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National Council on Disability

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

A Carefully Constructed Law

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This paper is part of a series of policy briefs analyzing and responding to certain problematic aspects of the Americans with Disabilities Act (ADA) decisions of the U.S. Supreme Court. An underlying element of such decisions has been the Court's treatment of the ADA as if Congress did not draft the Act carefully and with precision. In fact, the supposed uncertainties and ambiguities that the Court has perceived in the ADA are primarily the product of an abrupt change in the Court's approach to such legislation, and not to any inexactness in the statute.

Insight into the Court's views about the purported lack of clarity of the ADA's language has been provided by Justice Sandra Day O'Connor, who has been quite candid on this issue. Justice O'Connor occupies an historic and pivotal position on the Supreme Court of the United States. She is the first female to serve on the High Court and has distinguished herself as a thoughtful and tempered jurist. Frequently, she has provided the critical swing vote in closely divided, contentious decisions, including many of the most significant rulings of the Rehnquist Court. It is highly significant, then, that she has articulated the view that the ADA was not drafted carefully and clearly.

In remarks to a conference of business lawyers in March 2002, Justice O'Connor was quoted as saying that 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." She also reportedly cited the ADA as an example of a law "that did leave uncertainties as to what Congress had in mind."

Justice O'Connor is not the only person who has made such comments about the ADA. A representative of the Center for Equal Opportunity has called the ADA "one of the worst-drafted statutes in the U.S. Code."¹ And a prominent columnist declared that "[t]he law exudes grand ambitions and vague language."² Embedded in such uninformed remarks about the ADA are insinuations that the Act was hastily thrown together and that it uses language that is novel, imprecise, and vague. Neither of these assumptions is true, as the remainder of this paper seeks to demonstrate, first by focusing on the process by which the ADA was developed and then on the Act's content.

CONGRESS CAREFULLY CONSIDERED, NEGOTIATED, AND FINE-TUNED THE ADA BEFORE ENACTING IT.

Congress subjected the ADA to grueling scrutiny. The legislation was considered and passed by eight congressional committees—the Senate Committee on Labor and Human Resources, the House Committee on Education and Labor, the House Committee on Public Works and Transportation, the House Committee on Energy and Commerce, the House Committee on the Judiciary, the House Rules Committee, and two joint House/Senate conference committees. Congress held eighteen formal hearings to consider the ADA—two in the 100th Congress and sixteen in the 101st. Hundreds of witnesses testified, including public officials, technical experts, people with disabilities, and representatives of affected businesses and industries. Each

of the substantive standing committees that considered the legislation had a mark-up session to consider amendments, refine the language, and arrive at a final version for the committee to vote on. The Act was the subject of extensive floor debates in both the House and Senate. Scores of proffered amendments were examined and either agreed to or rejected. The versions of the law passed by the Senate and the House had to be considered by two different committees of House and Senate conferees to iron out final differences.

During its consideration by Congress, the ADA was the subject of extensive negotiations. Before the Act moved forward in the Senate, the Senate Committee on Labor and Human Resources sought the views and suggestions on the legislation of the George H. W. Bush Administration. The Administration, represented during Senate testimony by Attorney General Richard Thornburgh requested a series of changes to the Act. After considerable negotiations between White House representatives and Senate sponsors of the bill, the Committee reported out a substitute bill that incorporated most of the revisions and clarifications the Administration sought. President Bush announced that he endorsed the revised legislation. On the floor of the Senate, the ADA bill was thoroughly examined and debated, and various amendments were adopted, including an amendment to exclude certain conditions from the coverage of the statute.

When the ADA bill moved to the House of Representatives after Senate passage, the legislation was meticulously reviewed by four substantive committees. During committee and floor consideration, numerous changes were made to the bill, including the adoption of various amendments proposed by business interests who would be affected by the Act, such as the National Federation of Independent Business and the private bus industry. After finally proceeding through the four standing House committees plus the Rules Committee, and debates on proposed amendments on the House floor, the Act was passed by the House by an overwhelming majority.

After all the discussions, negotiations, compromises, and review by two joint conference committees, a high degree of consensus emerged, and the ADA was passed by the congressional committees and the full Senate and House by overwhelming bipartisan votes. No one could credibly maintain that Congress did not carefully scrutinize the ADA before passing it.

THE ADA WAS BASED UPON 25 YEARS OF METHODOICAL CONGRESSIONAL STUDY.

