Rle

MEMORANDUM

Date: December 30, 1994
To: Senator Dole
From: Alec Vachon
Re: TALKING POINTS FOR "FACE THE NATION" ON ADA

SENATOR, SOME PEOPLE THINK ADA IS A BURDEN TO STATE AND LOCAL GOVERNMENTS, THAT ADA IS AN UNFUNDED MANDATE. WHAT DO YOU HAVE TO SAY TO THAT?

* Think of this another way--what would happen if ADA were repealed? In the U.S. Constitution, there is something called the 14th Amendment, which says people are entitled to "equal protection of the laws." That means if a State or local government provides any service, then it must make it available on an equal basis to all people, including those with disabilities.

* Let's remember what we are talking about here--voting, getting a license, zoning permits, attending public meeting, paying taxes--basic rights and responsibilities.

* In my view, ADA protects State and local governments from excessive burdens. All ADA says is that state and local governments have to figure out some way to make their services available. Architectural changes in existing buildings are only required where there is no other way of making a service accessible. Of course, public meetings must be held in an accessible place.

  KANSAS EXAMPLE: In Scott County, the County Commissioners moved the courtroom from the inaccessible second floor to the accessible first floor, so people in wheelchairs could attend court sessions and other public meetings. They then moved county offices to the second floor. There is a buzzer on the first floor, and when pressed a clerk comes down to take care of business for anyone who can't make it upstairs.

* Also, ADA says if making a service accessible is an undue burden, State and local governments don't have to do it.

* If you think ADA is tough, just try the Federal courts. Courts might require full architectural accessibility--and that could be very, very expensive. And forget about an "undue burden" defense.

* In fact, you might call ADA "The State and Local Government Disability Flexibility and Relief Act."

* Also, I take exception to the "unfunded" label. Since 1985, Congress has provided State and local governments with $29 billion in Community Development Block Grants (CDGB). They have used about $136 million for handicapped access. They could use more, that is their choice.

* Also, you should know that there is very little new in ADA that has been required by the Federal government since 1973 as a condition of receiving Federal funds. The Federal government made the commonsense requirement that any program that uses Federal funds should be available to all people, including those with disabilities. Frankly, many State and local governments looked the other way for a long time.

* One last point--remember, people with disabilities are taxpayers, too. I have not heard anyone say people with disabilities should not have to pay taxes.

December 7, 1992

TO: Kerry, Bill, Bret, Mo, Mira, Dan and David

FROM: Marilyn

About a month ago, I gave you Governor Clinton's briefing papers for the areas that you cover -- attached are excerpts from his book for the same areas.

No.

AMERICANS W/ DISABILITIES

PUTTING PEOPLE FIRST

How We Can All Change America

Gov. Bill Clinton
Sen. Al Gore

TIMES BOOKS

Americans with Disabilities

WE HAVE LONG recognized that people with disabilities are some of our nation's greatest untapped resources. We believe that all persons with disabilities must be fully integrated into mainstream American society, so they can live fulfilling and rewarding lives. During our years in public office, we have compiled strong records of supporting public and private initiatives to enhance the independence and productivity of persons with disabilities.

As President and Vice President, we will continue our efforts. We will actively involve people with disabilities in developing a national policy that promotes equality, opportunity, and community for all Americans.

A Clinton–Gore Administration will ensure that children with disabilities receive a first-rate education that suits their needs. People with disabilities will be able to live in their own homes, in their own communities. Adults with disabilities will work alongside their peers without disabilities. And people with disabilities will have access to comprehensive health-care and consumer-driven personal assistance services.

We must not rest until America has a national disability policy based on three simple creeds: inclusion, not

exclusion; independence, not dependence; and empowerment, not paternalism.

Here's what we will do:

Americans with Disabilities Act

- Work to ensure that the *Americans with Disabilities Act* (ADA) is fully implemented and aggressively enforced—to empower people with disabilities to make their own choices and to create a framework for independence and self-determination. The ADA is not about handouts and it is not a giveaway—it guarantees the civil rights of American citizens with disabilities.

Health Care for All Americans

- *Provide all Americans with affordable, quality health coverage,* either through their workplaces or through a government program; prohibit insurance companies from denying coverage based on pre-existing conditions; and contain costs by taking on the insurance industry and the drug industries.
- *Expand long-term care choices* for Americans with disabilities.

Improve Educational Opportunities for Children with Disabilities

- Work to *ensure children with disabilities a first-rate education,* tailored to their unique needs but provided alongside their classmates without disabilities.
- Support increased funding for special education ser-

vices and work to improve the enforcement of laws which *guarantee children with disabilities the right to a high-quality public education.*

- Support increased efforts to *integrate children with disabilities into their schools' regular activities,* instead of sectioning them off in special programs where they cannot interact with other students.
- *Expand early intervention programs in health care and education*—such as Head Start—to ensure that children with disabilities live full and productive lives.

Expand Employment Opportunities for Americans with Disabilities

- *Increase the amount of special education, professional training, and job training* to reduce the extraordinarily high unemployment rate among Americans with disabilities as part of national adult education, job training, and apprenticeship programs.
- *Sign into law the Family and Medical Leave Act,* which George Bush vetoed in 1990, so that no worker is forced to choose between keeping his or her job and caring for a newborn child or sick family member.

No

OLDER AMERICANS

PUTTING PEOPLE FIRST

How We Can All Change America

Gov. Bill Clinton
Sen. Al Gore

TIMES BOOKS

Older Americans

THE GENERATION that worked its way out of the Great Depression, won the Second World War, and endured the worst of the Cold War has seen harder times than these. But older Americans know that we can do better—by them and by future generations.

The Republicans in Washington have repeatedly tried to cut programs that protect the rights and prosperity of older Americans. We think that's wrong. We will protect the long-term solvency of Social Security, protect the integrity of the Trust Fund, and lift the earnings test limitation.

A Clinton–Gore Administration will also work to enact a national health-care plan in its first year, expand long-term care services, bring down prescription drug costs, and enact family and medical leave legislation to guarantee that working Americans can keep their jobs while they care for ailing parents.

It is time to honor the compact between generations. Here's how:

Social Security

- Our Administration will *protect the integrity of the Social Security system* and ensure that it remains solvent in years to come.

• *Lift the Social Security earnings test limitation* so that older Americans are able to help rebuild our economy and create a better future for all.

National Health Care

• *Guarantee affordable, quality health care* by taking on the insurance industry and drug companies. We will guarantee a core package of benefits for every American.

• *Preserve and protect Medicare benefits.*

Long-term Care

• *Expand choices in care.* We will guarantee older Americans more control of their health care. Options will be expanded to include personal and home care, visiting nurse services, adult day care, and senior center services. Those who need little assistance in daily living will not be forced into nursing homes.

• *Bring down prescription drug prices.* In the last decade, the price of prescription drugs has risen at three times the rate of inflation. Some companies charge Americans more than they charge people from other countries for the same product. We support Sen. David Pryor's proposal to take away tax breaks from drug companies that raise their prices faster than the rate of inflation.

Safe and Strong Communities

• Fight crime by putting *100,000 new police officers* on the streets. We will create a National Police Corps and offer unemployed veterans and active military personnel

a chance to become law enforcement officers here at home.

- Provide federal assistance to areas hard hit by crime if they adopt a *comprehensive crime control plan* that includes proven anti-crime measures, such as community-based policing, which puts more police on the beat.
- *Put neighborhoods at the center of our efforts to revitalize America* by coordinating existing housing, education, employment training, health care, drug treatment, and crime prevention programs. We will target resources community by community to make the most of federal housing funds.
- *Strengthen the HOME program* to help community groups provide additional quality rental housing to low-income Americans.

The Family and Medical Leave Act

- *Sign the Family and Medical Leave Act.* This act will allow working parents to take twelve weeks of unpaid leave per year to care for a newborn child or sick family member, including an elderly parent. George Bush vetoed this legislation—leaving the United States as the only industrialized country in the world without a national family and medical leave policy.

November 13, 1992

TO: Stacy

FROM: SHEILA BURKE

SUBJECT: CLINTON/GORE ON THE ISSUES

Attached are the briefing papers from the Clinton/Gore Campaign that deals with your issues. Please review the information, contact staff directors, policy contacts and outside experts to prepare responses.

Stacy

CLINTON • GORE ON ISSUES OF CONCERN TO OLDER AMERICANS

The generation that worked its way out of the Depression, won World War II, and endured the worst of the Cold War has seen harder times than these. But older Americans know that we can do better — by them and by future generations.

The Republicans in Washington have repeatedly tried to cut programs that protect the rights and prosperity of older Americans. Bill Clinton and Al Gore will protect the long-term solvency of Social Security; protect the integrity of the Trust Fund, and lift the earnings test limitation.

A Clinton/Gore Administration will also work to enact a national health care plan in its first year; expand long-term care services; bring down prescription drug costs, and enact family and medical leave legislation to guarantee that working Americans can keep their jobs while they care for ailing parents.

It is time to honor the compact between generations. Here's how:

THE CLINTON/GORE PLAN

If any Americans have kept faith with the American promise, it's the generation that worked their way out of the Great Depression, fought their way to victory over Nazism and Facism, led the way through the Cold War and sacrificed to provide my generation with opportunities our parents never had.

Protect social security

• A Clinton/Gore Administration will protect the integrity of the Social Security system and ensure that it remains solvent in years to come.
• Lift the Social Security earnings test limitation so that older Americans are able to help rebuild our economy and create a better future for all.

National health care

• Guarantee affordable, quality health care by taking on the insurance industry and drug companies. Bill Clinton and Al Gore will guarantee a core package of benefits for every American.
• Preserve and protect Medicare benefits.

Long-term care

• Expand choices in care. Bill Clinton and Al Gore will give older Americans more control of their health care. Options will be expanded to

include personal and home care, visiting nurse services, adult day care, and senior center services. Those who need little assistance in daily living are not forced into nursing homes.

• Bring down prescription drug prices. In the last decade, the price of prescription drugs has risen at three times the rate of inflation. Some companies charge Americans more than people from other countries for the same product. Bill Clinton has endorsed Senator David Pryor's proposal to take away tax breaks from drug companies that raise their prices faster than the rate of inflation.

For many Americans, the rising cost of health care and the loss of it is the number one fear they face on a daily basis...We don't need to reduce quality; we need to restructure the system. And no nation has ever done it without a national government that took the lead in controlling costs and providing health care for all.

Safe and strong communities

• Fight crime by putting 100,000 new police officers on the streets. We will create a National Police Corps and offer unemployed veterans and active military personnel a chance to become law enforcement officers here at home.

• Provide federal assistance to areas hard hit by crime if they adopt a comprehensive crime control plan that includes proven anti-crime measures, such as community-based policing, which puts more police on the beat.

• Put neighborhoods at the center of our efforts to revitalize America by coordinating existing housing, education, employment training, health care, drug treatment and crime prevention programs. We will target resources community by community to make the most of federal housing funds.

•Strengthen the HOME program to help community groups provide additional quality rental housing to low-income Americans.

Sign the Family and Medical Leave Act

• As President, Bill Clinton will sign the Family and Medical Leave Act which Senator Al Gore introduced. This Act will allow working parents to take 12 weeks of unpaid leave to care for a newborn child or sick family member, including an elderly parent. George Bush vetoed this legislation — leaving the United States as the only industrialized country in the world without a national family and medical leave policy.

