

# NCD

National Council on Disability

## The Americans with Disabilities Act Policy Brief Series: Righting the ADA

### **Significance of the ADA Finding That Some 43 Million Americans Have Disabilities**

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November 15, 2002

The Supreme Court of the United States has indicated that a primary factor leading it to conclude that Congress wanted to take a narrow view of who is protected by the Americans with Disabilities Act (ADA) is the finding in the statute that “some 43,000,000 Americans have one or more physical or mental disabilities.” This paper examines the sources of the 43 million figure, the congressional understanding behind its inclusion in the ADA, the conclusions the Supreme Court has based on it, and problems with the Court’s interpretation of the figure.

## **HOW THE SUPREME COURT HAS USED THE 43 MILLION FIGURE**

In two of its decisions, the Supreme Court has pointed to the 43,000,000 estimate as a reason for concluding that Congress intended only a restricted range of people to be protected by the ADA. In *Sutton v. United Air Lines, Inc.*, the Court decided that Congress’ finding that 43 million Americans have disabilities “require[s] the conclusion” that Congress did not intend to provide ADA protection to persons whose otherwise disabling conditions can be corrected by medications and devices. And in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, the Court held that the 43 million finding confirmed that the definition is “to be interpreted strictly to create a demanding standard for qualifying as disabled.” In *Sutton*, the Court reasoned that if Congress intended to include persons with “corrected physical limitations” among those covered by the Act, it “undoubtedly would have cited a much higher number of disabled persons in the findings.” Similarly, in the *Williams* case, the Court concluded that Congress could not have intended to include persons with manual disabilities that interfered only with narrow categories of job tasks or “the number of disabled Americans would surely have been much higher.”

## **SOURCES OF THE NUMBER**

The opinion for the Court in *Sutton* noted that the ADA bills introduced in Congress in 1988 had included a figure of 36 million persons with disabilities, an estimate drawn from the National Council on Disability (NCD)’s version of the ADA draft bill published in its report *On the Threshold of Independence*. In that report and in NCD’s earlier *Toward Independence* report in which it first recommended that Congress pass an ADA, the Council had observed that various estimates place the number of Americans with disabilities between twenty million and fifty million, with thirty-five or thirty-six million being the most common estimate.

When ADA bills were reintroduced in the 101st Congress in 1989, the finding was increased from 36 million to 43 million without any explanation. In its *Sutton* decision, the Court theorized that the 43 million figure included in the 1989 versions of the ADA legislation “can ... probably be explained as an effort to include in the findings those who were excluded from the National Council figure.” According to the Court, these additional persons would include those under age 18 with disabilities, individuals in institutions and nursing homes, and noninstitutionalized

persons with mental retardation and mental illnesses. There is no evidence in the legislative history of the ADA to support the Court's theory about the enlarged number. The Court also conjectured that the 36 million and 43 million figures were closer to a "work disability approach" to disability than to a "health conditions approach," two extremes which NCD had contrasted in *Toward Independence*.

### **NOT THE NUMBER OF PEOPLE COVERED BY THE ADA**

Regardless of the source of the 43 million figure, however, neither NCD in proposing the ADA, nor the Congress in revising and enacting it, suggested that the ADA was only intended to protect 36 or 43 million people. The ADA expressly intended to provide a "comprehensive prohibition of discrimination on the basis of disability." Accordingly, the ADA provides protection not only to persons who actually have disabling conditions but also to those with a record of such a condition and those who are "regarded as having" a disability whether they actually have one or not. In his dissenting opinion in the *Sutton* case, Justice Stevens noted that 43 million could not be a "fixed cap" on the number of people protected by the ADA, since Congress included the "record of" and "regarded as" categories in the definition, with the expectation that the Act would protect individuals who do not have "actual" disabilities and therefore are not counted in the number.