As it considered and enacted the ADA, the 101st Congress had the benefit, not only of its direct fact-gathering through its investigation and hearing processes and the resources and compilations available to it through the Library of Congress and the Congressional Research Service, but also of a wealth of information compiled in a quarter century of study of discrimination on the basis of disability. Congress had formally solicited information and recommendations by establishing, by statute or congressional appointment, a number of investigatory and advisory instrumentalities, and vesting them with responsibility for studying

various facets of discrimination on the basis of disability and proposing ways to address and eliminate it. Thus, in 1965 Congress established the National Commission on Architectural Barriers, and charged it by statute to study the extent to which architectural barriers prevented access to public buildings and to propose measures to eliminate existing barriers and prevent new ones from being created.

In 1974, Congress authorized the convening of a White House Conference on Handicapped Individuals, whose statutory mission was to convene a national gathering “to develop recommendations and stimulate a national assessment of problems, and solutions to such problems, facing individuals with [disabilities],” with equal protection as a key focus. This initiative culminated in a May 1977 gathering in Washington, DC of approximately 3,700 individuals from every state and U.S. territory, representing over 100,000 people who attended local, state, and territorial conferences, that generated 815 formal recommendations addressing 287 issues, including civil rights for people with disabilities. In 1978, Congress added disability discrimination to the jurisdiction of the U.S. Commission on Civil Rights, an independent federal agency which studies and makes recommendations regarding civil rights issues. In response, in 1983 the Commission published *Accommodating the Spectrum of Individual Abilities* (hereinafter *Accommodating the Spectrum*), a comprehensive report on discrimination on the basis of disability which documented the types of discrimination people with disabilities encounter and provided a summary of case law and a conceptual framework for understanding and addressing such discrimination.

In 1984, a year after the Commission on Civil Rights issued *Accommodating the Spectrum*, Congress initiated another phase of its investigation of discrimination on the basis of disability and remedies for it. It established what came to be known as the National Council on Disability (NCD) as an independent federal agency charged with reviewing federal laws and programs affecting people with disabilities and making recommendations regarding ways to make such laws and programs more effective. In two of its statutorily mandated reports to the President and Congress NCD first proposed the concept of an ADA and then published the original draft of the ADA that was later introduced in Congress in 1988.

In 1989, the Advisory Commission on Intergovernmental Relations, a bipartisan body (comprised of three U.S. Senators, three members of the House of Representatives, three officials from the U.S. Executive Branch, four governors, four mayors, three members of State legislatures, three elected county officials, and three private citizens), focused its attention on disability discrimination and issued a report titled *Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal*. That report identified various barriers to governmental compliance with disability rights mandates, and was based in part on a survey of state officials regarding their assessment of impediments to employment of persons with disabilities in state government.

During congressional consideration of the ADA, members of Congress asked the General Accounting Office (GAO) for information about the costs of workplace accommodations and of

avoiding or removing architectural, transportation, and communication barriers. In response, GAO conducted a literature review of published studies, queried a wide range of industry groups and disability organizations, identified twelve reports that provided such information, and summarized their findings in *Persons with Disabilities: Reports on Costs of Accommodations, A Briefing Report to Congressional Requesters* (January 4, 1990).

To further inform ADA deliberations, in May 1988, the Chairman of the House Subcommittee on Select Education appointed the Task Force on the Rights and Empowerment of Americans with Disabilities to gather information on the extent and nature of disability discrimination. The Task Force conducted 63 public forums around the country attended by over 7,000 persons, submitted eleven interim reports to Congress, provided testimony at hearings on the ADA in both the House and Senate, and issued a final report, *From ADA to Empowerment; The Report of the Task Force on the Rights and Empowerment of Americans with Disabilities* (1990) documenting that Americans with disabilities faced “massive, society-wide discrimination and paternalism.”

In addition to legislatively generated information and documents, Congress, in its consideration of the legislation, had the benefit of a variety of other informational resources. Among the documents that Congress expressly relied on were the *Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic* (1988) and two Louis Harris polls. In the first of these polls, *The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream* (1986), the Harris organization presented results of the first nation-wide, telephone survey of Americans with Disabilities, including a wide array of statistical information about the incomes, job status, and other characteristics, activities, and viewpoints of people with disabilities. The second report, *The ICD Survey II: Employing Disabled Americans* (1987), provided data from Harris’ survey of employers’ policies, practices, and attitudes, that document frequent job discrimination against people with disabilities.

So, not only did the 101st Congress examine the ADA thoroughly and meticulously before passing the legislation, it also tapped into a wealth of documentary and other evidence garnered during 25 years of examination of the nature of discrimination on the basis of disability.

THE MAJOR CONCEPTS AND TERMS IN THE ADA WERE TIME-TESTED, NOT NEW.

