partly because the bill's language is so vague. It says that existing facilities must make only "readily achievable" changes that won't involve "burdensome expense." Yet what do these words mean in practice? Obviously, no bill can give precise instructions to thousands of individual businesses. But several states already have laws on the books that provide business more useful guidance than the Senate bill does.

. . . .

Predictions about the bill's projected benefits are obviously speculative. Worse, nobody has even tried to speculate about its costs. But it shouldn't be impossible to provide estimates. The Office of Management and Budget has done so before in tough instances, like the costs of air bags.

Congress and the Administration now have a similar responsibility to stand back, to weigh, to calculate. No one wishes to stint on helping the disabled. It requires little legislative skill, however, to write blank checks for worthy causes with other people's money.

Blank Check for the Disabled?, N.Y. TIMES, Sept. 6, 1989, at A24.

compromise is and will support it.[74]

Senator Hatch shared the statement of the ADA's underlying purpose. He stated that he was a co-sponsor of this legislation because he firmly believed in its objective: establishing a clear, comprehensive prohibition of discrimination on the basis of disability.[75] Senator Hatch sought to amend the ADA by providing a refundable tax credit for the costs incurred by small businesses to comply with the public accommodations requirements.[76] Although this amendment was rejected on a point of order, Senator Hatch offered the amendment in good faith. He did not seek to undermine the basic purpose underlying the ADA. Throughout the debate surrounding the ADA, Hatch demonstrated a strong commitment to passage of the legislation and helped secure some important compromises to secure strong bipartisan passage.

Senator McCain then spoke about one important amendment that emerged from the committee process—the communication requirements contained in Title IV of the ADA which require the existence of a telephone relay system for individuals with disabilities to use the telephone system.[77] Although the communication requirements were more stringent in the 1988 version of the ADA, it is clear that the telephone relay system requirements had strong bipartisan support. McCain and Harkin co-sponsored this amendment in committee.

Senator Durenberger noted the consistency of the purpose underlying the ADA as it was modified during the legislative process when he stated:

> The bill's genesis is in the proposals by the National Council on the Handicapped—a 15-member commission appointed by President Reagan. They were introduced as a bill last year by Senator Lowell Weicker. The changes since then have been many. We have eliminated many of the cost concerns that were troublesome to small businesses. In doing so we have won the support of President Bush. We were able to do this while still maintaining the basic principle of this legislation—to provide a clear and comprehensive prohibition against discrimination against persons with disabilities.[78]

Although the 1989 version of the ADA contained changes from the 1988 version, many Senators made mention of Senator Lowell Weicker's earlier work on the 1988 version as foundational to the ultimately enacted version.[79]

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74. 135 CONG. REC. 19,803 (1989).
75. *Id.*
76. *Id.* at 19,808.
77. *Id.* at 19,808-09.
78. *Id.* at 19,810.
79. *See, e.g., id.*

When Senator Cranston spoke in favor of the bill, he made special mention of the fact that the ADA would cover individuals with HIV infection.[80] He also noted that the bill contained a direct threat defense that would permit an employer to exclude someone from employment if his or her medical condition posed a significant risk of transmitting the infection to others. But he concluded with this statement: "As medical evidence concerning HIV has shown, however, AIDS carries very low risks of transmission. Therefore, the applicability of such a standard to an individual infected with the HIV virus should be rare."[81] No Senator objected to the accuracy of these statements by Senator Cranston.

Later in the day on September 7th, the Senate considered various amendments to the ADA. Senator Hatch offered an amendment requiring the National Council on Disability to conduct a study and report on the accessibility of wilderness areas to individuals with disabilities. That amendment was supported by Senator Kennedy, and was agreed to.[82]

Senators Hatch and Harkin entered into a colloquy to "clarify some of the mechanisms created in S. 933 to prohibit discrimination against people with disabilities in various employment settings."[83] The main point of this colloquy was to clarify that employers at temporary and changing construction sites would not necessarily be expected to create accessible paths of travel throughout their work on a site. "[T]o make constant different accommodations at different points on the site as would often be the case on temporary worksites, [would] be a factor taken into consideration in assessing which accommodations would pose an 'undue hardship' for an employer."[84]

Senator Harkin introduced two technical amendments. The first amendment added a comma to the bill. The second amendment allowed telecommunication carriers to have three years, rather than two years, to comply with the bill.[85] Senator Hatch agreed to these amendments and they were approved.

Senator Hatch offered the amendment that he had previously mentioned that would provide a refundable tax credit for the costs of small businesses complying with the ADA.[86] This amendment was co-sponsored by McCain, McConnell, Thurmond, and Kasten. Hatch argued that this amendment would allow the ADA to cover small businesses while also protecting them financially from the ADA's requirements.

Senator Bentsen opposed the amendment, calling it a "killer

80. *Id.* at 19,812-13.
81. *Id.* at 19,813.
82. *Id.* at 19,833
83. *Id.*
84. *Id.* at 19,834.
85. *Id.*
86. *Id.* at 19,835.

amendment" because it is an S-numbered bill.[87] Apparently, the House is supposed to initiate tax legislation and Bentsen was concerned that the House would "blue-slip" the bill because the "House is very jealous of its jurisdiction."[88] He also noted that "[t]he Budget Act clearly stipulates that it is not in order for the Senate to consider any amendment that reduces revenues below the level in the budget resolution."[89] Senator Bentsen was also chair of the Finance Committee, which should have had jurisdiction over this tax credit idea and appeared to be protective over his turf. Senator Packwood also objected to the amendment and suggested that Senator Hatch would have normally opposed such an amendment had he not taken a "paternal interest" in the ADA.[90]

Senator Pryor then made some negative comments against the bill itself. His comments are somewhat surprising because he had become a co-sponsor of the bill on August 3rd, more than a month earlier. (Senator Pryor was absent for the Senate's vote on this version of the ADA, so he neither voted for nor against the bill at this time.) He acknowledged that he decided to co-sponsor the bill before having read the legislation or the committee report. Having now read both items, he has "many questions."[91] His objections were as follows. First, he objected to the definition of disability because it "is extremely loose . . . [and] is going to be the subject of literally countless issues of litigation in the courts across the country."[92] Second, he criticized the scope of the bill, noting that it covers forty-three million disabled Americans and 3.9 million private businesses. Because of the broad scope, he argued that the penalties were too harsh. In particular, he objected to the remedies under Title III: an injunction, attorney's fees, and possible civil penalty by the Attorney General. He described the bill as a "lawyer's dream."[93]

Senator Hatch responded by saying that the civil penalty was only available in an action brought by the Attorney General and he hoped that Senator Pryor would still support the bill. He emphasized that the private action for damages that existed under a previous version of the bill was eliminated. Senator Kennedy also responded to Senator Pryor, reminding him that the remedies found in Title III were actually a compromise and that he would have preferred stronger remedies.[94]

The discussion then returned to Senator Hatch's tax credit proposal. Senator Dole had conferred with members of various committees and now opposed the tax credit amendment. He argued

87. *Id.* at 19,837.
88. *Id.*
89. *Id.*
90. *Id.* at 19,838.
91. *Id.* at 19,840.
92. *Id.*
93. *Id.*
94. *Id.* at 19,841.

that section 190 of the Internal Revenue Code, which allows for a $35,000 tax deduction for the removal of architectural barriers was a better solution to the problem than Senator Hatch's tax credit. He said that he was working on a revision to that provision which would attain Senator Hatch's objectives. The amendment failed on a point of order after Senator Hatch sought to have waiver of the Gramm-Rudman-Hollings Act (which required a 3/5 majority). The vote was forty-eight to forty-four in favor of the waiver, but that was not enough votes for the waiver.[95]

The discussion of the tax credit was quite lengthy—taking more than two hours. Throughout the debate, Senator Hatch insisted that he was not pushing this amendment to kill the ADA.