There is no certain number of people who are afforded protection from discrimination under the ADA. Any American is subject to being inaccurately considered as having a disability due to mixups in employment or medical records, confusion over similar names, malicious untruths, jumping to unwarranted conclusions, misinterpretation of personal characteristics or quirks, or other reasons. If, for example, an employer refuses you a job because of an inaccurate notation in your medical records that you have epilepsy, or diabetes, or HIV infection, or heart disease, or some other condition, you have been the victim of discrimination on the basis of a disability you were "regarded as" having or that you had a record of. In such a situation, you are protected under the ADA whether or not you have any condition that constitutes a disability. Thus, every American is potentially protected by the ADA from being discriminated against on the basis of disability. In that sense, the ADA protects the whole 288 million plus people in America.

### **NOT A PRECISE ESTIMATE OF PEOPLE HAVING ACTUAL DISABILITIES**

In addition to not representing the number of people the ADA protects, the 43 million figure also is not an attempt to estimate with any precision the number of people who actually have disabilities under the first prong of the ADA's definition of disability—"a physical or mental impairment that substantially limits one or more of the major life activities." The Court's opinion in *Sutton* did not say the ADA's protection was limited to 43 million Americans, but assumed that protection under the first prong of the definition was so limited. The Court's assumption of a

direct linkage between the 43 million estimate and the first branch of the ADA definition also represents a misunderstanding of the figure.

Sponsors and supporters of the ADA never claimed that the 36 and 43 million numbers were to be considered as reliable, precise estimates. In first proffering the 36 million figure in its *Toward Independence* report, NCD declared only that “[v]arious estimates place the number of Americans with disabilities between 20 million and 50 million persons, with a figure of 35 or 36 million being the most commonly quoted estimate.”

Significantly, NCD added the following caveat about the infant science of trying to count disabilities:

A precise and reliable overall figure is not currently available, due to differing operational definitions of disability, divergent sources of data, and inconsistent survey methodologies, which together make it impossible to aggregate much of the data that are available.

NCD noted that most existing studies employed either a “health conditions approach” or a “work disability approach,” “each of which has its own shortcomings and limitations.” Accordingly, NCD presented the statistical information about the population with disabilities in *Toward Independence* only to “provide a rough profile of the population with disabilities.” NCD reiterated such reservations and cautions in the report *On the Threshold of Independence* in which it incorporated the 36 million figure in the findings section of its original proposal of ADA legislation.

In increasing the figure from 36 to 43 million before reintroduction of the ADA in 1989, sponsors did not bother to explain the source of the larger figure. Nothing suggests, however, that the latter figure was intended to be any more precise than the former. In fact, during Senate consideration of the ADA, Senator Biden noted that “[t]here are a number of estimates of the number of disabled Americans, ranging from 20 to 50 million persons.” The legislative history of the ADA does not clarify the source of the 43 million number or precisely how it was calculated.

While ADA bills were pending in Congress, critics of the legislation sought on several occasions to have the sponsors provide a list of disabilities to be covered by the Act. The sponsors consistently refused to provide such a list because, as the Committee reports declared, “of the difficulty of ensuring the comprehensiveness of such a list.” If it was not possible for Congress to provide a list of all the conditions that would be covered as disabilities, it is obviously impossible to aggregate the numbers of persons with each of the conditions to produce a reliable count of people having such disabilities.

## WHAT THE FIGURE DOES REPRESENT

If the 43,000,000 figure is not the approximate number of people Congress intended the ADA to protect, nor an approximation of the number of people having “actual” disabilities under the first prong of the ADA definition of disability, then why did Congress insert such a figure at all? What purpose did the number serve in the findings section of the legislation? The answers are two. First, the figure made it clear that the ADA was addressing a problem that was substantial in size, that the number of people affected is not minuscule nor inconsequential. The U.S. Commission on Civil Rights had observed in its 1983 report *Accommodating the Spectrum of Individual Abilities* (p. 12) that “[a]n idea of the overall number of [disabled] people in America is important for determining the magnitude of the problem of discrimination against [disabled] individuals.” In enacting the ADA, Congress wanted to make it clear up front that it was addressing an important problem, one having sizeable dimensions. In the finding immediately following the 43,000,000 estimate, Congress found that discrimination on the basis of disability is “pervasive” in America. Both of these findings document that the ADA is addressing a problem of considerable magnitude, without any pretense at mathematical exactitude in measuring its size.

