

# NCD

National Council on Disability

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

### **Introductory Paper**

### **The Americans with Disabilities Act**

October 16, 2002

*The Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency.*

## The Americans with Disabilities Act

The Americans with Disabilities Act of 1990 (ADA) has been the most significant civil rights advancement for people with disabilities to date. The ADA was the Nation's commitment that its sorrowful legacy of oppression, segregation and inequality in dealing with disability would be overturned by the ADA's "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" in which sweeping protections were provided in employment, public services, public accommodation and services operated by private entities, transportation and telecommunications. The ADA has been the impetus for a revolution in the inclusion, integration and empowerment of Americans with disabilities.

Regrettably, the Supreme Court of the United States has seriously undermined the ADA's principles and objectives in a string of decisions, effectuating a harmful rollback of the civil rights of people with disabilities. The Supreme Court's pinched construction of the ADA has significantly abridged and narrowed its scope of protection in contradiction to a massive amount of documented and persuasive authority. Such rulings of the Court and the attendant harmful media portrayals of the ADA have had a devastating impact on the lives of many Americans with disabilities, and portend their return to second-class citizenship. A consensus is emerging in the disability community that it is time to fight back. The National Council on Disability (NCD) has undertaken a major initiative—titled *Righting the ADA*—to respond to the Court's decisions. This paper, the inaugural product of the project, provides an overview of the initiative, identifies reasons NCD has found it necessary to undertake it, and outlines the types of topics to be addressed in the series of papers NCD will issue. NCD will pursue two principal objectives: (1) to document and explain the problems created by the Supreme Court's ADA decisions; and (2) to develop legislative proposals for addressing those problems that appear appropriate for legislative correction.

## **HIGH EXPECTATIONS FOR THE ADA**

In remarks before more than 3,000 people, predominantly individuals with disabilities, gathered on the South Lawn of the White House for the signing ceremony on July 26, 1990, President George H. W. Bush described the Act as an "historic new civil rights Act... the world's first comprehensive declaration of equality for people with disabilities." He added that "[w]ith today's signing of the landmark Americans with Disabilities Act, every man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence and freedom."

Other officials were equally as enthusiastic in their assessments of the new law. Senator Bob Dole called the ADA “landmark legislation” that would “bring quality to the lives of millions of Americans who have not had quality in the past.” Senator Orrin G. Hatch declared the ADA was “historic legislation” whose passage was “a major achievement” demonstrating that “in this great country of freedom, ... we will go to the farthest lengths to make sure that everyone has equality and that everyone has a chance in this society.” Senator Edward M. Kennedy termed the ADA a “bill of rights” and “an emancipation proclamation” for people with disabilities. The executive director of the Leadership Conference on Civil Rights described the Act as “the most comprehensive civil rights measure in the past two and a half decades.”

## **ROLE OF THE NATIONAL COUNCIL ON DISABILITY REGARDING THE ADA**

At the time of the ADA’s passage in the Senate, Senator Dole observed:

The ADA is ... a good example of bipartisanship in action. The bill originated with an initiative of the National Council on Disability, an independent federal body comprised of 15 members appointed by President Reagan and charged with reviewing all laws, programs, and policies of the Federal Government affecting individuals with disabilities. 135 *Cong. Rec.* S 10790 (daily ed. Sept. 7, 1989) (remarks of Sen. Dole).

The first recommendation in NCD’s first report, *Toward Independence*, was that:

Congress should enact a comprehensive law requiring equal opportunity for individuals with disabilities, with broad coverage and setting clear, consistent, and enforceable standards prohibiting discrimination on the basis of [disability].

Subsequent recommendations in *Toward Independence* described in detail what should be included in such a statute, and NCD even suggested a name for the proposed statute—the Americans with Disabilities Act.

In its 1988 follow-up report, *On the Threshold of Independence*, NCD fleshed out its concept of the ADA by publishing its own draft bill, which was the basis of ADA bills introduced in the 100th Congress in April 1988. Congress relied on NCD and its reports during congressional consideration and passage of the ADA; members and staff of NCD testified at congressional hearings on the legislation. For a history of the ADA and a description of NCD’s role in its proposal and enactment, see NCD, *Equality of Opportunity: The Making of the Americans with Disabilities Act* (1997).