> I am happy to lick my wounds and admit I lost. I do not care; that is the way life is around here. If you want to win, you want to win; do not tell me it will kill this bill. I would not let it kill the bill. Before I let that happen in conference, I would have stripped it out myself, if that were the case. But it could not possibly be the case.[96]

After defeat of the tax credit amendment, general debate continued. Senator Armstrong initiated a discussion concerning the definition of disability which ultimately led to some of the exclusions found in the ADA. Armstrong first inquired as to whether the bill covered drug users and alcoholics. Senator Harkin informed him that they were working on some clarifying language for those disabilities. Senator Armstrong then said he wanted to provide a list for consideration of questionable disabilities that should not be covered by the ADA such as "alcohol withdrawal, delirium, hallucinosis, dementia with alcoholism, marijuana, delusional disorder, cocaine intoxication, cocaine delirium, disillusional disorder."[97] He also inquired about "homosexuality and bisexuality" about "exhibitionism, pedophilia, voyeurism, and similar" and, finally, about "compulsive kleptomania, or other impulse control disorders."[98] In each instance, Senator Harkin responded that those categories were already not covered by the ADA. Ultimately, however, Senator Armstrong was not satisfied unless the bill was amended to explicitly reach that result.

Senator Helms later returned the discussion to the definition of disability. (Senator Helms was one of eight Senators who voted against this version of the ADA.) In response to questions from Helms, Harkin replied that the bill did not cover pedophiles, did cover schizophrenics, was not sure whether it covered kleptomaniacs, did cover manic depressives, people with very low

95. *Id.* at 19,846.
96. *Id.* at 19,848.
97. *Id.* at 19,853.
98. *Id.*

IQ's, individuals with psychotics disorders, did not cover homosexuals, was not sure about transvestites but would accept an amendment to exclude them from coverage. Senator Helms repeatedly stated that he objected to individuals who are HIV-positive being covered by the statute because most of the "people who are HIV positive, most of whom are drug addicts or homosexuals or bisexuals."[99] Senator Harkin kept responding by saying that they were making good legislative history by agreeing that people who are HIV-positive are covered by the ADA.

Senator Kennedy reiterated the point about people who are HIV-positive being covered by the ADA and asked to have some letters printed in the record from the National Commission on AIDS which were consistent with that point.[100] The clarity of the legislative history on HIV being covered is fascinating because some lower courts actually concluded that HIV infection was not covered by the ADA despite the clarity of the Congressional intent.[101] Had judges made any inquiry into the legislative history of the ADA, they would have seen a unanimous understanding that Congress intended HIV to be covered. Senator Helms objected to that coverage and ultimately voted against the bill. But the supporters of the bill understood it covered individuals with HIV infection.

Senator Armstrong continued the discussion about the breadth of the definition of disability, arguing that "voyeurism" would be covered by the ADA because it is a listed disability in the Diagnostic and Statistics Manual of Mental Disorders, Third Edition ("DSM III").[102] After further discussion about the definition of disability, Senator Helms offered an amendment which limited coverage of individuals who engage in the illegal use of drugs or are alcoholics under section 504 of the Rehabilitation Act. Senator Harkin complained that Senator Helms was seeking to amend a bill other than the ADA, but acquiesced to the amendment.[103] The amendment was agreed to.

Referring to the 1986 Rehabilitation Act case involving coverage of transvestites, Senator Helms then offered an amendment excluding transvestites from coverage.[104] As noted earlier, that result had already been agreed to under the Fair Housing Act Amendment. Senator Harkin accepted this amendment, and it was agreed to.

Supporters of the statute also suggested language clarifying whether certain individuals would be covered by the ADA. Senator

99. *Id.* at 19,866.
100. *Id.* at 19,867.
101. *See, e.g.*, Runnebaum v. Nationsbank of Md., N.A., 123 F.3d 156 (4th Cir. 1997); Cortes v. McDonald's Corp., 955 F. Supp. 541 (E.D.N.C. 1996).
102. 135 CONG. REC. 19,871 (1989).
103. *Id.* at 19,873.
104. *Id.* at 19,875.

Harkin offered an amendment to exclude current users of illegal drugs as well as alcoholics from the definition of disability in certain situations.[105] Senator Coats supported the amendment and asked some clarifying questions. Coats indicated that he had supported a similar exclusion in committee and was satisfied with Harkin's amendment. In response to Coats' questions, Senator Harkin indicated:

- an employer can refuse to hire a job applicant or discharge an employee who is a current user of illegal drugs;
- an employer can refuse to hire a job applicant or discharge or discipline an employee who is an addict who is also currently using illegal drugs or alcohol;
- an employer may fire or discharge an employee who is a casual illegal drug user;
- an employer may use drug testing as a means of determining whether the employee is currently using illegal drugs;
- an employer may fire or discipline the employee if through testing it is determined that the employee is using illegal drugs;
- an employer may use drug-testing as part of the pre-employment screening process and then refuse to hire the applicant if it is found that he or she is using illegal drugs;
- a rehabilitated drug user, however, cannot be fired; and
- an employer is under no legal obligation to provide rehabilitation for an employee who is using illegal drugs or alcohol.[106]

In response to a question from Senator Danforth, Senator Harkin offered further clarification about the drug users provision in the bill. (Danforth was not a sponsor of the ADA but he did vote for this version of the bill.) The amendment (number 718) was set aside while they proceeded with other amendments.

The discussion then returned to amendment number 718, concerning drug users and alcoholics. In response to a question from Senator Armstrong, Senator Harkin indicated that an employer could take into account offsite drinking as a factor in employment or promotion "because it might bring disgrace" to the employer.[107] (In fact, it is not clear that an employer could consider offsite drinking if it did not impair job performance. The "disgrace" language was Armstrong's. Harkin simply agreed with it.) The amendment was agreed to.[108]

105. *Id.*
106. *Id.* at 19,876.
107. *Id.* at 19,881.
108. *Id.*

Senator Humphrey also objected that drug addiction is a covered disability under the ADA. He offered amendment number 721, that was supported by Senators Harkin and Kennedy, which clarified that current users of illegal drugs are not covered by the ADA.[109] Humphrey sought assurance that this amendment would not disappear in committee. Senator Harkin assured Senator Humphrey that the language would stay in the bill in committee. (He also noted that the language was redundant because other language in the bill already achieved this purpose. At this late hour, several of the amendments appear to have been redundant.) Senator Hatch also offered his assurance that the language would survive the conference. The amendment was agreed to. (It did survive the conference.)

Debate then turned to discussion of amendment number 722 which excluded various conditions from the definition of disability. Senator Kennedy supported the amendment while making it clear that it was a compromise, which he would have preferred not to make. He also pointed out "that some of the behavior characteristics listed such as homosexuality and bisexuality are not, even without this amendment, considered disabilities."[110] Senator Armstrong spoke in favor of the amendment while also noting that it should not be assumed "that because we have failed to exclude something that it is necessarily included."[111] Senator Hatch asked to be added as a co-sponsor to this amendment. Senator Hatch, like Senator Kennedy, argued that the amendment was unnecessary but agreed to support it as a compromise. The amendment was agreed to.[112]

This agreement is among the most interesting deals that helped make passage of the ADA possible by a strong bipartisan majority. Throughout the debate over the ADA, there were homophobic comments about the "sodomy lobby" supporting passage of the ADA. Many of these comments were also insensitive on HIV issues. Kennedy and other liberals, however, never intended the ADA to protect individuals merely because they were homosexual. They therefore disarmed Armstrong and Helms by readily agreeing to an amendment to exclude homosexuals from coverage. But they refused to go so far as to exclude individuals who are HIV-positive from coverage, because they genuinely did believe that the ADA would assist some individuals who faced discrimination because of their HIV status.