Second, the 43 million figure was included by congressional sponsors (and the prior 36,000,000 figure by NCD) in part to provide a gross estimate or “a rough profile” of the constituency for such a law—a critical consideration in the political arena. Supporters of the legislation wanted other members of Congress to join as cosponsors and to vote for it, and therefore found it advantageous to announce at the beginning of the bills that they would benefit a sizeable portion of the electorate. Persons who identified themselves as beneficiaries of the ADA would presumably be inclined to cast their ballots and to offer financial and other support to members of Congress who supported the legislation, and recognition that a lot of people would directly benefit from the ADA served as a strong political inducement to line up behind it.

In its report *On the Threshold of Independence*, in which NCD published its original version of the ADA (including the 36 million finding), NCD observed that persons with disabilities were “an emerging political constituency” which had “gained increasing attention from candidates.” The report referred to Harris poll data documenting a high sense of common identity among people with disabilities and their overwhelming support for legal protection against discrimination on the basis of disability, producing what the Harris organization termed “an emerging group consciousness.” Based on these factors, NCD predicted that this constituency’s “views and objectives will become an increasingly important aspect of American politics.” Such trends coupled with substantial estimates of the size of this population certainly sweetened the pot for potential supporters of the ADA legislation.

Construing the 43 million figure as an estimate of the magnitude of the constituency for the ADA makes it important to look more closely at what that constituency is composed of. What constraints were most likely to benefit from the ADA? Was it all persons who might potentially

be protected against discrimination under the Act? No, as noted previously, all Americans are afforded protection under the ADA if they are “regarded as” having a disability and are discriminated against because of it, but certainly not all such persons would identify themselves as beneficiaries of the ADA (until such discrimination actually happens to them). Nor would all people having an “actual” disability under the first prong of the definition necessarily benefit directly from the protection afforded by the ADA. The abstract benefits of being afforded protection under the ADA are only realized when an individual experiences an act that he or she identifies as discriminatory. Thus, the constituency for the ADA was comprised of persons who had experienced or believed themselves likely to experience discrimination on the basis of disability. This group of people would include some unquantifiable subset of people with actual disabilities, some unquantifiable subset of people with a record of a disability, and some unquantifiable subset of people who had been regarded as having a disability (but who might not have any actual impairment at all). Obviously, it was impossible for Congress to provide any exact number of the members of this indefinite class.

For the two purposes Congress was pursuing—of demonstrating a problem of substantial magnitude and of attracting supporters with the lure of a sizeable constituency of beneficiaries—it mattered little whether Congress chose 36, 43, or 50 million as its estimate. Each of these represents a substantial portion of the national population, and is within the range of some of the available estimates of the population with disabilities, and none of them is so large that it strains credulity.

## **THE WRONG PERSPECTIVE ON THE FIGURE**

Congress never suggested that the 43,000,000 figure should be used as a mathematically exact ceiling on the persons who could be afforded protection under the ADA. Indeed, the very fact that Congress did not feel it necessary to explain the derivation of the 43 million figure and what it included indicates that it had no expectation that profound, exacting conclusions would ever be deduced from it. Likewise, the fact that Congress did not hold any hearings to fine tune the figure and to delineate what it encompassed makes it clear that Congress had no expectation that the figure it included in its findings would be considered as providing a ceiling on coverage or as a yardstick for determining what conditions were included or excluded.