During its quarter century of examination and study of the nature and extent of discrimination on the basis of disability, Congress did not sit on its hands. Rather, it took incremental legislative steps to prohibit such discrimination that served to field-test such measures. Congress’ first significant effort to address discrimination on the basis of disability was its enactment of the Architectural Barriers Act of 1968, which provided that all buildings constructed, altered, leased, or financed by the U.S. Government shall be accessible to and usable by individuals with physical disabilities. In the years between 1968 and the enactment of

the ADA in 1990, Congress enacted a variety of laws addressing various aspects of discrimination on the basis of disability. These included Sections 501, 503, and 504 of the Rehabilitation Act of 1973; the Education for All Handicapped Children Act of 1975; the Developmental Disabilities Assistance and Bill of Rights Act of 1975; the Voting Accessibility for the Elderly and Handicapped Act of 1984; the Air Carrier Access Act of 1986; the Civil Rights Restoration Act of 1987; and the Fair Housing Amendments Act of 1988. Each of these statutes was a congressional attempt to address some portion or area of discrimination faced by people with disabilities, and Congress drew upon the results achieved under such laws in fashioning the ADA.

Most of the major standards and terms contained in the ADA were developed and fleshed out under prior laws and the regulations implementing them. In 1974 the amendments to the Rehabilitation Act, Congress created the three-prong definition of disability (originally termed “handicap”) that is used in the ADA. Regulations for the enforcement of Sections 501, 503, and 504 of the Rehabilitation Act elaborated on the definition of disability, and also identified various forms of prohibited discrimination, including failure to make reasonable accommodations, use of discriminatory selection criteria, noncompliance with accessibility requirements, and certain kinds of preemployment inquiries. All of these elements were included in the ADA.

During ADA consideration, consistency with the terminology and standards of the Rehabilitation Act and the Civil Rights Act of 1964 was one of the things that Attorney General Richard Thornburgh successfully insisted on as prerequisite to Administration endorsement. In his testimony before the Senate, he argued:

[N]ew legislation should take into consideration the existing fabric of federal laws prohibiting discrimination on the basis of [disability]. During the past two decades, Congress has enacted a series of statutes focusing on a wide range of problems and providing an intricate web of enforcement procedures. The Courts and federal agencies have also been active in interpreting these laws, defining the meaning of non-discrimination in the context of disability. Any new legislation should be coordinated with this body of law in order to avoid inadvertent conflicts, confusion, the inefficient use of enforcement resources, and unnecessary litigation.

Accordingly, consistency with prior statutes, regulations, and case law was a byword in crafting the final version of the ADA. That such consistency was achieved was attested to by President George H. W. Bush’s comments at the ADA’s signing:

Fears that the ADA is too vague ... are misplaced. The Administration worked closely with the Congress to ensure that, wherever possible, existing language and standards from the Rehabilitation Act were incorporated into the ADA. The Rehabilitation Act standards are already familiar to large segments of the private sector that are either federal contractors or recipients of federal funds. Because the Rehabilitation Act was

enacted 17 years ago, there is already an extensive body of law interpreting the requirements of that Act. Employers can turn to these interpretations for guidance on how to meet their obligations under the ADA.

The ADA did not spawn a brood of novel and nebulous terms and standards. It built solidly upon the foundation of prior laws and maintained the terminology, definitions, and conceptual framework of those statutes.

THE SUPREME COURT INTRODUCED CONFUSION AND UNCERTAINTY INTO THE ADA'S DEFINITION OF DISABILITY BY VEERING AWAY FROM PRIOR SETTLED INTERPRETATIONS.

Justice O'Connor's comments that the ADA was not "carefully written" and left "uncertainties as to what Congress had in mind" followed criticisms by Representative Steny Hoyer of her opinion for the Court in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*. Rep. Hoyer argued that, in interpreting the definition of "disability" in the ADA narrowly, Justice O'Connor had misunderstood and misstated the intent of Congress (Steny H. Hoyer, *Not Exactly What We Intended, Justice O'Connor, The Washington Post*, January 20, 2002, p. B01). The terms at issue in the *Williams* case, "disability," "substantially limits," and "major life activities," were all drawn from language Congress inserted into the Rehabilitation Act in 1974. They were also the subject of consistent regulations and settled regulatory guidance issued by the Department of Justice, the Department of Health and Human Services, the Equal Employment Opportunity Commission, and in all of the regulations issued by virtually every other federal department or agency.

How is it possible that Congress believed it was making use of clear, well-settled, and expansive terminology in enacting the ADA definition in 1990, and yet in 2002 Justice O'Connor views the ADA definition as presenting "uncertainties" and intended to "be interpreted strictly to create a demanding standard for qualifying as disabled" (*Williams*, 122 S.Ct. at 691)? The answer is not that Congress was not clear, but that the Supreme Court changed direction and discarded its previous approach to the definition of disability.