The language achieved under amendment number 718 was key to the passage of the ADA because it offered a compromise between those who wanted drug users unprotected by the statute and those

109. *Id.* at 19,883.
110. *Id.* at 19,884.
111. *Id.*
112. *Id.* at 19,885.

who wanted drug addiction to be recognized as a disability. By creating the category of "rehabilitated drug user," the drafters of the ADA would be able to be responsive to both constituencies. As with any compromise, there were still some ambiguities. Courts have, for example, struggled with the meaning of "current" drug user. How "current" is "current"? Does the person have to be using drugs illegally at the moment of discharge? Congress did foresee that ambiguity but offered no specific guidance on the meaning of that term.

Although most of the debate that day concerned the definition of disability, transportation issues received significant discussion at that time. Senator Hollings (who had become a co-sponsor on June 6th) offered an amendment, which related to the study required by the bill on the access needs of individuals with disabilities to intercity buses. The amendment provided for a one-year delay in implementing the lease/purchase requirement of accessible buses under the ADA. Senators Kennedy and Harkin supported the amendment, and it was agreed to.

Senator Bumpers then spoke, seeking clarification on some issues. He claimed that he was going to vote for the bill and was a co-sponsor.[113] In fact, he is not listed as a co-sponsor although he did ultimately vote for this version of the bill. He also indicated that he became sensitized to disability issues when his daughter was paralyzed in a wheelchair for six months.[114] He sought reassurance that public entities would only have to purchase accessible buses thirty days after the enactment of the ADA. Bus orders before that date would not need to comply with the accessibility requirements. Senator Harkins provided him with that reassurance, reading from page forty-seven of the Committee Report in support of his answer.[115] (It is interesting that the committee report is often used to reply to questions rather than the text of the statute, showing how much reliance members of Congress hold in the committee reports.)

Senator Bumpers entered into a colloquy with Senator Harkin concerning the meaning of the term "readily achievable" in the transportation context. Senator Harkins reassured Senator Bumpers that the term "readily achievable" does not apply to private buses purchased prior to thirty days after the enactment of the bill. Senator Harkin also explained that if it is too expensive to provide access then the owner of an establishment also has to consider alternative means of access. Again, Senator Harkin read extensively from the committee report to reply to Senator Bumpers' questions.[116]

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113. *Id.* at 19,858.
114. *Id.* at 19,861.
115. *Id.* at 19,858.
116. *Id.* at 19,860.

There was then a discussion about the cost of lifts on buses. Greyhound had taken the position that a lift will cost about $30,000 and increase the cost of a bus ticket by twenty-five percent. Senator Harkin disputed that claim, arguing that the price of a lift in Denver is only $12,000 and it will come down further in the near future.[117]

The Senate also debated whether Congress should be covered by the ADA. Details concerning congressional coverage ultimately delayed passage of the ADA. Senator Grassley introduced an amendment, which was supported by Senators Dole, Specter, and Humphrey, which would require Congress to be covered by the Act.[118] (Humphrey's sponsorship of this amendment is odd, because he did not vote for this version of the ADA.) Senator Ford objected to the amendment because it would mean that the executive branch would have some control over the legislative branch. (Ford did not sponsor the ADA, but he did vote for this version of it.) Ford asked that the amendment be withdrawn and that acceptable language be worked out in committee. Senator Grassley responded that he was willing to work out something in conference but that he wanted this amendment accepted at this time. Senator Ford was not happy with that solution. He said:

> I understand that we are pushed for time. It is a quarter of 10 at night. So we want to get it over with and go on and make a mistake and hope that we can take care of it at the conference. I think that I brought it to the attention of my colleagues, and apparently my colleagues are so anxious to get the bill passed tonight, they will swallow camels and choke on gnats.[119]

The amendment was agreed to. (The text of this amendment proved controversial in the final weeks of consideration of the bill.)

Senator Humphrey then offered a lengthy speech against the ADA. He objected to the potentially "monumental" price tag that would accompany passage of the ADA, citing the *New York Times* editorial.[120] He also objected to the scope of reasonable accommodations required in the employment section. "In fact, the definition of protected 'disabilities' in this bill is so broad that virtually any mental or physical shortcoming can be invoked as grounds for demanding the special 'accommodations' which the bill requires employers to provide."[121] He argued, "that these unprecedented Federal restrictions on employee qualifications will deter employers from preserving high standards of fitness, safety, and efficiency within their work force."[122] He objected to the

117. *Id.* at 19,862.
118. *Id.* at 19,879.
119. *Id.* at 19,880-81.
120. *Id.* at 19,882.
121. *Id.*
122. *Id.*

requirement that all businesses become accessible because these design changes would greatly increase the cost of new construction. He criticized the legal standards under ADA Title III as "riddled with vague terms and requirements which will make compliance virtually unachievable."[123]

Before the Senate voted to approve this version of the bill, various Senators spoke in support. During Senator Kennedy's speech, he reiterated the importance of this bill to individuals who are HIV-positive.[124] It is interesting that none of the amendments which sought to exclude certain individuals from coverage sought to exclude individuals who are HIV-positive from coverage. No one hid that they would be covered by the bill. This fact was repeatedly mentioned on the floor of the Senate.

The Senate finally voted on this version of the bill. Seventy-six senators voted in favor of the ADA, eight voted against, and sixteen were not present.[125] The most interesting votes in the Senate are Armstrong and Pryor. Armstrong got the amendments he wanted but voted against this version of the bill anyway. Ultimately, however, he voted for final passage of the ADA.[126] Pryor failed to vote on this version although he was present in the Senate but, like Armstrong, voted for final passage of the ADA. The *New York Times* editorial may have been correct in predicting that: "No politician can vote against this bill and survive." Both Armstrong and Pryor appeared to have serious reservations about the ADA yet ultimately voted for the legislation.

V. BILL RETURNS TO THE HOUSE

After this lengthy discussion in the Senate, the bill returned to the House. It now had some momentum, with the support of the Bush administration. Representative Conte reflected on that fact when he spoke on September 12, 1989, urging passage of the ADA:

> The Senate-passed bill is a good bill, the product of countless hours of negotiation. We ought to use it as our vehicle for the slight changes that may still be need to be made, or go ahead and pass it as is. The President and the congressional leadership are committed to enactment of this legislation. Let us get on with it.[127]

One of the few objections to the ADA in the House was offered

123. *Id.* at 19,883.
124. *Id.* at 19,888-89.
125. *Id.* at 19,903. The nays included: Armstrong, Bond, Garn, Helms, Humphrey, McClure, Symms, and Wallop. Not voting included: Adam, Baucus, Bentsen, Breaux, Burns, Glenn, Inouye, Lott, Metzenbaum, Mikulski, Mukowski, Pryor, Roth, Rudman, Sanford, and Sasser.
126. *See* 136 CONG. REC. 17,376 (1990).
127. 135 CONG. REC. 20,096 (1989).

by Representative Norman Shumway (R. Cal.) who reprinted an editorial from the *Wall Street Journal* in extended remarks (that were not spoken on the House floor). The bill was criticized as being vague and contradictory.[128] In even stronger words, Representative Burton (R. Ind.) spoke against the ADA on October 2, 1989. He said: "The ADA is the last ditch attempt of the remorseless sodomy lobby to achieve its national agenda before the impending decimation of AIDS destroys its political clout. Their Bill simply must be stopped. There will be no second chance for normal America if the ADA is passed."[129] Burton's comments reflected the homophobia that was used to prevent passage of the ADA.

Work on the ADA continued as the legislative session came to a close. Representative Hoyer reported on November 15, 1989, that the Education and Labor Committee had passed out the ADA on a thirty-five to zero vote.[130] Representative Newt Gingrich also made positive comments (in extended remarks) about the ADA and the work of the Education and Labor Committee on November 15, 1989.[131]

VI. HOUSE COMMITTEE REPORTS

Four House committees considered the ADA and made modifications in committee. In general, their work created eighty discrepancies with the Senate version of the ADA. Few of these discrepancies would prove to be controversial. The Senate largely receded to the House's amendments. Hence, the work of these four committees is crucial because they carved out the fine details of the statutory language.