Approaching the estimate presented in the findings as if it were a numerical combination for unlocking the determination of disability under the ADA involves several misconceptions. One difficulty with this approach is that it mistakenly treats the ADA as if it were a restricted eligibility program, like the Social Security disability programs. The federal courts have considerable experience hearing appeals of Social Security disability benefits determinations. The purpose of such programs is to identify the persons who satisfy certain strict, statutorily prescribed eligibility criteria, and then to provide them with certain specified benefits. The

eligibility standards for such programs are definite and narrow (and frequently medical), and the numbers of persons eligible for the benefits are somewhat determinable.

The ADA, in contrast, is a nondiscrimination law, a civil rights statute. Its stated purpose is to eliminate unjustified discrimination and to do so comprehensively. This objective is not well-served by trying to make fine distinctions about how much disability one person has as opposed to another, or to make mathematical determinations about how many people of which category ought to be included. The language of the ADA does speak of “disability” and “individuals with disabilities,” and provides a definition of “disability,” but does so in the context of prohibiting discrimination on the basis of disability, not in the context of a strict eligibility law where the money or services can only be given to a certain number of recipients. The ADA’s protection against discrimination on the basis of disability should be available to all Americans who experience such discrimination, no matter how numerous they turn out to be.

Another problem with approaching the 43 million figure with an accounting mentality is that it oversimplifies the concept and experience of disability. A frequent misconception is that there are two distinct groups in society—those with disabilities and those without—and that it is possible to draw sharp distinctions between these two groups. People actually vary across a whole spectrum of infinitely small gradations of ability with regard to each individual functional skill, the importance of particular functional skills varies immensely according to the situation, and can be greatly affected by the availability or unavailability of accommodations and alternative methods of doing things. Authorities on disability are in agreement that the concept of disability entails a social judgment; people come to have a disability when they are viewed and treated as having one by other people. As the U.S. Commission on Civil Rights put it in *Accommodating the Spectrum of Individual Abilities*, its comprehensive report on disability and disability discrimination, “people are *made* different—that is socially differentiated—by the process of being seen and treated as different in a system of social practices that crystallizes distinctions ....” (p. 95, n. 17). Thus, the experience of disability is closely linked to the concept of discrimination. Individuals may encounter discrimination on the basis of disability whether or not they previously thought of themselves as having a disability. Therefore, the people to be protected under the ADA cannot be ascertained and counted by reference to sharp, preordained criteria.

Trying to quote a single number to represent how many people have disabilities is also further complicated by the fact that the endeavor is an attempt to take a still snapshot of a moving target. The ADA partially recognized this circumstance by adding the following statement to the 43 million estimate: “and this number is increasing as the population as a whole is growing older.” The number is increasing for other reasons as well, including the recognition of “new” or “emerging” disabilities, growing numbers of immigrants with disabilities, and medical advances that prolong the lives of persons with potentially life-shortening conditions. It is also true that methodologies for counting disabilities in the American population were in their infancy in 1990

and have been constantly improving since then; one noteworthy example is the improvements that have been made in the questions about disabilities on the general census of the population.

Rather than starting with a number, 43,000,000, and trying to reason back to see what kinds of conditions Congress meant to include—an enterprise that is bound to be purely conjectural since Congress gave no clues as to how the figure was arrived at—the proper approach to a statute like the ADA is to look at what problem the law was intended to address. Congress was very clear and explicit in declaring that the ADA was intended to address pervasive discrimination on the basis of disability.

The ADA is a mandate for equality. The Court’s approach to the definition based on the 43,000,000 figure turns the Act upside down and focuses extraordinary attention on how disabled (*i.e.*, how different from the rest of us) the plaintiff is, as a precondition to being protected by the Act and thus entitled to be treated equally. And the Court sought to determine what conditions a person must have to qualify for this exclusive group entitled to equality by raw speculation from a simple number. The focus of the Act was and should be, instead, on eliminating covered entities’ practices that make people unnecessarily different because of their mental or physical limitations.