Under its current statutory mandate, NCD is responsible for gathering information and making recommendations about the implementation, effectiveness, and impact of the ADA. NCD has engaged in a series of consultations with people affected by the Act—ADA stakeholders—to

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gain their perspectives on the effects of the Supreme Court's decisions and the need for corrective action.

## **IMPACT OF THE ADA**

In a variety of ways, the ADA has lived up to the high hopes that accompanied its passage. The provisions of the ADA addressing architectural, transportation, and communication accessibility have changed the face of American society in numerous concrete ways. A vast number of buildings and other structures have been affected by sections of the ADA that make it illegal to design or construct any new place of public accommodation or other commercial facility without making it readily accessible and usable by people with disabilities, or to alter such a facility without incorporating accessibility features. The provisions of the ADA dealing with mass transit ended decades of disagreements and controversy regarding exactly what was required of public transportation systems to avoid discriminating on the basis of disability; the ADA contains detailed provisions describing requirements for providers of bus, rail, and other public transportation conveyances, and intercity and commuter rail systems. Though implementation has been far from perfect, much progress in transportation accessibility has been made. Provisions of the ADA dealing with telecommunications have resulted in the establishment of a nationwide system of relay services that permit use of telephone services by those with hearing or speech impairments, and in a requirement of closed captioning of the verbal content of all federally funded television public service announcements.

Other provisions of Title II of the ADA (covering state and local governments) and Title III (covering public accommodations) have eliminated many discriminatory practices by private businesses and government agencies. The ADA has had a particularly strong impact in promoting the development of community residential, treatment, and care services in lieu of unnecessarily segregated large state institutions and nursing homes. The Act has provided the foundation for President George W. Bush's New Freedom Initiative, issued in February 2001, committing his administration to assuring the rights and inclusion of persons with disabilities in all aspects of American life, and President Bush's Executive Order No. 13217, issued on June 18, 2001, declaring the commitment of the United States to community-based alternatives for individuals with disabilities.

At the ADA signing ceremony, President George H. W. Bush declared that other countries, including Sweden, Japan, the former Soviet Union, and each of the 12 member nations of the European Economic Community, had announced their desire to enact similar legislation. In the years since its enactment, it has proven true that numerous other countries have been inspired by the ADA to seek legislation in their own jurisdictions to prohibit discrimination on the basis of disability, and they have looked to the ADA, if not always as a model, at least as a touchstone in crafting their own legislative proposals.

In 1988, while the original ADA bills were pending before Congress, the Presidential Commission on the Human Immunodeficiency Virus Epidemic endorsed the legislation and recommended that the ADA should serve as a vehicle for protecting people with HIV infection from discrimination. *Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic* 121, 123 (1988). The ADA has indeed proven to be the principal civil rights law protecting people with HIV from the sometimes egregious discriminatory actions directed at them.

In a broader sense, the ADA has, as NCD has observed in a previous report, “begun to transform the social fabric of our nation.” NCD, *Promises to Keep: A Decade of Federal Enforcement of the Americans with Disabilities Act* 1 (2000).

It has brought the principle of disability civil rights into the mainstream of public policy. The law, coupled with the disability rights movement that produced a climate where such legislation could be enacted, has impacted fundamentally the way Americans perceive disability. The placement of disability discrimination on a par with race or gender discrimination exposed the common experiences of prejudice and segregation and provided clear rationale for the elimination of disability discrimination in this country. The ADA has become a symbol, internationally, of the promise of human and civil rights, and a blueprint for policy development in other countries. It has changed permanently the architectural and telecommunications landscape of the United States. It has created increased recognition and understanding of the manner in which the physical and social environment can pose discriminatory barriers to people with disabilities. It is a vehicle through which people with disabilities have made their political influence felt, and it continues to be a unifying focus for the disability rights movement.

*Id.*

Despite these and other marked successes of the ADA, the Act has not achieved many of its major objectives. Problematic judicial interpretations have blunted the Act’s impact in significant ways. NCD has become increasingly concerned about certain interpretations and limitations placed upon the ADA in decisions of the Supreme Court of the United States. While certainly not all of the Court’s decisions have been objectionable, those that are have had a serious negative impact. They have placed severe restrictions on the class of people protected by the ADA, have narrowed the remedies available to complainants who successfully prove violations of the Act, have expanded the defenses available to employers, and have even called into question the very legality of some parts of the Act.