The House resumed consideration of the ADA on March 7, 1990. Representative Owens expressed concern that the bill was moving very slowly through the House and that the administration was "no longer interested in the bill."[132] He also expressed concern that the Committee on Public Works "passed an amendment which seemed to water down one of the provisions in the act."[133] He then stated:

> Will the President lift a finger to get this legislation passed in a worthy and effective form, or will he continue to be distracted by whatever the White House's issue of the week happens to be?

128. *Id.* at 20,707 (extended remarks) (quoting September 11th editorial from the *Wall Street Journal*).
129. *Id.* at 22,734.
130. *Id.* at 28,974.
131. *Id.* at 29,306 (extended remarks).
132. 136 CONG. REC. 3658 (1990).
133. *Id.*

> Will the White House lead on this issue or will it continue to drift? I think the disabled community knows the difference between rhetorical commitment and a real commitment to their civil rights. They want to know where the President stands and what is the true depth of his commitment on the most important piece of legislation affecting them that the Federal Government has ever considered.
>
> They have little regard for Republican Members of Congress who posture by offering amendments to strengthen the bill in committee that they know will not pass, and which they unalterably oppose behind closed doors.
>
> . . . .
>
> The White House chooses to roll the dice and risk losing the credibility and good will it has created with Americans with disabilities.
>
> I call upon my colleagues in the House to take a firm stand against the White House's shenanigans, to assert our commitment to freedom, opportunity, and full civil rights protection for Americans with disabilities, and a strong America that such an act will bring about.[134]

The Public Works Committee had approved an amendment which would allow community rail services to make only one train per car accessible. The Energy and Commerce Committee approved different language. The Public Works Committee language was not the language considered by the House when the bill came to them for consideration. An attempt to substitute the Public Works language for the Energy and Commerce language was unsuccessful on the floor of the House.

The second, and most complete report, was the report of the Committee on Education and Labor.[135] It summarized the extensive hearings that were held on the ADA, describing the need for broad-reaching legislation in this area. The report talks extensively about the definition of disability and states:

> Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons

134. *Id.* at 3659.

135. H.R. REP. NO. 101-485, pt. 2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303.

> with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.[136]

Despite the clarity of this statement in the legislative history, the Supreme Court ruled otherwise, concluding that a court should consider mitigating measures in determining whether an individual is disabled under the ADA.[137]

The Minority Report from the Education and Labor Committee did not dispute the accuracy of this description of the definition of disability. The Minority Report merely emphasized the changes that were made in committee to the Senate version of the ADA. These include: (1) the Title VII relief mechanism was created for ADA Title I, (2) a phase-in period for coverage was created for ADA Title I, (3) the prohibition against "anticipatory discrimination was eliminated," (4) current users of illegal drugs were eliminated from coverage, (5) contract liability was clarified in ADA Title I and Title III, (6) more specific guidelines were created for the meaning of reasonable accommodation and undue hardship, (7) clarification of the alteration requirements under ADA Title III, (8) restrictions of the Attorney General's power under ADA Title III to seek damages, (9) clarification under ADA Title III that commercial facilities, rather than individual work stations, must be accessible, (10) clarification of good faith defense, and (11) creates flexibility in dealing with historical landmarks under ADA Title III.[138]

The third report was authored by the Judiciary Committee. It made some modifications to the bill.[139]

> The Committee adopted 5 amendments to the bill ordered reported by the Subcommittee. An amendment added a new section to the bill, Section 513, to encourage the use of alternative dispute resolution where appropriate and to the extent authorized by law. An amendment added additional factors to be considered in making a determination of what constitutes an undue hardship under title I and what is readily achievable under title III. An amendment clarified that the remedies incorporated by reference in titles I, II and III are the remedies that the ADA provides, and that the incorporated remedies are the remedies currently available. If those remedies are amended in the future, such remedies also apply to the ADA.
>
> An amendment clarified the "direct threat" provision, the phrase "essential functions" of a job, and the "anticipatory

136. *Id.* at 52.
137. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 488 (1999).
138. *See* H.R. REP. NO. 101-485, pt. 2, at 165-67 (1990).
139. *See* H.R. REP. NO. 101-485, pt. 3 (1990).

> discrimination" provision. This amendment also clarified what entities are covered under the general rule of title III, that commercial facilities are covered by the alterations provisions, and that exams and classes relating to applications, licensing, certifications, or credentialing must be held in an accessible place and manner. An amendment made technical changes to the interim accessibility standards under title III.[140]

Of these amendments, the one that was the most controversial was the rule that made Title VII remedies applicable to ADA Title I, with the understanding that those remedies would change in the future if Title VII's remedies changed in the future. In a report with "Additional Views," Representatives Sensenbrenner, McCollum, Gekas, Dannemeyer, Smith, and James argued that it was wrong to tie together those two statutes because the pending Civil Rights Act of 1990 would strengthen the remedies available under Title VII, and thereby strengthen the remedies available under the ADA. They objected to that modification because it would make compensatory and punitive damages available under ADA Title I. It was contrary to an earlier agreement reached between the Senate and the Bush administration in which punitive damages were deleted from a draft of the ADA.[141] This issue would remain controversial as the ADA was considered in Congress but the view of the House Committee would ultimately prevail.

The Judiciary Committee report also agreed with the Education and Labor report with respect to the definition of disability.

> The impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation. For example, a person with epilepsy, an impairment which substantially limits a major life activity, is covered under this test, even if the effects of the impairment which substantially limits a major life activity, is also covered, even if the hearing loss is corrected by the use of a hearing aid.[142]

The final committee to report on the ADA was the Committee on Energy and Commerce.[143] Its amendments were limited to those matters within the committee's sole or shared jurisdiction: provisions affecting rail transportation services provided by Amtrak, commuter authorities, and private entities; provisions affecting telecommunications services for individuals with speech or hearing impairments; and general provisions relating to the entire bill. The Minority Report characterized the ADA as a "homosexual rights" bill

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140. *Id.* at 23-24.
141. *Id.* at 88-89.
142. *Id.* at 28-29.
143. H.R. REP. NO. 101-485, pt. 4 (1990), *reprinted in* 1990 U.S.C.C.A.N. 512.

even though homosexuals were specifically exempted from statutory coverage. Their reasoning was as follows:

> Sixty percent of the 119,500 adults who have been diagnosed with full-blown AIDS as of February 1990 contracted the fatal virus through homosexual activity. An additional 7 percent list homosexual activity as one of their risk factors. It does not require a particularly shrewd attorney to argue that the protections available in the ADA are available to *all* male homosexuals by virtue of the perception that homosexual males "are regarded as" being infected with HIV. Indeed, a New Jersey court has interpreted a similar state law in exactly this fashion.
>
> . . . .
>
> [W]e believe that the ADA is a homosexual rights bill in disguise.[144]

In general, the four House committee reports made careful technical corrections to the ADA, which did not prove to be controversial when the bill went to a conference to resolve the discrepancies. These reports highlight that it was well understood by supporters and detractors that the bill would cover individuals with HIV infection. Two of the reports also reflect that some members of Congress did consider the mitigating measures issue and concluded that whether someone was disabled should be determined without consideration of the use of mitigating devices. Nonetheless, the United States Supreme Court ruled otherwise. These reports also foreshadow the controversy about remedies that would continue until final passage of the ADA. The House view, however, eventually prevailed despite an earlier agreement between the Senate and the Bush administration concerning remedies

VII. FLOOR DEBATE RESUMES

Consideration of the ADA resumed on May 1, 1990. Representative Bartlett answered some frequently asked questions about the ADA on the floor of the House.[145] On May 8, 1990, Representative DeLay spoke in favor of a tax credit for businesses to assist compliance with the ADA.[146] (The tax credit was one of the most controversial aspects of ADA consideration.) DeLay repeated his comments on May 15, 1990.[147]

Representative DeLay then offered lengthy comments on May

144. *Id.* at 82.
145. 136 CONG. REC. 9072-73 (1990).
146. *Id.* at 9641.
147. *Id.* at 10,419.