THE RECORD

• As Arkansas' Attorney General, Bill Clinton created the Advocates for the Elderly Program to help older Arkansans with their legal problems.
• Chaired the National Association of Attorney Generals' Special Subcommittee on the Rights and Legal Problems of the Elderly; and testified before the U.S. Civil Rights Commission against discrimination against older Americans in federal programs.
• Created the 1991 ElderChoices Program to allow seniors to use money normally reserved for nursing home care for long-term services of their choice — from personal care to home health care to adult day care.
• Led the nation's governors in fighting the elimination of Social Security disability benefits, and imposed a moratorium on terminations in Arkansas. The federal government subsequently changed its procedures.
• Initiated a broad range of cost-effective in-home health care and supportive services for people recovering from serious illness, people with chronic or terminal illness, and people who need help with daily living but live outside their homes.
• Removed the sales tax on prescription drugs.
• During his first term, imposed strict regulations on nursing homes prior to similar federal federal regulations. Nursing home residents were granted a 14-day period in which to rescind a contract for services and nursing homes must now provide annual disclosure statements to residents upon application.
• Sought and implemented a law mandating the appointment of senior citizens to state boards and commissions.
• Expanded coverage of adult protective services in Arkansas.
• Found state funding to purchase 100 new vans for senior citizen transportation. Additional funding for Meals on Wheels, and other transportation was made available through a 1991 one-cent-per-pack tax increase on cigarettes.
• Instituted a special literacy project to encourage older adults to participate in literacy programs as both students and teachers.

• Senator Gore voted for the Older Americans Act which expanded federal programs for Older Americans including "Meals on Wheels." The Act also expanded assistance for special needs programs for the frail and home-bound elderly and outreach activities for many elderly people.
• Voted for the Older Workers Benefits Protection Act which overturned a Supreme Court decision and made it unlawful to prevent older workers from receiving employee benefits because of their age.
• Voted for and strongly supports enforcement of the Americans With Disabilities Act.
• Consistently opposed cuts to Medicare and other entitlement programs for Older Americans.
• Fought for the Medigap law to protect seniors from buying worthless insurance coverage.

November 13, 1992

TO: Mr West

FROM: SHEILA BURKE

SUBJECT: CLINTON/GORE ON THE ISSUES

Attached are the briefing papers from the Clinton/Gore Campaign that deals with your issues. Please review the information, contact staff directors, policy contacts and outside experts to prepare responses.

No West

CLINTON•GORE ON AMERICANS WITH DISABILITIES

Bill Clinton and Al Gore have long recognized that people with disabilities are among the nation's greatest untapped resources. They believe that all persons with disabilities must be fully integrated into mainstream American society, so they can live fulfilling and rewarding lives. During their years in public office, they have compiled strong records of supporting public and private initiatives to enhance the independence and productivity of persons with disabilities.

As President and Vice President, they will continue their efforts. A Clinton/Gore Administration will actively involve people with disabilities in developing a national policy that promotes equality, opportunity, and community for all Americans. Bill Clinton and Al Gore will ensure that children with disabilities receive a first-rate education that suits their needs. People with disabilities will be able to live in their own homes, in their own communities. Adults with disabilities will work alongside their peers without disabilities. And people with disabilities will have access to comprehensive health care and consumer-driven personal assistance services.

We must not rest until America has a national disability policy based on three simple creeds: inclusion, not exclusion; independence, not dependence; and empowerment, not paternalism.

THE CLINTON/GORE PLAN

Americans with Disabilities Act

Health care for all Americans

Improve educational opportunities for children with disabilities

Expand employment opportunities for Americans with disabilities

Paid for by the Clinton/Gore '92 Committee

The ADA is not about handouts and it is not a giveaway — it guarantees the civil rights of American citizens with disabilities.

Americans With Disabilities Act

• Work to ensure that the Americans with Disabilities Act (ADA) is fully implemented and aggressively enforced — to empower people with disabilities to make their own choices and to create a framework for independence and self-determination.

Health care for all Americans

• Provide all Americans with affordable, quality health coverage, either through their workplaces or through a government program; prohibit insurance companies from denying coverage based on pre-existing conditions; and contain costs by taking on the health care industries.
• Expand long-term care choices for Americans with disabilities.

Expand educational opportunities for children with disabilities

• Work to ensure that children with disabilities receive a first-rate education, tailored to their unique needs but provided alongside their classmates without disablilities.
• Support increased funding for special education services and work to improve the enforcement of laws that guarantee children with disabilities the right to a high-quality public education.
• Support increased efforts to integrate children with disabilities into their schools' regular activities, instead of sectioning them off in special programs where they cannot socially integrate with other students.
• Expand early intervention programs in health care and education — such as Head Start — to ensure that children with disabilities live full and productive lives.

We must never forget that ADA also stands for "American Dream for All." We must not rest until America has a national disability policy based on three simple creeds: inclusion, not exclusion; independence, not dependence; and empowerment, not paternalism.

Improve employment opportunities for Americans with disabilities

• Increase special education, professional training, and job training efforts to reduce the extraordinarily high unemployment rate among Americans with disabilities as part of national adult education, job training, and apprenticeship programs.
• Sign into law the Family and Medical Leave Act, which George Bush vetoed in 1990, so that no worker is forced to choose between keeping his or her job and caring for a newborn child or sick family member.

Expand political participation

•Sign into law the "Moter-Voter Act," which George Bush vetoed this year, to make it easier for people with disabilities to register to vote.

The Record

• As Governor, Bill Clinton increased the funding of community programs for people with disabilities by 220 percent from 1983 to 1990.

• As Attorney General and Governor, recruited and employed qualified persons with disabilities on his staff. Under Governor Clinton's current administration, the State Directors of the Division of Rehabilitation Services, and the Division of Services for the Blind are qualified individuals with disabilities.

• With the legislature in 1985, established the Governor's Commission on People with Disabilities. The Commission has sparked more involvement and participation by persons with disabilities.

• A decade before the Americans with Disabilities Act, Governor Clinton supported administrative action to permit state agencies to secure adequate accommodations for staff with disabilities, regardless of costs.

• During the 1987 legislative session, provided key assistance to establish an interim Message Relay Center. The center provides statewide telephone accessibility for persons who are deaf and hard of hearing.

• In 1990, established the Governor's Task Force on Supported Housing. Its mission was to recommend state legislation, policy changes and program initiatives to increase the availability of supported housing — affordable, accessible housing in integrated community settings, with appropriate support services for the elderly and people with disabilities.

• In 1991-92, took action to provide additional state funds for expansion of Supported Employment Services, a vocational rehabilitation program for severely disabled people who need job coaching services and long-term support to obtain or maintain employment.

• In 1992, established a Governor's Task Force on In-Home and Community-Based Services for Persons with Disabilities. This task force is composed of leaders of the disability community, state agency officials and private business representatives.

• Senator Gore was an original cosponsor of the Americans with Disabilities Act.

• Voted for the "Motor-Voter" Act, which would have made it easier for people with disabilities to register to vote. George Bush vetoed the Act.

VOCATIONAL REHABILITATION ASSOCIATES
Established 1975
1522 S. Golden Rose Ave.
Hacienda Heights, California 91745
(818) 965-1923

February 16, 1994

Mr. Albert Gore, Jr.
Vice President of the United States
Old Executive Office Building
Washington D.C. 20501

Dear Vice President Gore:

This writer supports your efforts to streamline and downsize the federal government, as outlined in your Report of the National Performance Review.

We have been providing cost effective rehabilitation and re-employment services to people with disabilities for over 30 years.

My personal history is that I had an industrial injury that brought me into the field of vocational rehabilitation in 1958.

We have provided V.R. services for clients in many disability systems and are proud that we have returned more than 75% of the clients to suitable gainful employment.

This letter is in response to the 1992 audit by the General Accounting Office (GGD-92-30) which recommended that OWCP "explore the potential for increasing the use of state and in house staffs to do some work now done by contract counselors."

The GAO Report to the Chairman, Subcommittee on Social Security, Committee on Ways and Means, House of Representatives (GAO/HRD-88-11) found that there was little success in rehabilitating disabled beneficiaries in the Social Security Disability Insurance Program.

The GAO found the following:

> "The VR agencies in our review had evaluated nearly 12 percent of the SSDI beneficiaries and considered 2.5 percent successfully rehabilitated according to the criteria of the VR program. But only 0.3 percent of the 1983 beneficiaries were removed from the SSDI rolls after having been served by a VR agency."

The Social Security special Disability Advisory Council submitted the Report of the Disability Advisory council to the Honorable George Bush President of the Senate in February of 1988.

Mr. Albert Gore, Jr.
Vice President of the United States

The Disability Advisory Council made the following legislative recommendations:

> "Congress should authorize the Secretary to purchase VR services directly from private sector VR facilities, Federal agencies and State agencies other than State VR agencies."

To meet the objectives of your National Performance Review Report and to help OWCP successfully increase the rehabilitation and re-employment of injured federal workers;we recommend that OWCP continue to use the cost-effective services of private rehabilitation providers.

Please feel free to call on me if I may be of assistance to you in meeting your goals and objectives.

Sincerely,

Bill Roberts

Bill Roberts
President

BR/jr
cc: Senator Barbara Boxer
Senator Dianne Feistein
Representative Esteban E. Torres
Robert Reich, Director, Office of Mgmt & Budget
Barbara Scheffel, President-NARPPS
James Albrink, Chairman, NARPPS
Federal Workers' Compensation Committee
Senator Bob Dole

Chapter 2

Vocational Rehabilitation Has Minimal Impact on SSDI Benefit Rolls

The VR program has little effect on the SSDI program, our study of SSDI benefit awards in 1983 indicated. Only 1 percent of the beneficiaries studied had been removed from the benefit rolls by February 1986 for working, and of these, fewer than one-third had been clients at a VR agency. The VR agencies in our review had evaluated nearly 12 percent of the SSDI beneficiaries and considered 2.5 percent successfully rehabilitated according to the criteria of the VR program. But only 0.3 percent of the 1983 beneficiaries were removed from the SSDI rolls after having been served by a VR agency.

Very Few Beneficiaries Leave SSDI Rolls to Work Again

Of the 1983 beneficiaries we studied, only 1 percent left the SSDI rolls by February 1986 because of renewed work activity (see table 2.1). This included people who returned to work without benefit of VR services. Nearly two-thirds of the beneficiaries were still receiving benefits, while 30 percent were deceased. Some persons had been removed from the benefit rolls for other reasons, primarily medical recovery.

Table 2.1: Disabled Workers in 10 States Awarded SSDI Benefits in 1983: Benefit Status in February 1986

	SSDI beneficiaries	
	No.	Percent
Total initial awards in 1983 (10 states)	70,531	100.0
Status as of Feb. 1986: Still on benefit rolls	45,822	65.0
Deceased	21,137	30.0
Transferred to retirement rolls	24	0.0
Suspended or terminated for work activity	734	1.0
Suspended or terminated for other reasons[a]	1,217	1.7
Unknown[b]	1,597	2.3

Source: GAO's computer study of SSDI beneficiaries in 10 states.

[a]Primarily this category includes individuals removed for medical recovery (no trial work period started).