When Congress was considering the ADA, the leading legal precedent on the definition of disability was the Supreme Court's decision in *School Board of Nassau County v. Arline*. The *Arline* ruling was expressly relied on in several of the ADA Committee reports in discussing the definition of disability. In that case, the Supreme Court took a very expansive and non-technical view of the definition. While there is no need to review the details of the decision in this paper, it is significant that the Court found that Ms. Arline's having been hospitalized for infectious tuberculosis was "more than sufficient" to establish that she had "a record of" a disability under Section 504 of the Rehabilitation Act, and the Court made that ruling even though her discharge from her position was not because of her hospitalization. The Court displayed a lenient interpretation of what a plaintiff needed to show to invoke the protection of the statute. It noted

that in establishing the new definition of disability in 1974, Congress had expanded the definition “so as to preclude discrimination against ‘[a] person who has a record of, or is regarded as having, an impairment [but who] may at present have no actual incapacity at all.’”

The Court declared that the “basic purpose of Section 504” was to ensure that individuals “are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others” or “reflexive reactions to actual or perceived [disabilities],” and that the legislative history of the definition of disability “demonstrates that Congress was as concerned about the effect of an impairment on others as it was about its effect on the individual.” The Court elaborated as follows:

Congress extended coverage ... to those individuals who are simply “regarded as having” a physical or mental impairment. The Senate Report provides as an example of a person who would be covered under this subsection “a person with some kind of visible physical impairment which in fact does not substantially limit that person’s functioning.” Such an impairment might not diminish a person’s physical or mental capabilities, but could nevertheless substantially limit that person’s ability to work as a result of the negative reactions of others to the impairment.

It was against this legal backdrop that Congress adopted the essentially identical definition of disability in the ADA.

Beginning with its decision in *Sutton v. United Airlines* in 1999, the Supreme Court began to turn its back on the broad, relaxed interpretation of disability endorsed by the Court in the *Arline* decision, until by the time of the *Williams* decision in 2002, the Court was espousing the view that the definition should be “interpreted strictly to create a demanding standard for qualifying as disabled.” The problems with and consequences of this pinched construction of disability will be examined in other policy briefs in this series, but for present purposes the key point is that it is totally untrue to suggest that the ADA was not carefully written or that its definition of disability was unclear or vague.

In adopting the definition of disability from the Rehabilitation Act, Congress was consciously incorporating a clear, well-settled, and broad definition. In attacking the definition of disability as vague or unclear, critics are making a mistake that the Court pointed out in another context under the ADA in its decision in *Pennsylvania Department of Corrections v. Yeskey*—confusing the breadth of a statutory term with ambiguity. The ADA definition of disability was intentionally broad, but until Justice O’Connor and her colleagues muddied the waters, it was clear and explicit, as reflected in the Court’s own decisions at the time the ADA was enacted.

CONCLUSION

Congress went through a laborious, tedious, and intensive process of considering and revising the ADA, including numerous negotiations, compromises, and tweaking of the language, prior to passing the statute. Even before Congress began its work on the ADA bills, the proposal had a strong legal and conceptual base, grounded in a quarter of a century of investigation and analysis by Congress and by a variety of federal and other agencies, including the U.S. Commission on Civil Rights, the National Council on Disability, the congressional Task Force on the Rights and Empowerment of Americans with Disabilities, and the Louis Harris polling organization.

The major provisions of the ADA, including the definition of disability, were almost all derived from practically identical terms in prior legislation, particularly the Rehabilitation Act. The meaning of these provisions was the subject of considerable regulatory language, interpretive guidance, and court precedents at the time the ADA was enacted. The standards and terminology incorporated into the ADA had been field-tested and had proven workable. The Supreme Court's decision in *School Board of Nassau County v. Arline* had endorsed a broad and inclusive reading of the definition of disability under the Rehabilitation Act. Congress embraced this expansive approach to the definition in choosing to use the same definition in the ADA.

The Supreme Court infused harshness and uncertainty into the interpretation of the definition of disability when it disregarded the *Arline* approach and instead substituted a technical, constricted construction of what a person has to prove to have a disability under the ADA. Prior to the current Court's misconstruction of the statutory language, the ADA's definition of disability was quite broad, but it was not vague or unclear.

Any suggestion, by Justice O'Connor or others, that the ADA was thrown together hastily at the last minute without careful consideration and deliberation, or that the ADA includes a lot of novel, hazy, imprecise legislative language, is simply wrong.

- 1 . Roger Clegg, letter to the editor, *The Washington Post* January 30, 2002, p. A22.
- 2 . Robert J. Samuelson, "Dilemmas of Disability," *The Washington Post*, June 30, 1999, p. A31.

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