15, 1990, in opposition to the ADA.[148] He complained that the bill was costly and vague because it relies on "case law" rather than statutory language to define who is disabled. He complained that there had been insufficient discussion of the bill in the House and that members of Congress were afraid to speak against it. Representative Burton agreed with DeLay and argued that the ADA would raise the cost of housing for everyone by requiring accessibility.[149] Representative Smith (R. Tex.) then argued for the importance of a credit for small businesses to assist with ADA compliance.[150]

Representative Douglas then spoke. He indicated that DeLay, Burton, Smith, and himself had gone to the White House the previous week to argue that the remedies under the ADA had to be weakened under ADA Title III and that the Committee on the Judiciary had approved a narrowing amendment on the remedy issue.[151] He also said that he wanted an amendment to protect public safety under the ADA. Finally, he said that he wanted a religious exemption under the ADA. (The ADA does contain a direct threat exemption which responds to his first concern, and exempts religious entities under ADA Title III which responds to his second concern.)

Representative Douglas also spoke against the medical examination rules saying that police departments should be able to conduct pre-screenings before making offers of employment.[152] That language, however, was never changed in the ADA although that issue was raised repeatedly during debate. (Nonetheless, the courts have been very lenient with police and fire departments in ADA cases,[153] interpreting the ADA as if it had been amended to achieve Douglas' desired policy outcome.)

Finally, Representative Burton spoke at length about coverage of "homosexuals." He was concerned that the ADA would cover homosexuals because it covers people who have HIV infection. He sought an amendment that "would clarify that the ADA is in effect homosexual rights legislation, but stating that homosexuals are not deemed disabled because they are regarded as HIV positive."[154] (Although Burton did not succeed in amending the ADA with such language, some courts have certainly interpreted the ADA as if such

148. *Id.* at 10,456-58.
149. *Id.* at 10,458.
150. *Id.* at 10,458-59.
151. *Id.* at 10,459-60.
152. *Id.* at 10,461.
153. *See, e.g.*, Krocka v. City of Chicago, 203 F.3d 507 (7th Cir. 2000) (finding that it was lawful to place police officer in the Department's "Personnel Concerns Program" merely because he was taking Prozac even though he had suffered no adverse job performance due to his mental health condition).
154. 136 CONG. REC. 10,462 (1990).

an amendment were added.[155]) He also expressed concern that the bill could be used by homosexuals to assist them in adopting children.

Representative DeLay concluded this session by including an article entitled "Disabling the Disabled" by Maiselle Dolan Shortley in the Congressional Record. She argued that child molesters would be considered disabled under the ADA and that the language of the statute is so vague that it should be considered the "Lawyers Full Employment Act." (That label was used frequently by the bill's detractors.[156])

Serious consideration of the ADA took place in the House between May 17, 1990 and May 22, 1990 when an amended version of the ADA passed by a vote of 403-20. Representative Bart Gordon (D. Tenn.), who was not a sponsor of the 1988 version of the ADA, called up the resolution in the House which established the rules for debating the ADA.[157] He indicated that the bill had 249 cosponsors in the House, and had passed the Senate by a vote of seventy-six to eight. Representative Lynn Martin (R. Ill.) then spoke against the rule for debate, claiming that it was too restrictive. She also objected to section 509 of the bill, which made it applicable to Congress, but subject to their own internal rules and enforcement.[158] This issue would be a source of disagreement until final passage. (Martin ultimately voted for the ADA.)

Representative Gordon argued that the rule for debate was fair, because the bill had already been subjected to extensive consideration by subcommittees and committees. "To talk about having an open rule of the floor now, after all this kind of earlier scrutiny of the bill, would make a mockery of the whole committee system."[159] His comments reflect the respect that is generally accorded to the committee system and why it is often reasonable for courts to give weight to the work of those committees.

Representative Robert S. Walker (R. Pa.) supported Representative Martin's remarks, arguing that some important amendments would not be considered under the rule proposed for this bill's consideration. Representative Glenn Anderson (D. Cal.) spoke in favor of the rule, while also noting that it would allow consideration of amendments that he would oppose. Representative Thomas DeLay (R. Tex.) also spoke against the rule, indicating that he had offered eleven amendments in the Rules Committee, not one of which would be considered under the rule for consideration of the

155. *See, e.g.*, Runnebaum v. Nationsbank of Md., N.A, 123 F.3d 156 (4th Cir. 1997).
156. 136 CONG. REC. 10,463 (1990).
157. *Id.* at 10,839.
158. *Id.* at 10,839-40.
159. *Id.* at 10,841.

ADA.[160] (He would ultimately vote against the bill.)

Representative Bennett (D. Fla.) spoke passionately in favor of the bill, indicating that he became disabled when he contracted polio during World War II. He spoke about the importance of buildings being accessible and individuals with disabilities having an opportunity to be employed. Representative Bill McCollum (R. Fla.) spoke against the rule, although he favored the bill itself.

Debate in the House continued on May 17, 1990, on the rule for consideration of the ADA. Representative H. Martin Lancaster (D. N.C.) spoke against the rule although he ultimately voted for the ADA. He had an amendment to Title III that the House would not be considering. Representative Newt Gingrich (R. Ga.) also spoke against the rule.

Representative William E. Dannemeyer (R. Cal.) spoke against the definition of disability under the ADA, focusing in particular on its coverage of HIV infection. He said:

> With this bill, in the form that it is now to be considered by the House, if it is adopted, every HIV carrier in the country immediately comes within the definition of a disabled person.
>
> ... Is that sound public policy? And since 70 percent of those people in this country who are HIV carriers are male homosexuals, we are going to witness an attempt or an utterance on the part of the homosexual community that, when this bill is passed, it will be identified by the homosexual community as their bill of rights.[161]

Representative Burton agreed with Dannemeyer, arguing that amendments to protect the public against communicable diseases needed to be discussed or debated on the floor of the House. Representative Steve Barlett (R. Tex.) also agreed that the rule should be opposed so that full debate of the ADA could occur.[162] He opposed the rule but voted for the ADA.

Despite this vigorous opposition to the rule, it passed overwhelmingly by a vote of 237 to 172, with 23 not voting. Debate, pursuant to the rule, then proceeded on the bill itself.

Representative Steny Hoyer (D. Md.) offered the first major speech in favor of the bill.[163] His description of the bill aptly described its content: "Whenever possible, we have used terms of art from the 1964 Civil Rights Act and from the Rehabilitation Act of 1973 phrases already interpreted in courts throughout this land so that business can know exactly what we mean."[164] Representative

160. *Id.* at 10,842.
161. *Id.* at 10,851.
162. *Id.* at 10,852.
163. *Id.* at 10,855-56.
164. *Id.* at 10,856.

Major Owens (D. N.Y.) emphasized this same point in his remarks.

None of the fundamental concepts in this legislation were new. Rather, they are derived largely from section 504 of the Rehabilitation Act of 1973 and its implementing regulations, and the Civil Rights Act of 1964. As such, there is a history of experience in implementing the concepts in this bill which will greatly facilitate the task of informing those with rights and responsibilities under this legislation as to what its provisions mean.[165]

Representative Bartlett spoke in favor of the bill, after undergoing an exchange with Representative Hoyer, to clarify the meaning of the "direct threat" defense under the bill. He defined some of the phrases in the statute, such as "undue hardship" and "readily achievable" in ways that were consistent with the committee reports. He also offered his support of some forthcoming amendments regarding remedies and food workers.[166] There was further general debate before the House considered the amendments that were permitted under the rule for debate. (Members of each of the committees that considered the legislation were given an allotted amount of time for general comments.)