[b]Accounts being updated at the time of our data request were unavailable for our database. Because of the miscellaneous nature of such updates, the cases could be expected to be distributed across the other categories. Examples of such updates would be change in address, number of dependents, benefit status, etc.

will promote the major goal of SSA's VR programs, which is to place the maximum number of beneficiaries into gainful employment and, as a consequence, to achieve savings to the trust funds/general revenues.

People with disabilities have the same rights and obligations with respect to work as the nondisabled. People with disabilities who are unable to work should have access to public and community assistance programs. To advance these policies, the Council makes a number of recommendations that we believe can make VR services more effective for DI and SSI recipients who are disabled.

Legislative Recommendations

Congress should authorize the Secretary to purchase VR services directly from private sector VR facilities, Federal agencies and State agencies other than State VR agencies.

By law, SSA may reimburse only for VR services provided or purchased by State VR agencies, unless the State is unwilling to participate in SSA's VR programs. As a result, there is little competition among VR providers to ensure that disability beneficiaries receive high quality, cost-effective services. Based on their current resources, States have a finite capacity to provide vocational rehabilitation services to clients with disabilities.

The Council believes that service providers other than State VR agencies can deliver efficient and effective services to at least some DI and SSI beneficiaries. In contracting directly with these facilities to provide VR services to DI and SSI beneficiaries, the Secretary should develop a management plan that contains performance criteria, has a rational administrative structure for ensuring that SSA's clients receive appropriate and adequate VR services, and which permits the Secretary to enter into, modify or terminate contracts as the need arises.

Congress should require SSA to collect data concerning the characteristics of beneficiaries that State VR agencies accept, serve and rehabilitate and the characteristics of those not served by State VR agencies and the causes therefor.

During our review of SSA's VR programs, we were frustrated by the lack of data on the effectiveness of SSA's referral criteria and reimbursement program. Although RSA presently collects data on characteristics of all persons served by State VR agencies, data on SSA beneficiaries who are referred for VR services are sparse and inconclusive. The December 1987 GAO report of DI beneficiaries in 10 States, which we examined, showed generally that those DI beneficiaries whom the State VR agencies agreed to evaluate for services were much younger than those who were not evaluated. The median age of those evaluated by the State VR agencies was 33, while the median age of those the State VR

FCC REVIEW OF S.933 TELECOMMUNICATIONS SECTION

[redacted]

Federal Communications Commission
Washington, D.C. 20554

MEMORANDUM FOR THE DOMESTIC POLICY COUNCIL

FROM: Dennis R. Patrick PRP for DRP
Chairman
Federal Communications Commission

ISSUE: What should be the Administration's Position on S.933, "Americans with Disabilities Act of 1989", as it relates to telecommunications service for certain disabled persons?

Introduction

Senator Harkin introduced S.933 to the Committee on Labor and Human Resources on May 9, 1989. It is designed to prohibit discrimination on the basis of disabilities. The bill appears to be consistent with President Bush's goal of integrating disabled Americans into the mainstream of American life in a way that permits the disabled to increase their economic and personal independence. Many hearing and speech impaired persons have been unable to take greater advantage of the nation's telecommunications network, hindering them from performing to their potential. To respond to this situation, Title V of S.933 provides that it will be considered discrimination for purposes of the Act for any common carrier, as defined in 47 U.S.C. § 153(h), to refuse to provide, not later than one year after the enactment of the bill, interstate and intrastate telecommunications relay services so that such services provide opportunities for communications that are equal to those provided to individuals able to use voice telephone services. Enforcement by the Federal Communications Commission would be through provisions of the Act relating to revocations of licenses, forfeitures of property, enforcement of orders, and civil actions. S.933 also would require the Commission to adopt rules within 180 days of the bill's enactment setting forth minimum standards and guidelines for telecommunications relay services.

Background

S.933 is related to a number of other recent legislative initiatives dealing with the need for telecommunications devices for the deaf (TDD) systems by certain disabled persons. On October 28, 1988, Public Law 100-542 was enacted. This legislation seeks to assure that the Federal telecommunications system is fully accessible to hearing-impaired and speech-impaired individuals, including Federal employees, for communications with and within Federal agencies. The law directs the Administrator of General

Services (GSA) immediately to expand the trial Federal TDD relay system,[1] previously operated by the Treasury Department, and to design a new federal relay system which can accommodate future technological improvements. In addition, Section 5 of Public Law 100-542 requires the FCC to complete an outstanding inquiry[2] regarding an interstate TDD relay system by July 27, 1989.

In the inquiry proceeding, interested parties were requested to submit specific proposals for implementing an interstate TDD relay system that would enable hearing and speech impaired persons to carry on real-time conversations with voice telephone users. Such proposals were to include technical, economic and regulatory requirements. The Commission currently is preparing its response to the comments submitted.

Discussion

The Commission favors the availability of TDD relay services to the hearing and speech impaired. Comments in Docket 87-124 reveal general support for such a system. **The issue is not discrimination by carriers against the disabled or an unwillingness by carriers to provide TDD services,** as suggested **by S.933, but, rather, is the inability of the hearing and speech impaired to independently pay the costs involved in establishing and operating the TDD system.**

It is generally accepted that the hearing and speech impaired are, on the average, less affluent than many other segments of society. That economic disadvantage is exacerbated by the additional costs they must pay to use services designed for those who are not disabled. For example, the hearing and speech impaired generally require more time to conduct telephone conversations than voice telephone users, which results in higher long distance telephone bills for them. They would be expected to be charged for the costs of implementing and using the TDD system required by S.933. Without some form of financial assistance, then, it is unlikely that a majority of the hearing and speech impaired community will be able to take advantage of an otherwise non-subsidized TDD relay service. For that matter, the national TDD system suggested by the bill, at an estimated minimum cost of $15 million to establish and $165 million annually to operate, in all likelihood would constitute a financial burden on everyone. Therefore, Title V should address **not discrimination by common carriers, but mechanisms** for financing the TDD

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1 Relay service provide translation between individuals communicating with special teletypewriters and individuals speaking through telephones.

2 Notice of Proposed Rulemaking and Further Notice of Inquiry in CC Docket No. 87-124, 3 FCC Rcd 1982 (1988).

relay system it requires and means of making TDD services more affordable for the hearing and speech impaired.

Turning to more specific matters, the application of Section 502(a) of S.933 to every common carrier in the country seems inadvisedly broad. The nation's interconnected voice network is a tremendously complex system that has developed over a century. It is unlikely that a nationwide, interconnected, operational TDD system can be implemented within one year. For example, requiring a large portion of the nation's 1,500 local exchange carriers to be prepared to provide individual relay centers would be economically impractical and technically infeasible. Construction and operation of facilities to satisfy a universal relay service requirement could necessitate enormous levels of investment that would not be recoverable by reasonable charges. In effect, the requirement would apply the inverse of the principle of economies of scale. It is doubtful that many carriers would be able to develop and implement TDD systems capable of providing opportunities equal to those using live voice transport. The costs for each carrier to implement a suitable TDD system could be in the millions of dollars. Moreover, it is not clear there are sufficient technical or organization resources available to the carriers to achieve implementation within the one year period specified. On the matter of resources, the bill is inequitable in that it effectively imposes a penalty on carriers with small service areas. Large carriers possess a greater ability to secure financing. They also have access to large metropolitan areas where there are greater concentrations of subscribers, including the hearing and speech impaired. Unless subsidized, the cost to use the universal TDD relay service could make it unavailable to those who need it most.

The bill appears to forbid any common carrier to refuse to provide equivalent interstate and intrastate TDD relay services. Under this country's bifurcated jurisdictional system, however, most carriers provide either interstate service or intrastate service. Indeed, by judicial order, some local exchange carriers, viz., the Bell Operating Companies, are summarily precluded from providing interstate services. As written, the bill requires carriers subject to the Communications Act, such as AT&T, MCI and Sprint, to provide intrastate TDD services. Such a requirement would intrude on the states' jurisdiction and create an upheaval in the existing division of jurisdictional responsibility in this country. The bill should be clarified to eliminate such a reading if it is not intended. The bill also fails to delineate the jurisdictional roles of state and federal authorities in implementing the goals of Section 502(a). This issue easily could lead to complex Commission and judicial proceedings that would significantly delay the provision of TDD relay service in this country. Further, the bill is unclear as to the applicability of the Section 502 to resellers and other non-dominant carriers, private carriers, and cellular and other radio common carriers.

It is not clear what "opportunities for communications that are equal to individuals to use voice telephone services" means in Section 502(a). By

the very physics involved it is technically impossible to "provide opportunities for communications" for the hearing and speech impaired that are "equal" to those available to the rest of society. At the very least, some explanation as to the practical meaning of "equal" is needed in the bill. Other questions arise as well. For example, are all public telephones to be equipped for TDD relay services? Also, the term "discrimination" requires further clarification in order to reconcile its meaning with the term "unlawful discrimination" contained in Section 202(a) of the Communications Act, 47 U.S.C. § 202(a). Finally, a number of states have implemented or are implementing intrastate TDD relay systems. (Those that are operational are being funded by state revenues, exchange carriers or telephone subscribers.) Coupled with the current proceeding now underway by the FCC in CC Docket No. 87-124, which ultimately should develop a model interstate TDD relay system in response to P.L. 100-542, it is not clear that additional legislation is necessary or desirable now.

Informal consultation with several common carriers reveal that they share these views.

Options

1. Request withdrawal of the legislation.

2. Enter consultation with representative carriers to develop a better system model before proceeding with any bill.

3. Propose modifications to current bill.

Option 1. Request withdrawal of the legislation.

Pros:

+ Removes the burden of policing common carriers for discriminatory conduct regarding TDD provision;

+ Allows TDD relay system proceedings underway in both federal and state jurisdictions to proceed unimpeded;

+ Removes potentially undue administrative burden on many telephone companies;

+ Removes likely conflict between federal and state jurisdictions regarding the provision of intrastate relay service; and

+ Eliminates the imposition of enormous, possibly unrecoverable costs on hundreds of carriers.

Cons:

+ Possibly delays the introduction of intrastate TDD relay services in some areas of the country;

Option 2. Consult with representative carriers to develop a better system model before proceeding with any bill.

Pros:

+ Results in a consensus among carriers on how best to implement the goal of universal TDD provision;

+ May accomplish goal of universal TDD relay system without any legislation, or with fewer potential social hazards;

+ Provides an avenue for realizing economies of scale in the implementation of universal TDD relay system;

+ Eliminates the potential for inequitable treatment of small carriers;

+ Offers potential for implementation of a more cost effective service;

+ Provides an avenue to address the public telephone issue;

+ Permits development of an acceptable means for carrier cost recovery; and

+ Increases the likelihood that implementation of relay service will occur as soon as possible in all areas.

Cons:

+ Denies the hearing and speech impaired immediate legislative action; and

+ May delay the implementation of a universal TDD relay system in some areas;

Option 3. Propose modifications to the current bill.

Pros:

+ The hearing and speech impaired will have a universal TDD relay system sooner than if alternative is to adopt current bill; and

+ The potential dislocations associated with the current broad requirement on all carriers will be minimized;

Cons:

+ Delays the bill.