And the Court compounded the difficulties inherent in its approach by trying to parse out the separate parts of the ADA definition with mathematical nicety. As Justice Stevens noted in his dissenting opinion in the *Sutton* case, “The three parts of this definition do not identify mutually exclusive, discrete categories. On the contrary, they furnish three overlapping formulas ....” To permit the ADA to achieve its declared objective of eliminating discrimination comprehensively, a more enlightened reading would interpret both the three branches of the definition and the 43 million figure less rigorously in the spirit Congress intended. Addressing pervasive discrimination should not have been converted into a mathematical and semantical exercise.

### **SPECIFIC INAPPROPRIATE CONCLUSIONS FROM THE 43,000,000 FIGURE**

In both *Sutton v. United Air Lines, Inc.* and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, the Court approached the issues in the cases by asking the wrong question. In *Sutton*, the Court asked whether conditions that can be corrected by medications and devices could be included in the definition of disability. In *Williams*, the Court asked whether manual disabilities that interfere only with narrow categories of job tasks could be included in the definition. In each case the Court looked to the 43,000,000 finding, which it assumed enumerated the number of persons having conditions under the first prong of the definition, and concluded that the number was not large enough to include the category of condition at issue in the case. In *Sutton*, the Court went further and, taking a narrow approach to the third (regarded as) prong of the definition, ruled that the plaintiffs did not have a disability under that prong as well. In *Williams*, the Court did not address the “regarded as” prong of the definition because it had not been

decided in the Court of Appeals' decision, and even left open the possibility that the plaintiff might be able to prove an actual disability with evidence that she was substantially limited in performing important daily household and personal care tasks.

The resolution in the *Williams* case of the issue regarding whether the plaintiff's workplace limitations resulting from her condition demonstrated a disability under the ADA would have been answered differently if the case had been approached as presenting a different question—whether Congress intended to provide protection from discrimination for persons terminated from their jobs because they have a physically impairing condition (in *Williams*' situation carpal tunnel syndrome) which interferes with the performance of one or more job tasks. There can be little doubt that the answer to the latter question is yes. Congress did intend to provide such protection. The legislative history of the ADA is filled with statements that the ADA was intended to address discrimination against people not only because of the underlying severity of the person's condition, but also because of employers' and other covered entities' viewing and treating impairments as disqualifying.

Similarly, the ruling that the plaintiffs in the *Sutton* case were not within the protection of the ADA would have reached a different conclusion if the focus of the analysis had not been on a technical examination of the 43 million figure and trying to draw sharp dividing lines between the prongs of the definition of disability and had been, instead, on the type of discriminatory actions the plaintiffs alleged they had been subjected to. The ADA contains a provision that makes it illegal for an employer to “us[e] qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual or class of individuals with disabilities unless the standard, test, or other selection criteria ... is shown to be job-related for the position in question and is consistent with business necessity” (42 U.S.C. §12112(b)(6)). The plaintiffs in *Sutton* were clearly excluded from the jobs they sought because of vision criteria that “screen out or tend to screen out an individual or class of individuals with disabilities.” Yet the employer was never required to demonstrate that such criteria were job-related and required as a matter of business necessity.

The *Sutton* analysis would have turned out quite different if the Court had posed the question as whether Congress intended to provide protection to people denied jobs because of a qualification standard or selection criterion that tends to screen out people with vision impairments that allegedly are not job-related and consistent with business necessity. Clearly, Congress did intend the ADA to afford such protection. This is not to say that the plaintiffs in *Sutton* (or in *Williams* as well) would ultimately have prevailed in their lawsuits; maybe they would, maybe they would not. Perhaps the defendant could have demonstrated that its vision criteria were both job-related and consistent with business necessity. But the plaintiffs should not have been prematurely thrown out of court without ever getting the court to examine the discrimination they alleged.

The Court's approach in *Sutton* and *Williams* turns the ADA into an engine for classifying and labeling individuals instead of an instrument for combating discrimination. And this approach dangles entirely on a dubious thread of hypertechnical analysis from the 43 million figure.