Representative John J. LaFalce (D. N.Y.) offered the first amendment. (He voted for the bill.) This amendment phased in coverage of small businesses under ADA Title III. It was cosponsored by Tom Campbell (R. Cal.). No one spoke in opposition to the amendment. The amendment passed unanimously, with 401 ayes, 0 noes, and 31 not voting.[167] (With a minor amendment, this language is part of the Conference Report, and became a part of the enacted bill.)

Representative Bill McCollum (R. Fla.) then offered an amendment to ADA Title I, stating that "if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."[168] Without the amendment, the bill already gave deference to the employer's judgment but did not specify that deference would be particularly important when that job description was in written form. There was no opposition. The amendment was agreed to.[169] It became part of the final bill.

Representative Jim Olin (D. Va.), who ultimately voted against the ADA, offered the third amendment. It provided that an expense is presumed to be an undue hardship under ADA Title I "if an employer incurs costs in making an accommodation which exceeds 10 percent of the salary or the annualized hourly wage of the job in

165. *Id.* at 10,857.
166. *Id.* at 10,858-59.
167. *Id.* at 10,899-900.
168. *Id.* at 10,902.
169. *Id.* at 10,903.

question."[170] This amendment produced opposition. Some opponents were concerned that it would encourage or permit accommodations so long as they did not exceed ten percent of salary, thereby raising the ceiling on reasonable accommodations. Others objected that the ten percent figure was too arbitrary. The argument was also made that the amendment was harmful to low wage employees, who the bill should be seeking to assist. The amendment failed on a vote of 187 ayes, 213 noes, and 32 not voting.[171]

The fourth amendment was offered by Representative Hansen, who then agreed to accept a substitute version from Representative Bruce Vento (D. Minn.). The amendment concerned access to wilderness areas.[172] There was no opposition. The amendment, as modified, was agreed to.[173] It became part of the final bill.

The fifth amendment was offered by Representative Jim Chapman (D. Tex.) who voted for ultimate passage of the ADA. His amendment became a source of controversy with the Senate. It read:

> (d) Food Handling Job – It shall not be a violation of this Act for an employer to refuse to assign or continue to assign any employee with an infectious or communicable disease of public health significance to a job involving food handling, provided that the employer shall make reasonable accommodation that would offer an alternative employment opportunity for which the employee is qualified and for which the employee would sustain no economic damage.[174]

In supporting the amendment, Chapman suggested it could be used by food service employers to deny employment to people who are HIV-positive even though "I am not here to say that there is any evidence that AIDS can be transferred in the process of handling food."[175] He argued that the amendment is needed "in the real world with real people who have real businesses that create real jobs . . . ."[176] (The amendment, of course, does not specifically mention HIV and does give rise to ambiguity as to whether HIV should be considered an infectious or communicable disease.)

Representative J. Roy Rowland (D. Ga.) suggested that the amendment be modified to say "as specified by CDC" so that there would be no ambiguity about what infectious or contagious diseases are affected by this amendment.[177] (Ultimately, that language was part of the compromise that was reached between the House and

170. *Id.*
171. *Id.* at 10,908-09.
172. *Id.* at 10,909.
173. *Id.* at 10,911.
174. *Id.*
175. *Id.*
176. *Id.* at 10,912.
177. *Id.*

Senate.) The opponents to the amendment argued that it perpetuated discrimination against people with HIV infection by suggesting, contrary to medical evidence, that they can spread HIV through the food supply. The supporters of the amendment recognized that there was no medical evidence that HIV could be transmitted by food handlers but they also argued that this amendment was necessary to protect the restaurant industry from the public's false perceptions. The amendment was approved by a vote of 199 to 187, with 46 Representatives not voting.[178] This amendment was controversial until final passage. A weaker version was approved in the final bill, although the Sixth Circuit has certainly interpreted the ADA as if the Chapman amendment had prevailed.[179]

Three more amendments were considered on May 22, 1990. Representative William Lipinski (D. Ill.), with Representative Dennis Hastert (R. Ill.), offered an amendment which would allow commuter rail services to make only one train per car accessible. But if continuing demand is not met by the one car, then additional cars must be made accessible. Although this amendment required fewer accessible cars than the pending ADA, it also created a higher standard of accessibility for those cars. His approach had been approved by the Public Works and Transportation Committee; the existing language had been approved by the Energy and Commerce Committee.[180] This amendment was opposed by many representatives who argued that the existing language had been worked out between the administration, disability community, and the Energy and Commerce Committee. The amended version would promote segregation rather than integration of the entire transportation system. Supporters argued that it would be more financially feasible. The amendment was defeated on a vote of 110 ayes, 290 noes, and 32 not voting.[181]

Representative Bud Shuster (R. Pa.), who voted against ultimate passage of the ADA, offered the next amendment. It would permit the Secretary of Transportation to waive application of the transportation section on an annual basis if certain conditions are met.[182] Opponents of the ADA argued that this amendment would exempt eighty percent of cities in the United States, and undercut the goal of providing accessible transportation. The amendment was defeated on a vote of 148 to 266, with 18 not voting.[183]

The final amendment considered by the House related to enforcement of the ADA. It was introduced by Representative F.

178. *Id.* at 10,917.
179. *See* EEOC v. Prevo's Family Mkt., Inc. 135 F. 3d 1089 (6th Cir. 1998).
180. 136 CONG. REC. 11,427-28 (1990).
181. *Id.* at 11,432-33.
182. *See id.* at 11,433.
183. *Id.* at 11,438-39.

James Sensenbrenner (R. Wis.). His concern was that the pending Civil Rights Act of 1990 would amend Title VII to provide for jury trials and compensatory and punitive damages. Because the ADA linked its remedial structure to Title VII, that new bill would also expand the remedies available under the ADA. Sensenbrenner sought to "delink" the remedies available under the ADA from the remedies available under Title VII so that the new Civil Rights Act would not apply to the ADA. As Sensenbrenner pointed out, in previous debate, Congress had been assured that punitive and compensatory damages would not be available under the ADA.[184] Future passage of the Civil Rights Act of 1990 threatened that understanding.

Opponents of the Sensenbrenner amendment argued that it was important for the ADA to offer the same remedies as Title VII. If Title VII were to be expanded to include compensatory and punitive damages, then the ADA should follow suit.[185] After a spirited debate, the amendment lost by a vote of 192 to 227, with 13 not voting.[186]

Despite the fact that there were supposed to be no more amendments considered before the vote in the House on the bill, Representative Thomas DeLay (R. Tex.), who voted against final passage, moved to recommit the bill to the Committee on Rules with various amendments. These amendments included an exception for individuals with a history of drug addiction or alcoholism, and rules to include the executive and judicial branches under the ADA. The motion failed by a vote of 143 to 280, with 9 not voting.[187] The House then voted on this version of the ADA. It passed by a vote of 403 to 20, with 8 not voting.[188]

In all, the House passed three amendments before passage in that chamber: the small business amendment for ADA Title III, the written job description amendment for ADA Title I, and the food handling amendment for ADA Title I. Of these three amendments, the food handling amendment would prove to be the most controversial, causing a slight delay in the passage of the ADA.

VIII. FIRST CONFERENCE REPORT

Because the House and Senate had passed different versions of the ADA, it next went to a joint conference for consideration. Before going to the conference, each chamber met to discuss the instructions that they wished to give their conferees. In the House, the conferees were instructed on May 24, 1990, to insist upon the three amendments that were made on the floor of the House. In the

184. *Id.* at 11,440.
185. *See id.* at 11,442 (remarks of Representative Edwards).
186. *Id.* at 11,450.
187. *Id.* at 11,466.
188. *Id.* at 11,466-67.