Recommendation

While the Commission favors access to telephone services by the hearing and speech impaired, proposed S.933 would slow the progress of CC Docket No. 78-124 and impede implementation of TDD relay systems generally. Its requirement for provision of TDD relay services by all carriers would produce a series of complex and contentious legal issues that would be costly to both carriers and the government to resolve. It also proposes punitive action against carriers for not offering TDD service when the problem is one of funding, not scienter. In the end, we believe S.933 would impose significant obstacles to the achievement of the very goal it purports to foster, i.e., access by the hearing and speech impaired to telephone services. Our recommendation is that the President suggest that the Committee consult with representative carriers and this Commission before proceeding with S.933 or its successor.

March 24, 1989

TO: Senator Dole

FROM: Mo West

SUBJECT: Adapt v. Burnley - Letter to President Bush

On February 13, the Court of Appeals for the Third Circuit issued a decision, Adapt v. Burnley, that is of enormous importance to persons with disabilities.

Summary of Decisions:

The Court struck down, as contrary to federal disability civil rights statutes enacted by the Congress, "local option," the Department of Transportation (DOT) policy that allows transit systems the option of providing transit to persons with disabilities solely through a system of advanced reservation. Aside from segregating people with disabilities, transit systems often require reservations several days in advance. This, the Court found, violates the civil rights provisions of Section 504 of the Rehabilitation Act, Section 105 (b) of the Federal Aid-Highway Act, and Section 16 (a) of the Urban Mass Transportation Act.

The decision required that buses newly purchased with federal assistance are to be accessible. No retrofitting is required; the ruling only applies to future purchases. The Court said that, because transit systems may phase in accessible buses, the ruling would not lead to any undue financial burdens for transit systems. Moreover, the ruling required that transit systems provide both accessible mainline transportation for those who can use buses and adequate paratransit to serve those who cannot. The decision also struck down the 3% cost cap, under which the Department of Transportation deemed transit systems to be in compliance with disability civil rights laws, and thus avoid imposing unreasonable cost burdens, once they spent 3% of their operating expenses on disability access.

General Language:

The language and rationale used by the Court in reaching its conclusions are equally as important as the holdings are. The 73-page decision is laced with integration-oriented statements and phrases derived from the corpus of race and gender discrimination cases. The case sets forth a new charter for interpreting laws like Section 504, stating that Congress' plain intent was to eliminate the segregation of persons with disabilities.

Congressional Intent:

This decision comes the closest yet to correctly discerning Congress' intent in enacting disability civil rights protections.

Action to be Taken:

A major concern at this point is to persuade the Administration to embrace this decision and not to appeal it to the U. S. Supreme Court. The Department of Transportation has 90 days from the date of this decision to decide whether to seek an appeal; this determination will be made by the Departments of Transportation and Justice with the White House weighing in.

The court decision in Adapt v. Burnley is completely consistent with President Bush's campaign promise to integrate persons with disabilities into all aspects of American life. Without access to public transit, as you know, persons with disabilities can never have equal access to employment, education, recreation and all else that the rest of America takes for granted. President Bush, in his speech to the joint session of Congress, reiterated his commitment to bring persons with disabilities into the "economic and social mainstream."

I believe it would very helpful if you, as one of Congress' strongest supporters of the rights of persons with disabilities, would consider urging the Administration to embrace this decision and not to appeal it to the Supreme Court.

For your review, attached is a letter to President Bush indicating your support of this decision.

Do you want to send the attached letter?

Yes___ No____

BOB DOLE
KANSAS

United States Senate

OFFICE OF THE REPUBLICAN LEADER
WASHINGTON, DC 20510-7020

March 24, 1989

President George Bush
The White House
Washington, D.C. 20500

Dear Mr. President:

On February 13, a decision of the Third U.S. Circuit Court of Appeals issued a decision in ADAPT v. BURNLEY, which is of enormous importance to persons with disabilities. As important as the holdings are, the language and rationale used by the Court underline Congress' intent to eliminate the segregation of persons with disabilities. The decision embarks on the importance of full integration and participation of disabled Americans in society, consistent with the statutory requirement of equal access. The 73- page decision, should it stand, will have an immense impact on enabling people with disabilities to obtain full participation and integration in society. Next to attitudinal barriers, lack of accessible transportation is the most significant impediment to employment for people with disabilities in this country.

In summary, the Court ruled that "local option"(a policy that allows transit systems the option of providing transit to people with disabilities only if they make reservations at least 24 hours in advance and sometimes several days in advance, and then only in segregated settings) is contrary to federal disability rights policy;

The decision required that new buses purchased with federal funds be accessible; no retrofitting is required and the ruling only applies to future purchases. The Court found that, because transit systems may phase in accessible buses, the ruling would not lead to any undue financial burdens for transit systems.

The Court disapproved the 3% cost cap, under which transit systems were deemed to be in compliance with federal disability civil rights laws, once they spent 3% of their operating expenses on disability access.

Requiring a phase-in of accessible public transportation would be consistent with your goal of providing disabled Americans full participation and integration in the social and economic mainstream of society. The ADAPT V. BURNLEY decision will strengthen our efforts to obtain accessible transportation and greatly reduce one of the major causes of unemployment for persons with disabilities. Without access to public transit, as we all know, persons with disabilities can never have equal access to employment, education, recreation, and everything else the rest of America takes for granted.

I respectfully request that you carefully consider this decision, and encourage the Department of Justice not to petition the Supreme Court for certioriari.

Sincerely,

BOB DOLE
United States Senate

BD/mw

Equal Employment Advisory Council

MEMORANDUM

May 12, 1989

TO: EEAC Members

FROM: Jeffrey A. Norris
President

RE: Comprehensive Legislation Introduced to Eliminate Discrimination Against Individuals with Disabilities

S. 933, a revised version of last year's Americans With Disabilities Act (ADA), was introduced on May 9 by Senator Tom Harkin (D-IA). An identical version of the bill was introduced in the House of Representatives on the same day (H.R. 2273). A variety of structural and substantive changes have been made in the original version of the bill introduced last year. See EEAC Memorandum 88-73, June 10, 1988. The bill, however, remains a broad legislative package with separate titles addressing employment, public accommodations, public services and transportation, and telecommunication services.

The ADA is designed to be enforced in addition to, rather than in place of, existing federal, state and local laws which prohibit disability discrimination. Although it is to be enforced by the EEOC, the bill also provides for a private right of action under Section 1981, a post-Civil War statute which allows for jury trials and awards of punitive damages. In his news release announcing introduction of S. 933, Senator Harkin states that it is time that we "opened the courthouse door for persons with disabilities."

S. 933 has been targeted by its supporters for prompt action. While the White House has not given a formal endorsement to this or any other specific proposal on disability discrimination, it is clear that President Bush is interested in this issue and is eager to support an effort to increase opportunities for persons with disabilities. EEAC has heard from several member companies who have been contacted by organizations seeking employer support for the bill. To assist you in responding to such inquiries, our analysis seeks to highlight those sections which need to be clarified as the bill is debated.

Typically, EEAC member companies are among those employers recognized for their exemplary efforts in providing opportunities and accommodations to individuals with disabilities. Thus, most member companies would not quarrel with the stated goal of the

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legislation. As with last year's version of the bill, however, the specific statutory language of the 1989 legislation deserves close attention in assessing its impact on your business and employment practices.

For an employer assessing the practical impact of the legal requirements imposed by the ADA's section dealing with employment, the following points are noteworthy:

-- The bill's emphasis appears to be on litigation as a means of achieving results. S. 933 provides complaining parties with an option to circumvent the EEOC and to proceed directly to federal court by filing a law suit under Section 1981, which provides for jury trials and awards of compensatory damages (such as "pain and suffering") and punitive damages.

-- The bill adopts a definition of the impact theory of discrimination which places a greater burden on employers than the standard disparate impact theory applied by the Supreme Court to sex and race discrimination cases.

-- The bill seeks to adopt for private employers, without modification, a standard for accommodation of disabilities which was developed in the context of programs funded by the federal government.

-- The bill's approach to current use of drugs by a drug abuser is different from the approach under the Rehabilitation Act and appears to run counter to the requirements imposed by the Drug-Free Workplace Act passed by Congress last year.

-- The bill imposes new requirements concerning disability discrimination which will apply in addition to existing requirements imposed by state laws and other federal laws.

In this regard, it is interesting to compare ADA to the provisions in last year's legislation, which would have been a dramatic departure from the standards imposed under current law. This year, the drafters have revised the bill to include some definitions from Section 504 of the Rehabilitation Act. But, in moving these provisions to the new bill, there have been changes in wording which appear to make significant changes in the meaning and application of Section 504 standards as currently understood.

The drafters of ADA have been selective in deciding which provisions of existing law to include and which provisions to ignore. The net result is that S. 933 cannot accurately be characterized as simply an expansion of existing federal law to cover additional employers. A detailed analysis of ADA follows.

OVERVIEW OF ADA

The 1989 legislation begins with a series of "Findings and Purposes" which recognize discrimination against individuals with disabilities as a serious and pervasive social problem and conclude that there is a need for a clear and comprehensive national mandate to eliminate the problem and for a set of clear, strong, consistent, enforceable standards to address discrimination against individuals with disabilities.

Section 3 defines many of the terms used in the bill, including "disability," which draws upon the language in the definition of individual with handicaps in the Rehabilitation Act. 29 U.S.C. § 706. Thus, a disability is defined to mean "a physical or mental impairment that substantially limits one or more of the major life activities." The definition also includes "a record of such an impairment" or "being regarded as having such an impairment."

Next follow the six major segments of the bill. This year's version is an improvement over the 1988 draft in that it attempts to deal with employment matters in a single title, transportation matters in a separate title, public accommodation matters in a another, and so on. The primary exception, and perhaps the most confusing segment of the bill, is Title I which contains a series of general prohibitions on discrimination aimed at services, programs, activities, benefits, jobs, and other opportunities. These prohibitions are taken generally from the regulations issued under Section 504 of the Rehabilitation Act, 29 U.S.C. § 706. There are no specific enforcement provisions attached to Title I, but it appears that -- to the extent they relate to employment -- these provisions may be enforced under the employment discrimination provisions of Title II, either through the EEOC or through a direct lawsuit under Section 1981.

One of the provisions in Title I not found in Section 504 regulations is a ban on "discrimination on the basis of association." Specifically, Section 101(a)(5) of the ADA provides that it is discriminatory to deny "equal services, programs, activities, benefits, jobs, or other opportunities" to an individual or an entity because of "the relationship to, or association of, that individual or entity with another individual with a disability." The proponents have indicated that this provision is designed primarily to prohibit discrimination against the families and friends of individuals with disabilities, particularly AIDS victims.

Employment -- Title II of the bill is the section devoted to employment discrimination. The bill's threshold is identical to that in Title VII of the Civil Rights Act of 1964, covering employers with 15 or more employees. Title II of ADA incorporates many of the standard definitions found in Title VII, and directs the EEOC to issue regulations to carry out the ADA within 180 days of enactment. The Title II provisions are written to prohibit discrimination against any "qualified individual with a disability," defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."

Title II's prohibition on discrimination applies to "job application procedures" as well as the standard aspects of employment listed in the prohibition in Title VII of the Civil Rights Act of 1964; that is, hiring, discharge, compensation, etc.