Media coverage of the Court’s ADA decisions has only made matters worse. While such coverage has not been uniformly negative, a significant portion of it has misleadingly presented the Act in a highly unfavorable light, placing a negative “spin” on the ADA, on the court decisions interpreting it, and on the impact it has had on American society. Inhibitive court decisions combined with harmful media perspectives have caused the ADA frequently to be the

object of misunderstanding, confusion, and even derision. The detrimental pronouncements of the courts and negative impressions of the ADA fostered by media mischaracterizations have fed upon one another to generate increasing misunderstanding of the Act's underlying purposes and vision, to frustrate some of its central aims, and to narrow the scope and degree of its influence. Non-rigorous research about the ADA has done little to rectify judicial and media misimpressions and often has contributed to confusion about the Act and its impact.

## **SERIES OF ADA POLICY BRIEFS**

To address detrimental rulings of the Supreme Court, NCD is issuing a series of policy documents discussing specific topics raised by the Court's decisions. Initially, NCD will respond to certain detrimental comments about the ADA leveled by Justice Sandra Day O'Connor, to the Court's misinterpretation of the ADA estimate of 43 million people with disabilities, to the Court's conclusion that Congress intended the ADA to be construed narrowly, and to several key media misrepresentations and erroneous attacks on the ADA.

Subsequently, NCD will examine various specific substantive aspects of the Court's rulings that have weakened or restricted the impact of the ADA. A major concern is the Court's highly restrictive interpretation of the ADA's definition of "disability" that has been reflected in the Court's position on various components or applications of the definition, such as mitigating measures, "per se" disabilities, the "not-just-one-job" standard, the delineation of major life activities, and the "regarded as" prong of the definition. Difficulties and confusion have also resulted from the Court's statements on federal agencies' authority to issue regulations interpreting the definitions in the ADA, and the varying degrees of deference the Court has given to ADA regulations issued by the various executive agencies. Problems and unresolved issues continue on the issue of who is "qualified" under the ADA, particularly in regard to the impact on ADA cases of plaintiffs' application for and receipt of disability benefits.

Another major problem area to be addressed concerns constitutional limits on the power of Congress to enact disability rights laws such as the ADA and other civil rights legislation. In addition, NCD will examine the implications of the Court's failure to resolve the issue of whether the ADA protects independent contractors from discrimination. The Court's rulings regarding employers' safety requirements raise issues regarding employers' discretion to require workers to meet federal safety requirements, and problems associated with the Court's ruling on the permissibility of a risk-to-self standard.

NCD also has concerns regarding the Supreme Court's rulings on the requirement that employers make reasonable accommodations for workers with disabilities, including the Court's recognition of a reasonableness standard for reasonable accommodations apart from the ADA's undue hardship standard, and the impact of seniority systems and collective bargaining on reasonable accommodations.

NCD plans to address some limitations the Court has imposed on the remedies available in ADA cases, including certain restrictions on attorneys' fees in cases where defendants cease ADA-violating actions after an ADA action is filed, and the elimination of punitive damages in private causes of action brought under Title II of the ADA, Section 504 of the Rehabilitation Act of 1973, or Title VI of the Civil Rights Act of 1964.

NCD will take a cross-issue look at the consequences of the Supreme Court's ADA decisions, to contrast the state of the law before the decisions were rendered with the legal situation after the decisions, to identify undesirable and unjust results in the decisions of the lower courts as a result of the Supreme Court's rulings, and to summarize instances of unaddressed discrimination and injustices stemming from the Court's rulings that do not result in reported court decisions. NCD will also examine deficiencies of non-rigorous research about the ADA and its impact.

As the initiative moves forward, NCD will present a list, updated as individual papers are completed, to serve as an electronic table of contents of the series of policy papers.

After documenting and explaining various problems created by the Supreme Court's ADA decisions, NCD will undertake to develop legislative proposals for addressing those problems that appear appropriate for legislative correction. This will involve not only crystallization of NCD's own ideas of potential legislative revisions to return the ADA to the path that Congress, President George H. W. Bush, and others with stake in the ADA intended in enacting it, but also obtaining the input and counsel of representatives from the disability community and other interested parties on the most effective and achievable ways for undoing the damage to the ADA resulting from the Court's rulings and media distortions. Ultimately, NCD will present its legislative proposals, along with pertinent supportive material from the previous papers, in a final comprehensive report on *Righting the ADA*.

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