Senate, Senator Helms made a motion to insist that the conferees agree to the House's food handling amendment (the Chapman amendment).[189] Senator Harkin disagreed. Senator Kennedy also objected, pointing out that there was no medical basis to the Chapman amendment and that Senator Chapman himself had acknowledged that fact.[190] A motion was made to table the Helms' motion. That motion lost on a vote of forty to fifty-three.[191]

Senator Grassley then spoke about the importance of the ADA creating a right of action against members of Congress. He did not offer a formal amendment but Senator Harkin offered his support for a cause of action against the Senate. There was discussion about how to do so within constitutional limits because it did not seem appropriate for the Equal Employment Opportunity Commission or the Attorney General to have authority over the legislative branch.[192]

Finally, Senator Boschwitz indicated his support for the small business amendment to ADA Title III. Senator Harkin also expressed his support for that amendment.[193] There was no discussion of the written job description amendment from the House and that amendment did not prove to be controversial within the conference. The Senate agreed to the House's language in conference.

The conference reported its suggested language on June 26, 1990.[194] The Report indicated that the House receded to the Senate's version of the bill with respect to the food handling amendment. The Report noted that the undue hardship and direct threat rules already took care of any potential problems with contagious food handlers and the Chapman amendment was unnecessary.[195] With respect to the small business exemption, the Senate receded although the conferees made some modest language changes to the House amendment.[196] With respect to the wilderness amendment, the Senate also receded, although the language again was changed slightly.[197] The House receded to the Senate's amendment to have itself covered under the ADA. The House chose a different mechanism for its own coverage.[198]

Both the House and Senate versions had various exceptions from the definition of disability within Title V (miscellaneous title). The Senate had exempted a list of potential disabilities from

189. *Id.* at 13,050.
190. *Id.* at 13,057.
191. *Id.* at 13,062-63.
192. *Id.* at 13,064.
193. *Id.*
194. H.R. REP. NO. 101-558 (1990).
195. *Id.* at 59.
196. *Id.* at 77.
197. *Id.* at 82.
198. *Id.*

coverage. The House had various exclusions by category. The Senate receded to the House version. The Senate version arguably contained more exemptions because it included an exemption for "current psychoactive substance-induced organic mental disorders (as defined by DSM-III-R which are not the result of medical treatment) . . . ."[199] That general exclusion was not in the House version. Before the House or Senate met to discuss the Conference Report, Representative Bartlett noted that the conferees did not follow the Senate's instructions with respect to the food handling amendment.[200] In the Senate, Senator Hatch also noted that there was a problem with the language with regard to the enforcement that would be used against the Senate. He agreed that there was a problem to be resolved with respect to the food handling amendment.[201] Senator Hatch indicated that he signed the conference report "but withheld a right to be able to vote whichever way I wanted to on the Chapman [food handling] amendment . . . ."[202] In an exchange with Senator Kennedy, Senator Hatch indicated that his staff had mistakenly signed off on the language with respect to Senate coverage, and it needed to be changed. Because the food handling and Senatorial coverage issues still had to be resolved, Congress could not vote on the ADA before the July 4th recess.

IX. CIVIL RIGHTS ACT OF 1990

The Senate delayed further consideration of the ADA while it considered the Civil Rights Act of 1990 on July 10, 1990. The Civil Rights Act discussion was relevant to the ADA because the remedies rules that Congress were creating would also apply to the ADA.

First, the Senate considered an amendment to the Civil Rights Act which was a bipartisan rule that would apply the various civil rights laws to the Senate while also protecting separation of powers principles.[203] Senator Wendell Ford (D. Ky.) proposed this amendment and Senator Kennedy supported it.[204] Senator Harkin indicated that this amendment would also apply to the ADA.[205] As Senator Grassley later explained, the language of this amendment was somewhat controversial. The supporters of the ADA had not yet worked out acceptable language on coverage of the Senate and the language in the Civil Rights Act was apparently weaker than the language being considered by the Senate for the ADA. (Under the Civil Rights Act language, the Senate rather than the courts would

199. *Id.* at 84.
200. 136 CONG. REC. 16,156 (1990).
201. *Id.* at 16,250.
202. *Id.*
203. *Id.* at 16,727.
204. *Id.* at 16,728.
205. *Id.* at 16,731.

resolve complaints.) By approving this language in the Civil Rights Act, further debate about this issue would be effectively foreclosed under the ADA.[206]

Senator Grassley moved to table the pending amendment (concerning Congressional coverage). That motion was defeated in a vote of eighteen to seventy-four.[207] (Senator Harkin voted in favor of tabling the motion; he apparently preferred the Grassley amendment under which there would be a stronger cause of action than under the Ford amendment. But Senators Kennedy and Hatch both voted against the motion to table, apparently having agreed to the Ford amendment.) The Senate then approved the Ford amendment.

Despite the vote, Senators Grassley and Harkin continued to try to modify the language. Senator Grassley offered an amendment which would give aggrieved individuals a private right of action against the Senate if they were a victim of discrimination.[208] Senator Hatch offered an amendment to the Grassley amendment.[209] The Hatch-Grassley amendment gave individuals a private right of action; the previously approved Ford amendment would not have done so. Senator Harkin indicated that he voted "no" to table the Ford amendment because it provided, in general, for a good underlying structure. Nonetheless, he believed that his amendment offered further improvement by providing for a private right of action. At the conclusion of the debate, Senator Rudman moved to table the amendment. That motion passed by a vote of sixty-three to twenty-six.[210] Hence, the Ford amendment contained the language ultimately used in the ADA, with the Grassley-Hatch mechanism having failed to pass the Senate.

X. FURTHER SENATE CONSIDERATION OF FIRST CONFERENCE REPORT

Having considered the Civil Rights Act of 1990, the Senate then returned to consideration of the first Conference Report on the ADA on July 11, 1990. At the conference, the Senate had agreed to most of the language changes proposed by the House. There were few areas of ongoing disagreement. Senator Ford moved to have the Conference Report language with respect to remedies against the Senate deleted and replaced with the language approved the previous day with regard to the Civil Rights Act of 1990.[211] Senator Harkin accepted the Ford amendment, given the vote of the previous day, although he indicated that he continued to prefer an approach

206. *Id.* at 16,740.
207. *Id.* at 16,753-54.
208. *Id.* at 16,754-55.
209. *Id.*
210. *Id.* at 16,758.
211. *Id.* at 17,029.

under which a private right of action against the Senate would be available.[212] Given that the Senate remedy issue had been resolved, Senator Harkin indicated that the remaining point of disagreement concerning the Conference Report involved the food-handling situation.

Senator Hatch proposed an amendment to resolve the food handling controversy. Under the Hatch amendment, the Secretary of Health and Human Services would publish a list of "infections and communicable diseases which are transmitted through the handling [of] the food supply."[213] Under this amendment, a restaurant could not discharge someone merely because of public fears and misperceptions about the contagiousness of a disease. In order for a restaurant to act adversely, the CDC must have indicated that there was a genuine risk of contagiousness. The amendment "is not based on fear. It is based on sound science."[214]

Senator Helms opposed the Hatch amendment, claiming that it would "gut the Chapman amendment."[215] Senator Dole supported the Hatch amendment (with one minor language change that Hatch accepted). In supporting the Hatch amendment, Dole also specifically mentioned that the ADA covers people with mental retardation, cerebral palsy, deafness, blindness, or HIV infection.[216] Like everyone else who commented on the food handling amendment, Dole presumed that individuals with HIV infection were covered by the ADA. Ultimately, the Hatch amendment passed on a vote of ninety-nine to one, with only Senator Helms voting against it.[217] Before the Senate completed its discussion of this matter, Senators Dole and Hatch had a colloquy in which Senator Hatch agreed that HIV infection would be one of the diseases that the Center for Disease Control considered for its list of diseases that could be spread through the food supply. Because the Senate had not accepted all the language from the Conference Report, a second conference was necessary.