The term "discrimination" is specifically defined to include three situations. They are:

(a) the failure to make reasonable accommodation to the known physical or mental limitations of a qualified individual with a disability unless the employer can demonstrate that "the accommodation would impose an undue hardship on the operation of its business;"

(b) to deny employment opportunities because of the need of an individual for reasonable accommodation; and

(c) the imposition of "qualification standards," tests, or selection criteria "that identify or limit, or tend to identify or limit," a qualified individual with a disability, or any class of qualified individuals with disabilities, unless justified by the employer.

The employer's burden of justification is also spelled out in subsection (c). That is, to defend such standards, tests, or criteria, the employer must show that they are "necessary and substantially related to the ability of an individual to perform the essential functions of the particular employment position."

The enforcement scheme of Title II is spelled out in Section 205. It makes available the remedies and procedures of Title VII of the Civil Rights Act of 1964 (Sections 706, 709, and 710). These are the sections of Title VII which provide for an individual who has been the victim of discrimination to file a charge of discrimination with the EEOC. The agency then investigates the charge and attempts through conciliation to bring the parties to a voluntary resolution of the matter. If conciliation fails, the charging party has the right to initiate

a lawsuit in federal court to receive back pay and other appropriate remedies such as rightful seniority. In addition, Title II of the ADA makes available the remedies and procedures of 42 U.S.C. § 1981, a post-Civil War statute which provides for an extended statute of limitations, jury trials, and awards of compensatory and punitive damages. There is no requirement that an individual first exhaust the Title VII procedures before filing a Section 1981 lawsuit.

A unique aspect of this ADA enforcement scheme is that the right to file a charge or lawsuit is not limited to those who have been discriminated against. An action can be initiated by any individual who believes that he or she "is about to be subjected to discrimination." In addition, the language of Title II specifically makes the Title II enforcement process available for violations of "any provisions of this Act ... concerning employment." Presumably this means that charges could be filed under Title II alleging violations of the general prohibitions in Title I.

Title II also requires employers to post notices in an accessible format describing the employment provisions of the law.

Public Services -- The public services section of the ADA, Title III, prohibits discrimination on the basis of disability in all activities of state and local governments. This marks an extension of the coverage of Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination in those state and local government activities and programs receiving federal financial assistance. The provisions place particular emphasis on accessibility of public transportation.

Public Accommodations -- Title IV of the ADA is designed to apply to many establishments operated by private businesses. This provision guarantees individuals with disabilities "full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation."

The term public accommodation is defined to mean any privately-operated establishments that are used by the general public as "customers, clients, or visitors" or "that are potential places of employment" and whose operations affect commerce. The bill lists numerous examples of such establishments: shopping centers, hotels, restaurants, office buildings, gas stations, sales establishments, public transportation terminals, etc. The Title IV requirements focus on accessibility, and should be reviewed by anyone who operates such establishments.

This section incorporates sections of the Fair Housing Act providing for enforcement through private lawsuits as well as by the Attorney General. In such lawsuits by private persons, the court is authorized to award actual and punitive damages to the plaintiff, to enjoin the defendant from engaging in such practices, and to order the defendant to take such affirmative action as may be appropriate. (42 U.S.C. § 3613).

Telecommunications -- Title V of the ADA requires those companies which provide telephone services to the general public to, within one year, provide telecommunication relay services so that individuals who use non-voice terminal devices or Telecommunication Devices for the Deaf (TDDs) will have opportunities for communications equal to those provided to customers who use voice telephone services.

Miscellaneous Provisions -- Title VI contains several miscellaneous provisions which are important to employers. Specifically, Section 601(a) provides that nothing in the ADA shall be construed to reduce the coverage of the Rehabilitation Act or to apply a lesser standard of protection than required under the Rehabilitation Act. Similarly, Section 601(b) provides that nothing in the ADA shall be construed to limit any state or federal law that provides any greater protection for the rights of individuals with disabilities than the ADA. Section 602 contains a prohibition on retaliation, similar to that found in Section 704 of Title VII of the Civil Rights Act of 1964. Section 605 provides for an award of attorney's fees to the prevailing party in any action or administrative proceeding commenced under the ADA.

ANALYSIS

DIFFERENCES BETWEEN ADA AND EXISTING LAW

Proponents of the ADA have stressed that the primary differences between the ADA and the Rehabilitation Act are not differences of substance, but simply differences in scope, in that the ADA will apply to more employers. In fact, however, a careful reading of the provisions of the new ADA indicates there are significant changes from existing law.

Before detailing those differences, it should be emphasized that in talking about the "existing law" under the Rehabilitation Act, we are talking about a body of law which was not developed with the concerns of private employers in mind. This is a particularly important point for those whose familiarity with the Rehabilitation Act is mainly a result of their experience under Section 503, the requirements applied to government contractors. The proponents of the ADA view the existing law under the

Rehabilitation Act as including primarily the law developed under Section 504 (which applies to recipients of federal grants) and Section 501 (which applies to the employment practices of federal agencies). Section 503 is an affirmative action requirement while Section 504 is only a non-discrimination statute.

Thus, to the extent that the Rehabilitation Act requirements have developed in the context of private sector employers, it has generally been with regard to situations where the employer has had a responsibility to take affirmative action, that is, a responsibility to do something more than simply not discriminate.

On the other hand, to the extent that the law of non-discrimination has been developed under the Rehabilitation Act, it has primarily involved situations where the employer was either the federal government or an entity which owed its existence to receipt of significant federal financial assistance. This means, for example, that most of the law with regard to accommodations has been developed in the context of programs which were funded with tax dollars from the federal government, not in the context of a private sector workplace.

Thus, to the extent that the ADA does simply incorporate "existing law" under the Rehabilitation Act, that law will consist primarily of regulations and decisions developed under Section 504 rather than under Section 503.

Reasonable Accommodations -- The ADA defines the term "reasonable accommodation" in Section 3(3) and then discusses the application of the concept in Section 202(b). In each instance, there is some variation between the ADA language and the current law under the Rehabilitation Act.

As you may recall, under last year's version of the ADA, any accommodation whose economic effect was less than "bankruptcy" was reasonable. An employer would have been required to make any accommodation which did not threaten the existence of the business. The "bankruptcy" standard does not appear in this year's version of the bill. Instead, an employer is not required to make an accommodation if the employer can demonstrate that the accommodation would impose "an undue hardship on the operation of its business." Section 202(b)(1).

This language follows the wording of the reasonable accommodation provision in the Section 504 regulations issued by the Department of Health and Human Services at 45 CFR § 84.12. Actually, however, the standard as spelled out by the Supreme Court has been that "accommodation is not reasonable if it either imposes 'undue financial and administrative burdens' on a grantee, ... or requires 'a fundamental alteration in the nature of the program.'" See School Board of Nassau County v. Arline,

107 S.Ct. 1123, 1131 n.17 (1987) citing Southeastern Community College v. Davis, 442 U.S. 397, 410-412 (1979). See also, Alexander v. Choate, 469 U.S. 287, 300 (1985).

To the extent that the ADA does not include the second prong of the standard, it is inconsistent with existing Supreme Court interpretations. The drafters may have assumed, however, that courts or agencies interpreting the ADA would incorporate the entire standard, as restated in Arline. However as Congress is presumed to be aware of existing Supreme Court precedent, the courts are likely to view the language of S. 933 as broadening the accommodation requirements. Accordingly, it would be desirable to have the entire standard restated with the refinements necessary to indicate that the standard is being applied to "employers" and "jobs" rather than "grantees" and "programs."

The deviation between the ADA and existing law is much more obvious in Section 3(3) which defines the term "reasonable accommodation." In this definition, the drafters of the ADA have incorporated some familiar language from the Section 504 regulations. (See Health and Human Services regulations, 45 CFR § 84.12) But, a very significant change has been made in that language. The term "may" in the Section 504 regulations has been changed to read "shall" in the ADA.

Thus, the Section 504 regulations provide that "Reasonable accommodation may include: ... job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions." (emphasis added) 45 CFR § 84.12(b). The ADA incorporates each of these suggested items as part of the definition of reasonable accommodation, by stating that the term reasonable accommodation "shall include - job restructuring,... ." (emphasis added).

This change, albeit only a single word, necessarily creates questions about the interpretation and application of the term reasonable accommodation in the ADA. Under Section 504, an accommodation which involves job restructuring would be examined to determine whether that particular accommodation is reasonable in that particular situation. The literal meaning of the new language of the ADA appears to be that each of the listed steps is a required accommodation, the reasonableness having already been determined by the statute. While this change in language may be the result of a simple oversight in drafting, the courts routinely read the terms "may" and "shall" as having different meanings. If the drafters do not intend to change the substantive law of the Rehabilitation Act, they should use the same language used in the Section 504 regulations. Clarity on the meaning of this provision is particularly important for private employers because this list of specific accommodations

was never included in the Section 503 regulations issued by the Department of Labor.

It may be noted that while the ADA has incorporated subparts (a) and (b) of the Section 504 regulation on reasonable accommodation, (45 CFR § 84.12) the drafters chose not to include subpart (c) which spells out the factors to be included in determining whether an accommodation would impose an undue hardship. That subpart specifies that the factors to be considered include:

(1) the overall size of the recipient's program with respect to the number of employees, number and type of facilities, and size of budget;

(2) the type of the recipient's operation, including composition and structure of the recipient's workforce; and

(3) the nature and cost of the accommodation needed.

It is not clear why the sponsors of the ADA have chosen to include one segment of the regulation in the ADA while excluding another. If the statute is going to define "reasonable accommodation," it should define it fully and correctly. Otherwise the result will be confusion when a court attempts to ascertain the intent behind incorporating only a portion of the definition.

Of course, if the above-cited language from § 84.12(c) were to be included, it would have to be rewritten to focus on private employment rather than on recipients of federal financial assistance. Indeed, some additional refinements would seem to be appropriate if the Section 504 standards are to be transported generally into the ADA provisions applicable to private employers.

The difficulty of simply applying existing Section 504 law to private employers can be seen, for example, in the court's decision in Nelson v. Thornburgh, 567 F. Supp. 369 (E.D. Pa. 1983), a case cited frequently by proponents of the ADA as an example of how the reasonable accommodation analysis is to be made. The questions raised by that decision are not directed at the particular accommodation which the court ordered; that is, the hiring of several part-time readers for several blind caseworkers at the Pennsylvania Department of Public Welfare. Rather, the concerns focus on the court's rationale in reaching that decision. The court estimated that the part-time readers would cost approximately $6,600 per year for each caseworker, who received a salary of approximately $21,400 per year. The court noted that the agency that employed the caseworkers had suffered

budget cutbacks and that its financial resources were limited. However, the court concluded, the cost of the readers was modest when compared to the agency's overall administrative budget.

> I am not unmindful of the very real budgetary constraints under which the [agencies] operate, and recognize that accommodation of these plaintiffs will impose some further dollar burden on an already overtaxed system of delivery of welfare benefits. But the additional dollar burden is a minute fraction of the [agencies'] personnel budgets. Moreover, in enacting section 504, Congress recognized that failure to accommodate handicapped individuals also imposes real costs upon American society and the American economy. ... When one considers the social costs which would flow from the exclusion of persons such as plaintiffs from the pursuit of their profession, the modest cost of accommodation ... seems, by comparison, quite small.