## CONCLUSION

Congress included in the ADA a finding that 43,000,000 Americans have disabilities in order to indicate that the ADA was addressing a problem of sizeable dimensions and to give a rough idea, an order-of-magnitude estimate, of the constituency who would support and laud the enactment of such a law. It did not explain the derivation of such a figure, and made no effort to conduct hearings to verify or refine the figure or to explain what categories composed it. Congress never intended the figure to be subjected to mathematical partition for deductions about what types of conditions the ADA affords protection to. Indeed, the sponsors of the legislation consistently refused demands that they provide a list of the conditions included in the ADA definition of disability, on the grounds that it was impossible to do.

The 43 million figure does not represent the number of people protected by the ADA. The “record of” and “regarded as” prongs of the definition of disability provide protection to all Americans who are discriminated against whether they have any actual impairment or not. The ADA's focus is on eliminating discrimination and doing so comprehensively.

Neither does the 43 million figure represent the number of people protected under the first prong (actual disability) of the definition. The constituency for the ADA was comprised of persons who had experienced or believed themselves likely to experience discrimination on the basis of disability. It includes a combination of unquantifiable subsets of people with actual disabilities, with a record of a disability, and who have been regarded as having a disability (but who might not have any actual impairment at all). It was impossible for Congress to provide any exact number of the members of this indefinite class. For the purposes for which Congress included the 43,000,000 figure, it was immaterial whether Congress chose 36, 43, or 50 million as its estimate, since each of these figures represents a substantial portion of the national population, is within the range of some of the available estimates of the population with disabilities, and is not so large that it strains credulity.

The Court's approach to the 43 million figure as the source of mathematical deductions about the definition of disability entails several misconceptions. It mistakenly treats the ADA as if it were a restricted eligibility program, like the Social Security disability programs, which have definite and narrow eligibility standards, resulting in fairly ascertainable numbers of persons eligible for the benefits. Since the ADA is a nondiscrimination law, its stated purpose—comprehensively eliminating unjustified discrimination—is not served by fine distinctions about how much disability one person has as opposed to another, or by mathematical determinations about how many people of which category ought to be included.

Approaching the 43 million figure with an accounting mentality also oversimplifies the concept and experience of disability. It plays into a prevalent misconception that sharp distinctions exist between those with disabilities and those without, when, in fact, people vary across a whole spectrum of infinitely small gradations of ability with regard to each individual functional skill, whose significance varies according to the situation and the availability of accommodations and alternative methods of doing things. Moreover, the concept of disability entails a social judgment; people come to have a disability when they are viewed and treated as having one by other people, so the experience of disability is closely linked to the concept of discrimination. For these reasons, the people to be protected under the ADA cannot be ascertained and counted in advance by reference to sharp criteria and categories.

The Court's focus on the 43 million figure for clues to demarcating the content of the prongs of the statutory definition of disability required it to engage in pure speculation, and to pose the wrong questions in the *Sutton* and *Williams* cases. Clearly, Congress did intend to protect people alleging the kinds of discrimination the plaintiffs in these two cases claimed had happened to them. Yet the Court's approach leads such claims to be thrown out of court without an examination of the allegedly discriminatory conduct.

At its core, the ADA is a mandate for equality. The focus of the Act was and should be on eliminating employers' and other covered entities' practices that make people unnecessarily different because of their mental or physical limitations. Hypertechnical distinctions based upon the 43 million figure turn the Act upside down and focus extraordinary attention on how disabled (*i.e.*, how different from the rest of us) the plaintiff is, as a precondition to being protected by the Act and thus entitled to be treated equally. This transforms the ADA from a measure for prohibiting discrimination into a stimulus for more classifying and labeling of individuals, in direct opposition to the spirit of the Act. Such unenlightened, speculative, and overly simplistic analysis predicated on the 43 million figure, and the significant and unfortunate conclusions about the statute it has produced, are far from what Congress intended and are much less than a law of such importance as the ADA merits.

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The National Council on Disability wishes to acknowledge the contributions of Professor Robert L. Burgdorf Jr. to this policy brief.