XI. THE SECOND CONFERENCE REPORT

Following the instructions from the House and Senate conferees, there was a second Conference Report.[218] The House receded to the Senate version of the food handling amendment. With respect to coverage of the Senate, the House receded to the Senate version with a minor amendment. The bill then went to the House and Senate for final approval. The bill, along with the second

212. *Id.* at 17,030.
213. *Id.* at 17,033.
214. *Id.* at 17,035.
215. *Id.* at 17,036.
216. *Id.* at 17,044.
217. *Id.* at 17,058.
218. *See* H.R. REP. NO. 101-596 (1990).

Conference Report, is reprinted in the Congressional Record.[219]

Representative Dannemeyer spoke in opposition to the rule that was supposed to govern consideration of the ADA. He indicated that he had repeatedly requested an amendment to the ADA which would have excluded individuals with communicable diseases from coverage, and that amendment was defeated.[220] Representative Burton also opposed the bill because of the scope of the definition of disability.

> There is going to be about 900 classes of disabled or handicapped people because of this bill, 900; 46 ½ million people are going to fall under the definition of handicapped or disabled, 46 ½ million. That is one out of every five Americans who is going to be considered disabled or handicapped.[221]

He also objected to the removal of the Chapman amendment. "The AIDS virus is a time bomb ticking that will explode in the future. We have made it even more volatile because we are allowing people with active AIDS to work in close proximity to patients and to handle food."[222] Despite these two objections, the House approved the rule for debate by a vote of 355 to 58, with 19 not voting.[223]

The House then proceeded to consider the second Conference Report. Representative Hawkins described the final bill as a compromise:

> The conference report which we consider today is also a compromise. When we went to conference on the bill, there were a substantial number of differences, over 80, between the House and Senate versions. Almost without exception, these differences were resolved in favor of the House position. I want to stress this again, that the Senate receded on almost every point of difference, particularly to those which amended the Senate-passed bill with provisions deemed important to business or other private interests.
>
> With respect to the provision dealing with placement of individuals in food handling positions, the House receded to the Senate provision which was the result of a bipartisan and unequivocal compromise fashioned by Senator Hatch. The House also receded to the Senate provision concerning the applicability of the legislation to Senate employees.[224]

In the discussion of the food handling issue, various

219. 136 CONG. REC. 17,251-77 (1990).
220. *Id.* at 17,278.
221. *Id.* at 17,279.
222. *Id.*
223. *Id.* at 17,280.
224. *Id.* at 17,281.

representatives said that they preferred the Chapman amendment to the Hatch amendment, but they did not want to hold up final passage of the ADA over this relatively minor issue. They noted that the ADA affected many individuals with disabilities, who do not have HIV and do not have jobs in the food handling industry. Passage of the ADA was needed to protect the larger category of individuals with disabilities.

Representative DeLay then raised the relief issue. He noted that the 1990 Civil Rights Act was being considered by Congress. Under that bill, individuals who bring suit under Title VII of the Civil Rights Act of 1964 could attain punitive and compensatory damages. Because the ADA borrows Title VII's enforcement scheme, the effect of that legislation would be to incorporate punitive and compensatory damages into the ADA. Although Representative Hawkins had described the bill as a compromise, Representative DeLay disagreed. He argued that the bill was too pro-plaintiff:

> I think that this bill is probably the most closed piece of legislation that I have ever seen and ever witnessed and ever been a part of in my 12 years in the legislative body. Because of support from the White House for the bill, the Democrats for this bill and many of the Republicans for this bill, Members of this House on committees and in the full House have had the political cover to resist any reasonable amendments to this bill.[225]

Representative Burton also spoke against the bill, complaining about its broad scope.

> [T]hey tell us there are going to be 43 million-plus people defined as handicapped or disabled by this bill. That is one out of every five or six Americans. When we start talking about the massive amounts of litigation this is going to cause over the next few years, just think about what that is going to do to the economy and the commerce of this Nation. It is going to cause severe problems.[226]

At the end of the debate, Representative Dannemeyer moved that the Conference Report be recommitted with instructions to adopt the Chapman amendment. That motion failed by a vote of 180 to 224, with 28 not voting.[227] The House then proceeded to vote on the ADA itself. The vote was 377 to 28, with 27 not voting. (Representative Ford, who had participated extensively in the debate, did not vote.)

The Senate then took up consideration of the Conference

225. *Id.* at 17,284.
226. *Id.* at 17,286.
227. *Id.* at 17,295.

Report. Senator Kennedy agreed with Representative Hawkins' description of the legislation.

> During the process, the House made a number of modifications in the Senate bill to clarify certain aspects of the legislation and to allay the opposition of the business community. The House has been productive in its deliberations and has included the disability community in shaping its refinements. Senate conferees have accepted almost all of these clarifications.[228]

After further debate, which mostly consisted of Senators acknowledging the hard work that underlay enactment of the ADA, the bill passed the Senate on July 13, 1990, by a vote of ninety-one to six, with three not voting. The President signed the bill into law on July 26, 1990.

The President's signing statement correctly described the agreements reached under the ADA. He expected the ADA to be interpreted consistently with the Rehabilitation Act, which had been in effect for seventeen years. Business interests were protected by phase-in periods and cost defenses. No mention was made by the President, or any member of Congress, of protecting the business community through a narrow definition of disability. Instead, the President predicted that the ADA "promises to open up all aspects of American life to individuals with disabilities—employment opportunities, government services, public accommodations, transportation, and telecommunications."[229]

XII. CONCLUSION

What do we learn from the ADA's travels through Congress? At least three important points emerge. First, the committee reports were considered extensively and relied upon as an accurate statement of the meaning of the ADA. Whenever members of Congress quoted from the committee reports, there was agreement that the principles in the reports reflected the intent of Congress. There was no attempt whatsoever to hide controversial items like the coverage of individuals with HIV-infection in the bill. The courts made some of these issues more difficult to resolve by ignoring this legislative history. Although it may be true that legislative history can be sneaky and conniving, the ADA reflects a very open and honest legislative debate. Ignoring this material is disrespectful to Congress' hard work.

Second, it is clear that Congress had a very strong intent to use the ADA to help respond to the AIDS crisis. One historical origin of the ADA was the President's Commission on HIV Infection. In the

228. *Id.* at 17,361.

229. *Statement on Signing the Americans with Disabilities Act of 1990, in* 2 PUB. PAPERS 1070 (July 26, 1990).

key committee reports and in comments by the key sponsors (as well as detractors), it was acknowledged that the ADA would cover individuals who are HIV-positive. The courts, by contrast, have acted as if it were hard to discern Congress' intent on this issue.

Third, both the proponents and opponents of the ADA understood the definition of disability to have a very broad scope. The proponents proudly proclaimed that the bill would cover more than forty-three million Americans with disabilities. The opponents complained that the bill covered 900 categories of disabilities, which encompassed one in five Americans. There were some attempts to narrow the definition of disability by, for example, excluding individuals with contagious diseases or individuals with a history of drug abuse. None of these efforts succeeded. The compromises that were achieved with respect to the ADA involved further protections for the business community by phasing in their coverage and limiting remedies that could be sought against them under ADA Title III. The definition of disability, however, was not a source of compromise except to exclude certain categories of individuals, like homosexuals, who the bill's supporters never claimed the bill covered. The primary source of controversy under the ADA was an exemption for restaurants so that they could fail to employ individuals who were HIV-positive. The Senate succeeded in obtaining the language it desired. It refused to permit restaurants to fail to hire individuals who are HIV-positive merely out of unfounded fears that they might infect the food supply. Senator Hatch was crucial in holding the line against AIDS hysteria.

There were predictions by a small minority of Senators that the judiciary would find the ADA to be a vague document that is hard to interpret. Those predictions turned out to be accurate because the judiciary has refused to consider the documents that Congress created to clarify its intentions. It has insisted that the plain language resolve all controversies rather than interpret the ADA in the context of its two years of consideration. Justice O'Connor may choose to blame Congress for this set of affairs; I would argue that the blame lies with a judiciary that has refused to educate itself to the history of this statute.