567 F. Supp. at 382. Before the ADA is acted upon by Congress, it would be useful to clarify whether this type of analysis, perhaps appropriate when the employer is a public agency operating with federal financial assistance, is to be followed when the employer is a private entity receiving no federal grants. The question is an important one because even the most expensive accommodations can be found to be "modest expenditures" if the point of comparison is the company's overall administrative or personnel budget.

In examining this point, of course, it is fair to note that the general experience of many EEAC member companies has been that many innovative and successful accommodations have been made with only minor expenditures. At the same time, however, it cannot be ignored that there are requests for accommodations which involve considerably more expense. It is legitimate for employers to be concerned about the open-ended nature of an analysis such as that found in the Nelson decision. The sponsors of the ADA have been sending mixed signals in this regard. Although Senator Harkin offered a list of accommodations that have been made, each of which cost less than $50, his response to the question of cost was similar to that made by Senator Weicker last year. That is, the ADA is a civil rights statute and cost is not a legitimate factor to be considered in applying a civil rights statute. In addition, the sponsors have emphasized that whatever the costs of the ADA may be, those costs are justified because they will result in a reduction of the federal deficit as more individuals with disabilities move off of public assistance and into jobs.

Qualified Individual with a Disability -- The employment provisions in Title II are framed in terms of prohibiting discrimination against a qualified individual with a disability, or qualified individuals with disabilities. The definition of such an individual as a person who can, with reasonable accommodation, perform the essential functions of the job is drawn from the regulations issued under Section 504. See, for example, the Department of Health and Human Services regulations at 45 CFR § 84.3(k). The ADA modifies the definition slightly to include individuals who can do the essential functions of the job without an accommodation.

Although the concept that "qualification" is related to only the essential functions of the job has been part of the regulations under Section 504, it was never included in the regulations issued under Section 503. The practical impact of the concept is closely related to the employer's obligation to provide reasonable accommodation by modifying certain aspects of an individual's job duties. A key factor in determining the extent of that obligation will be the definition of "essential functions," a term which is not defined in the ADA. It may be noted that when it issued the regulations containing the term "essential functions," the Department of Health and Human Services explained that term was used to assure that handicapped persons would not be disqualified simply because they "may have difficulty in performing tasks that bear only a marginal relationship to the particular job." See 45 CFR § 84, Appendix A. If no definition of "essential elements" is placed in the statute, the statements made in congressional committee reports and during the congressional debate may be instrumental in suggesting how broad the obligation on private employers will be to modify or restructure jobs.

ENFORCEMENT PROVISIONS

The employment discrimination provisions of ADA would combine the enforcement procedures and remedies of Title VII of the Civil Rights Act of 1964 and a post-Civil War statute, 42 U.S.C. § 1981. The Title VII procedure, of course, is one focused on an investigation and conciliation efforts by the EEOC to promote voluntary resolution by the parties. If the EEOC process fails to resolve the dispute, there is the opportunity for a lawsuit as a final resort. Section 1981, on the other hand, involves direct resort to the federal courts, with the opportunity for a jury trial and the potential of a verdict that includes a large award of compensatory and punitive damages, not available under Title VII.

In announcing the new version of the ADA, the bill's chief sponsor, Senator Harkin, pointed to disability discrimination as a serious economic problem for our society. He then suggested that

victims of other kinds of discrimination can "march over to the courthouse, file a lawsuit and win." But, he added, there is still one group of Americans who do not have this right. "To this day," he said, "nothing prevents an employer ... from excluding Americans with disabilities. It's time we changed that -- and opened the courthouse door for persons with disabilities." The new draft of the ADA clearly reflects this special emphasis on litigation as a primary means of achieving results.

Senator Harkin has mentioned several times that he wants the ADA to be passed in 1989 because this is the 25th anniversary of the Civil Rights Act of 1964 which prohibited employment discrimination on the basis of race, sex, and national origin. But, the sponsors of the ADA seem to have overlooked the fact that the effectiveness of the 1964 law is due to the vision of legislators who pushed to create a prohibition on employment discrimination which focused on cooperation and voluntary compliance as the preferred means for achieving its goal. By providing for Section 1981-type lawsuits which allow -- indeed, encourage -- individuals to circumvent the EEOC's conciliation process, the sponsors of the ADA have opted for an enforcement scheme which ignores the heart of the Civil Rights Act of 1964. The inclusion of the Section 1981 procedures and remedies makes it fair to ask whether the first priority is opportunities in the workplace or opportunities in the courthouse.

The Section 1981 procedures provide individuals an incentive to circumvent the conciliation process. As the Supreme Court recognized in Johnson v. Railway Express, 421 U.S. 454, 461 (1975), the filing of a lawsuit under Section 1981 can tend to deter efforts at conciliation. Indeed, when Congress established the current enforcement scheme for Title VII, it deliberately selected cooperation and voluntary compliance as the preferred means for achieving the goal of eliminating employment discrimination. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974). See also Ford Motor Co. v. EEOC, 458 U.S. 219, 228 (1982), indicating that voluntary compliance can end "discrimination far more quickly than could litigation proceeding at its often ponderous pace."

Courts construing the Age Discrimination in Employment Act have recognized that claims for compensatory and punitive damages would interfere with statutorily-mandated conciliation. See e.g., Rogers v. Exxon Research & Engineering Co., 550 F.2d 834, 840-41 (3d Cir. 1977), cert. denied, 434 U.S. 1022 (1978). That court noted that introducing the "vague and amorphous concept" of pain and suffering damages into the administrative setting "might strengthen the claimant's bargaining position" but it also would "introduce an element of uncertainty which would impair the conciliation process." 550 F.2d at 841. The court also observed that "[t]he possibility of recovering a large verdict for pain and suffering will make a claimant less than enthusiastic about

accepting a settlement for only out-of-pocket loss in the administrative phase of the case." Id.

The motivation behind combining these two distinct enforcement schemes of Title VII and Section 1981 appears to be simply a desire to assure that individuals with disabilities have available to them whatever rights and remedies might be available to other victims of employment discrimination. This simple logic has only superficial appeal, however. In fact, not all of the protected groups have access to Section 1981, which is a race discrimination statute that has been interpreted to include some forms of religious or national origin discrimination. But, it clearly provides no rights to a victim of sex discrimination, or age discrimination. In addition, the prohibitions on sex, race, national origin and age discrimination do not contain any requirement comparable to the "reasonable accommodation" aspect of the prohibition on disability discrimination which requires employers to respond on an individual basis. That unique aspect of the ADA would seem to dictate the need for a consistent administrative scheme, with courts playing a role only as a last resort.

A better approach would seem to be to proceed on the basis of the years of experience we already have, under Title VII as well as under the Rehabilitation Act, to assess what enforcement structure is most likely to be effective and efficient in producing the desired goals of this legislation. While there is currently an open issue in Patterson v. McLean Credit Union, (U.S. No. 87-107), with regard to whether Section 1981 properly applies to claims of private sector employment discrimination at all, few would maintain that Section 1981 has been the most effective law in our arsenal against employment discrimination. The remedies offered by Section 1981 may be attractive on an individual basis as a potential windfall for a plaintiff, but there is an inherent conflict between that law and the provisions of Title VII.

In setting up an enforcement framework, the drafters have surprisingly failed to include one of the provisions of the Rehabilitation Act regulations which has generally been a most useful and efficient mechanism. Those who have had experience in working with the procedures of Section 503 generally acknowledge that one of the best devices included in the Rehabilitation Act enforcement scheme is the provision which allows the agency, upon receipt of a complaint of discrimination, to refer the matter to the employer's internal complaint procedure for up to sixty days. See 41 CFR § 60-741.26(b). This can assure an opportunity for the parties to resolve the complaint where the alleged discrimination is the result of an oversight or misunderstanding. The addition of such a provision to the ADA procedures would be a positive step for employers and employees, as well as for the enforcement agency and the courts.

DRUG AND ALCOHOL ABUSE

By virtue of reworking certain definitions, the ADA changes the approach to issues of drug and alcohol abuse currently found in the Rehabilitation Act. The existing law under the Rehabilitation Act excludes from coverage as an "individual with handicaps" any person who is an alcoholic or drug abuser and whose current use of drugs or alcohol prevents the individual from performing the duties of the job in question. The existing definition also excludes from coverage any alcoholic or drug abuser whose current use would constitute a direct threat to property or the safety of others. See 29 U.S.C. § 706.

The ADA takes a somewhat different approach. The issue of coverage of drug addicts and alcoholics is not addressed as part of the basic definition of who is an individual with a disability. Rather, the ADA provides that as part of its "qualification standards" an employer may require that the current use of alcohol or drugs by an alcoholic or drug abuser does not pose a direct threat to property or the safety of others in the workplace. Under the ADA, "qualification standards" which tend to identify or limit individuals with disabilities must be shown by the employer to be necessary and substantially related to the ability of the individual to do the job in question. Thus, the approach of the ADA clearly places on the employer the burden of demonstrating that a drug addict who is currently using drugs poses a direct threat in the workplace. Otherwise, that individual presumably is protected by the ADA.

The combination of this new definition and the ADA's restriction on tests which "tend to identify" individuals with disabilities could arguably restrict employer drug screening practices. An individual screened out by such a test arguably would be able to challenge the exclusion and thereby put the employer in the position of having to demonstrate that the exclusion is necessary and substantially related to the ability of an individual to perform the essential functions of the particular job.

This approach of the ADA also appears to be in conflict with the responsibilities placed on employers under the Drug-Free Workplace legislation passed by Congress last year. That law requires covered government contractors to certify that they are maintaining a drug-free workplace. A false certification, or failure to carry out the specific requirements of the law, can subject the contractor to debarment from future government contracts for up to five years. The ADA, however, appears to create a situation where a contractor who becomes aware of an employee's drug use can take no action to remove that employee from the job unless the employer can demonstrate that the

employee poses a direct threat to others in the workplace. At hearings this week, Senator Harkin indicated he did not believe there was a conflict between the ADA and the drug-free workplace requirements. If no conflict is intended, then clearer language is called for. As it stands now, the ADA approach to drug and alcohol abuse raises questions about exactly how Congress expects employers to respond to drug and alcohol abuse issues in the workplace.

The ADA's approach to contagious diseases is the same as that explained above for drug and alcohol abusers. That is, the employer may adopt a qualification standard which requires that individuals with a currently contagious disease not pose a direct threat to the health or safety of other individuals in the workplace. The ADA, thus, would take an approach somewhat different from the Rehabilitation Act, which was amended last year to exclude from the definition of "individual with handicaps" any person whose currently contagious disease constituted a direct threat to the health or safety of others in the workplace. 29 U.S.C. § 706(c).

GENERAL PROHIBITIONS

One of the most ambiguous segments of S. 933 is Title I, which is a series of general prohibitions on disability discrimination. The essence of these provisions is drawn from the regulations issued under Section 504 of the Rehabilitation Act. (See 45 CFR § 84.4). While the meaning of these provisions may be clear if viewed in the context of a program funded by a federal grant, the application of these prohibitions to private employers becomes uncertain. For example, Section 101(a)(1)(C) of ADA prohibits providing an individual with disabilities a job which is "less effective" than the job provided to others. Section 101(a)(2) provides an explanation of the meaning of "effective" in terms of benefits and services, but nowhere in the bill is the term "effective" defined as it relates to a job. Does it mean something which is not otherwise covered by the provisions in Title II dealing with employment? If so, what? If not, what is the need for this ambiguous general prohibition?

Another aspect of the general provisions which raises questions is the language in Section 101(a)(1)(E) which makes it illegal to provide significant assistance to an organization or individual that discriminates. Again, the apparent genesis of this provision is in regulations which related to programs which were funded by federal grants. An entity which takes federal grant money and then uses it to support another organization which discriminates runs the risk of losing its federal funding. Section 504 regulations have been interpreted to prohibit providing support to a community recreation group or social organization which discriminates against handicapped persons. See 45 CFR § 84,

Appendix A. But, how is this provision to be applied in the context of the private employers to be covered by the ADA?

For example, if an employer has made significant financial contributions to an educational institution, and that institution is accused of handicap discrimination, is the employer subject to some sort of joint or vicarious liability under the ADA? Is the standard one of strict liability, or does the employer first have to be aware of the discrimination? Are there any limitations on the reach of this provision? Is it limited to financial support or does it apply to other forms of support? For example, if a manager of a little league team excludes an individual with disabilities from that team, would that individual be able to file a lawsuit in federal court against the employer which provided all the uniforms and equipment to the league? If an employer allows a community social organization to meet on its premises, is that employer subject to a federal lawsuit if that organization excludes an individual with a disability from participating? While the sponsors have said nothing to indicate that they intend to impose expansive vicarious liability, the plain language of the legislation says nothing to indicate that there are any limitations.

Indeed, the problem here is typical of other aspects of the legislation where the sponsors simply appear to assume that standards devised to limit discrimination by the recipients of federal grants can easily be transported into a program intended to prohibit employment discrimination in the private sector.

Finally, there is one additional troublesome aspect to the general prohibitions in Title I. This problem, however, appears to be the result of a deliberate decision by the drafters rather than merely an oversight. As noted above, the general provisions are drawn from language in regulations issued under Section 504. In the Section 504 regulations, however, these provisions specifically protect "qualified handicapped persons." In incorporating each of these provisions into the ADA, the term "qualified" has been deleted. In fact, the term "qualified" appears nowhere in Title I. The plain language of Title I would seem to make it illegal for an employer to deny a job to an individual with a disability where that disability made the individual unqualified for the job. To this extent, Title I appears to expand upon -- rather than conflict with -- the employment provisions in Title II which limit the protection of the law to qualified individuals. Again, the question which must be answered is precisely what are the provisions in Title I intended to add to the specific provisions in Title II? If they are merely duplicative, is there any need for the Title I provisions? If they are not intended to be duplicative, the sponsors should spell out clearly how these provisions will apply to private employers and why the term "qualified" has been excised.

DISPARATE IMPACT

The provisions in Title I as well as language in Title II appear to envision the application of the disparate impact theory as a means of proving discrimination. In simple terms, the disparate impact theory is that theory which permits an individual to make out a prima facie case of discrimination simply on the basis of statistics, without any showing of discriminatory intent. This theory does not appear specifically in the language of Title VII of the Civil Rights Act of 1964, but was devised by courts as a means of scrutinizing the discriminatory impact of certain facially-neutral selection criteria -- such as a height requirement or a requirement that an individual have a high school diploma -- which did not specifically exclude women or minorities but which did have a disproportionate impact on a protected group.

The manner in which the disparate impact theory has been incorporated into the ADA raises several concerns. First, unlike the disparate impact theory under Title VII, which applies to practices which disproportionately exclude women or minorities from job opportunities, the drafters of the ADA have applied the theory to standards, tests or criteria which tend to identify or limit any class of qualified individuals with disabilities.

The inclusion of the term "identify" is new. That term does not appear in the Section 504 regulations. What is a test which tends to identify individuals with disabilities? Is this provision intended as a subtle prohibition on the use of pre-employment physical examinations? Last year's version of the bill specifically prohibited such examinations. Does the language in this year's version also prohibit the use of post-employment physicals, used by many employers as a baseline examination? None of the explanatory materials provided by the sponsors discusses the term "identify", so it is difficult to determine what is intended by the addition of that term. Some proponents have suggested that its use in the bill is designed simply to prevent employers from making inappropriate pre-employment inquiries about an individual's disability. If this is all that is intended, it would seem that a better provision could be drafted.

For example, government contractors subject to Section 503 of the Rehabilitation Act are required routinely to give individuals an opportunity to identify themselves as an "individual with handicaps." The Section 503 regulations issued by the Department of Labor spell out language that is used to advise a handicapped individual that the employer has an affirmative action plan and to inquire about any accommodations that might be made. See 41 CFR § 60-741, Appendix B. This

Section 503 approach properly recognizes identification as the first step, and a necessary step, toward providing reasonable accommodation. An individual who chooses not to identify himself or herself as an "individual with handicaps" is free to decline the invitation to self-identify and to work without any employer-provided accommodation.

Of course, there is a basic tension between the desire of the drafters to not have individuals with disabilities identified and the desire of the drafters to apply the disparate impact theory which requires employers to count people according to categories. The adverse impact approach as applied under Title VII of the Civil Rights Act of 1964 requires adequate statistical information about the number of minorities and females in the relevant labor market with appropriate qualifications for a particular job. These statistics are then used as a basis of comparison with the number of minorities and females identified in the employer's workforce. There is at this time no adequate source of comparable statistics about the availability of qualified individuals with disabilities. Moreover, given the number of individuals with a particular disability in comparison to the overall workforce, it is doubtful that such statistical analysis would have legal or practical significance.

Apart from the "identify" issue, there are other serious questions about the manner in which the ADA has incorporated the disparate impact theory. Do the sponsors intend to eliminate those limitations which already exist in the law with respect to the application of the disparate impact theory? Specifically, is the statutory language in the ADA intended to incorporate or to overrule the Supreme Court's decision in Alexander v. Choate, 469 U.S. 287 (1985)?

The Supreme Court was very clear in its unanimous decision in Alexander v. Choate that there are limitations in the way the disparate impact theory can be applied under the Rehabilitation Act. That case involved a challenge to a Medicaid rule which limited the number of days of inpatient services which were covered during a year. It was argued that such a limitation was illegal under the Rehabilitation Act because it had a disproportionate effect on handicapped persons. The Supreme Court, in an opinion by Justice Marshall, rejected this argument stating that Congress would have to give some indication in the form of statutory language or legislative intent if it wanted to require each recipient of federal funds to evaluate the effect on the handicapped of every proposed action that might touch the interests of the handicapped, and then consider alternatives for achieving the same objectives with a less severe impact on the handicapped. Without such a clear signal from Congress, the Court was reluctant to rule that Section 504 embraced all claims of disparate impact discrimination. Is the language in the ADA designed to give the courts that signal? Are there any

limitations on the disparate impact theory embraced by the ADA? The sponsors should make their intentions clear.

Revision of Traditional Disparate Impact Theory -- In examining the ADA's requirements with regard to proof of discrimination based on the effects of an employer's job criteria or tests, it should be noted that the burden of proof allocation in the ADA is not consistent with either the standard applied under the Section 504 regulations or the standard applied by the Supreme Court in race and sex discrimination cases.

Under the Section 504 regulations issued by the Department of Health and Human Services, for example, a recipient of federal funding has the obligation not to use any selection criterion that screens out handicapped persons, unless the recipient could show the criterion "to be job-related for the position in question." The burden of demonstrating the existence of alternative criteria with less discriminatory impact was placed on the enforcement agency (that is, the Director of the Office of Civil Rights At HHS). See 45 CFR § 84.13.

In transporting this theory into the ADA, several changes have been made. First, the burden on the employer is described not as showing that the criterion is job-related, but rather the employer is expected to demonstrate that it is "both necessary and substantially related to the ability of the individual to perform ... the essential components of such particular ... job." Section 101(b). Is the change from "job-related" to "substantially related" intended to increase the burden on the employer who must justify a selection criterion?

Second, the ADA shifts the burden with respect to alternative criteria, requiring the employer to demonstrate that "the essential components cannot be accomplished by applicable reasonable accommodation, modifications, or the provision of auxiliary aids or services." Section 101(b)(1). This shifting of the burden with respect to available alternatives is not only contrary to the Section 504 regulations, it is also a departure from the traditional theory of disparate impact discrimination as applied by the Supreme Court since 1971. See Albemarle Paper Company v. Moody, 422 U.S. 405, 425 (1975) ("it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest... ."). The analysis of the bill prepared by the sponsors does not address this departure from established law.

Definitions and Drafting Issues - Finally, with regard to this aspect of the bill, there are again several drafting inconsistencies that need to be pointed out because they raise uncertainty about how the ADA might be interpreted and applied. One of these has to do with the term "essential components" which

is used in Section 101(b) of the ADA, referred to above. In Section 201 (5), the ADA defines a qualified individual with a disability as one who can perform the "essential functions" of the job, but the employer's burden is described in Section 101 (b) in terms of "essential components." Is there a distinction intended by the use of these different terms?

In Section 101(b), the ADA sets forth the employer's burden to demonstrate that the essential components of the job cannot be accomplished with the use of "auxiliary aids or services." This term, "auxiliary aids or services" is specifically defined in the ADA, Section 3(1), as meaning qualified interpreters for individuals with hearing impairments, qualified readers for individuals with visual impairments, and various other devices and services traditionally thought of as accommodations. Of course, the employers duty to provide an accommodation is subject to the reasonableness standard. However, the reasonableness standard does not appear either in the definition of auxiliary aids and services, or in the statement of the employer's obligation with respect to such aids and services. Again, this may be simply a drafting oversight, but because auxiliary aids and services have been defined separately from accommodations, questions are likely to arise about the application of this requirement.

DUPLICATION IN COVERAGE

As noted above, the ADA is intended to be an addition to, not a replacement for, existing prohibitions on handicap discrimination. Employers who are government contractors, for example, will be expected to comply with both Section 503, enforced by the Department of Labor, and with the ADA, enforced by the EEOC and private lawsuits. In addition, there are 44 states which have current prohibitions on handicap discrimination, many of which include requirements for accommodation of individuals with disabilities. Section 601 of the ADA specifically provides that the new law should not be interpreted as reducing the scope of the Rehabilitation Act. Thus, for many employers, the ADA will provide at least a third layer of enforcement with respect to handicap discrimination issues.

Proponents of the ADA have argued that the 44 state laws vary so greatly from one to another that these state laws are no substitute for a comprehensive federal statute establishing national standards. Indeed, the proponents are correct in stating that there are significant differences among the various state laws in this area. But there is nothing in the ADA to protect employers from these multiple layers of enforcement or from simultaneous enforcement actions in different forums. Moreover, nothing in the bill assures a government contractor

that the Department of Labor and the EEOC will both reach the same conclusion with respect to whether a particular accommodation is sufficient or insufficient. And, even when the employer has satisfied both the EEOC and the DOL, there is no assurance that the employer's accommodation will be accepted as satisfactory by a federal court in a private suit under the ADA, or by the state agency which also has jurisdiction over the same workplace. The unnecessary duplication created by having multiple agencies with overlapping jurisdiction means that resources are not being used as efficiently as they might be to promote opportunities and accommodations for individuals with disabilities.

CONCLUSION

A careful review of the new ADA indicates that there are a series of specific problems with the bill. These fall into four general categories. First, the bill's emphasis on litigation reflects a preference for lawsuits, as opposed to conciliation and voluntary compliance as the preferred manner of achieving the bill's laudable goals. Second, the new draft of the bill does not simply take the law as it stands under the Rehabilitation Act, but rather seeks to make significant changes in that law by a series drafting changes in the commonly-understood interpretations of the Rehabilitation Act. Third, to the extent that the ADA does incorporate existing law from the Rehabilitation Act, it is adopting law which has been developed in the context of federal grant programs and applied to organizations which were the recipients of federal funding, not private sector workplaces. There are refinements which must be made in these provisions if they are to be practical, realistic standards for private employers.

Finally, the new draft of the ADA has not responded to the concerns about multiple layers of enforcement which were clearly expressed in response to last year's proposal. This year's version again seeks to impose a layer of enforcement on top of existing disability discrimination requirements without eliminating any of the burden, or seeking to assure consistent enforcement for those employers who would be subject to multiple enforcement schemes. The ironic twist to the sponsors' insistence on overlapping enforcement efforts is that the companies which have demonstrated a strong, consistent commitment to creating opportunities for individuals with disabilities will be among those employers who feel the weight of the duplication and inconsistency which multiple enforcement schemes inevitably create.

Because several draft versions of the new ADA have been circulating for the past few weeks, we have already heard from a number of member companies with questions or concerns about particular provisions. Their comments have been incorporated into the above analysis. We will continue to monitor the progress of this legislation and will welcome any additional comments. For your information, a copy of S. 933, as introduced, is included in this mailing. Your questions concerning this memorandum may be directed to Larry Kessler or John Tysse at (202) 789-8650.

Memorandum

To: Members of the Committee on Education and Labor

From: Pat Morrissey, Professional Staff and
Randy Johnson, Labor Counsel

Subject: Reactions to the letter on the Americans with Disabilities Act of 1989 from the Consortium for Citizens with Disabilities

Background

On May 9, 1989, the Americans with Disabilities Act of 1989 (ADA) (H.R. 7723 and S. 933) was introduced in the House and Senate. The ADA would prohibit discrimination on the basis of disability in most areas of the private sector -- employment, transportation, public accommodations, and telecommunications -- as well as in services and opportunities provided by State and local governments not now covered under Federal law. For more information on this legislation see staff memos of 4/21, 5/23, and 6/5 in 1989.

On June 1, 1989, the Consortium for Citizens with Disabilities (CCD) sent letters to Mr. Bartlett, Mr. Gunderson, and possibly other Members of the Committee on Education and Labor (attached) objecting to a "Dear Colleague" sent by Mr. McCollum on the ADA. This memo clarifies and expands on points in the CCD letter.

REMEDIES

The ADA includes a wide range of remedies and procedures; they vary across its four principal titles. CCD contends that such remedies -- encompassing the full range from injunctive relief and attorney's fees to punitive damages -- are necessary to provide "... true protection and ... to parallel the remedies available to other minorities."

Complying with prohibitions against discrimination on the basis of race and sex is not always the same as it is for disability. Such compliance, in terms of disability, involves not only the question of access but often involves reasonable accommodation in order to achieve access. This places special burdens on both the covered entity and the individual with a disability. Such an individual's needs for reasonable accommodation must be known by the covered entity and the covered entity must respond to them. In other civil rights laws there are no comparable considerations.

Given such a conceptual difference, the use of the remedies and procedures in title V of the Rehabilitation Act of 1973 and title VII of the Civil Rights Act of 1964, would provide administrative entities and the courts the opportunity to build

more easily and consistently on current case law in the area of disability discrimination, whereas the remedies and procedures drawn from other laws may not. With the unique, often individual-oriented solutions required to avoid or overcome injury in cases of disability-related discrimination, especially in the area of employment, consistency in the development of case law would be an important outcome that all parties should welcome.

The remedies in the ADA do not strictly parallel those in current civil rights statutes. They offer more than is available in such law in some instances and, in one instance offer less than is available.

Potential Expansion of Remedies Available under Current Labor and Civil Rights Laws. Most current labor statutes (including title VII of the Civil Rights Act of 1964) allow for backpay and benefits and, in some cases double backpay and benefits, to plaintiffs that are successful against employers in courts and administrative proceedings. The civil rights remedies in section 504 (prohibition against discrimination on the basis of handicap by Federal grantees) of the Rehabilitation Act of 1973 allow for similar relief, while the availability and scope of compensatory damages are unsettled. The Fair Housing Act of 1968 allows for actual and punitive damages, temporary or permanent injunction, and civil penalties. With such laws the availability of remedies, when limited, has a broad reach (section 504). On the other hand, the availability of remedies, when extensive, has a narrow reach (the Fair Housing Act).

The ADA provides remedies drawn from these as well as other statutes. This would give the ADA a broad reach, not available in other civil rights statutes. This reach would be most likely in cases involving employment, public accommodations, and telecommunication relay service. This broad reach would be possible because of the potential access to multiple remedies, but also because the individual has access to a private cause of action in cases where discrimination has occurred and in cases where discrimination has not occurred, but where the individual believes it will occur.

Employment -- Availability of Multiple Remedies Drawn from Two Statutes: Access to section 1981 of the Civil Rights Act of 1866/1870, included as one of the remedies under title II of the ADA pertaining to employment, would allow jury trials and punitive damages. The availability and use of the section 1981 provision has been limited to cases involving race, and more recently ethnicity and national origin. Because of the availability of the anti-discrimination provisions in title VII of the Civil Rights Act of 1964 related to employment, the

section 1981 provision has not been the only law, or in most cases the primary law, used in employment disputes decided in the courts. Moreover, section 1981 is not available to individuals seeking private right of action in sex discrimination cases. The use of section 1981 also appears to run counter to an emerging trend in some courts and States that have put limits on the amounts that can be awarded for punitive damages by juries.

Given these points, the fact that the ADA provides access to the remedies in title VII of the Civil Rights Act of 1964 in employment cases, and the failure of Congress to place the section 1981 provision in other labor statutes, the argument for retaining section 1981 as a remedy in the ADA would seem marginal.

Selective Exclusion of Administrative Procedures from Another Civil Rights Law. Title IV of the ADA, Public Accommodations, allows an individual who claims to be discriminated against on the basis of disability or one who believes he or she is about to be, up to two years to file for appropriate relief in Federal court. If the individual is successful, he or she may be awarded actual and punitive damages, a temporary or permanent injunction, and "such affirmative action as may be appropriate."

In addition in title IV of the ADA, the Attorney General may file for similar relief in "pattern or practice of resistance" to protected rights cases. Besides the availability of the remedies that are available to the individual, in cases brought by the Attorney General civil penalties of up to $50,000 (first offense) and up to $100,000 for each subsequent offense are authorized.

These provisions in title IV of the ADA do parallel those pertaining to disability in the Fair Housing Amendments of 1988 (amendments to the Fair Housing Act of 1968). However, the availability of an administrative procedure to expedite the resolution of complaints, which is in the Fair Housing statute is not included in the title IV remedies and procedures section in the ADA.

Since the ADA, when enacted, will apply to a full range of entities not previously covered and since individuals with disabilities should be able to understand their rights, determine if their rights have been abridged, and easily seek relief, the remedies in the ADA should lend themselves to clear and consistent interpretations by all parties including the courts. In addition, inclusion of administrative procedures in the ADA wherever appropriate and practical, would seem to encourage fair and expeditious consideration of civil rights complaints by individuals with disabilities and minimize the need to use the courts for resolution of complaint charges.

ANTICIPATORY DISCRIMINATION

The CCD letter says, "The ADA permits a person to sue if he or she believes an act of discrimination is about to occur. This is precisely the right that has been included as part of civil rights acts for years." The letter then cites language in the Fair Housing Act of 1968 as an example. The information in the letter on this point may be interpreted in other ways.

Injunctive relief to stop or prevent injury from a discriminatory act is available in current civil rights laws, but a claim must be based on facts not "beliefs." The concept of anticipatory discrimination would seem to make sense when the issue is settlement on a house. In addition, in the area of construction and the sale or rental of housing, the right to file a prospective complaint has merit. However, how to prove or disprove such a complaint in many other contexts seems less workable, especially in the area of employment. A CRS American Law Division brief characterizes this language as "...a relatively novel, and far broader, concept of legal standing to complain of prospective violations than traditionally embodied in other statutory contexts."

In the section of the CCD letter pertaining to anticipatory discrimination, it also addresses Mr. McCollum's concern about coverage of unintentional discrimination in the ADA. In defense of covering unintentional discrimination in the bill, the letter cites 15 years of case law under section 504 of the Rehabilitation Act of 1973 (which prohibits discrimination on the basis of handicap by Federal grantees) and a Supreme Court Case, Alexander v. Choate.

Covering unintentional discrimination by Federal grantees may be easier to defend and justify, than covering all forms of such discrimination in all situations in the private sector. Until the private sector develops experience, expertise, and resources to provide access and reasonable accommodation in a proactive manner, coverage of unintentional discrimination in the ADA in some circumstances may appear as problematic. The situations in which unintentional discrimination would be covered in the ADA should be clarified. The decision in the Alexander v. Choate case would seem to reinforce this suggestion.

Alexander v. Choate involved a class action suit in which the plaintiffs contended that reducing the annual in-hospital days for Medicaid patients in Tennessee would have a disparate impact on individuals with handicaps and therefore would be a violation of section 504. The Supreme Court held that "... section 504 and its implementing regulations reach some claims of disparate-impact discrimination, the effect of Tennessee's reduction in annual inpatient hospital coverage is not among them."

Justice Marshall, writing for the Court, acknowledged that section 504 of the Rehabilitation Act covered some forms of unintentional discrimination. He offered some examples where such discrimination might be prohibited -- but again this was in the context of applying such prohibitions to recipients of Federal funds -- "transportation and architectural barriers, the discriminatory effect of job qualifications...procedures, and the denial of special education....." Thus, although cases involving unintentional discrimination may be covered in these areas within the context of section 504, others may not (e.g., inpatient hospital days, as in the Choate case). Given this distinction made under section 504 by Justice Marshall, it would seem useful to have a full discussion about where, when, and how unintentional discrimination should be prohibited in the private sector, and then express it clearly in the ADA.

CONTAGIOUS DISEASES, ALCOHOLISM, AND DRUG ADDICTION

Much discussion and debate is likely to occur over the provisions related to alcohol and drug use, and contagious diseases in the ADA. Additional clarity in the provisions seem warranted, especially for the one which addresses alcohol and drug use.

Parallelism with other civil rights laws. The CCD letter is correct in stating that the same language on alcohol and drug use and contagious diseases is contained in the Fair Housing Amendments of 1988 and the in ADA, but not correct in stating that such language is contained in the Civil Rights Restoration Act and the ADA.

The Civil Rights Restoration Act did amend section 504 in the same manner for coverage of contagious diseases, however, it did not amend the section 504 language on alcoholism and drug addiction (Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of handicap by Federal grantees; the 1978 amendments to this Act added a provision excluding individuals who are alcoholics or drug addicts from the definition of individuals with handicaps). Thus, the Civil Rights Restoration Act did not alter the current understanding of protection of individuals with alcoholism or drug addiction under section 504 of the Rehabilitation Act.

With the same language in the Fair Housing Law, section 504, and the ADA, the courts may draw on section 504 case law for many interpretations in cases involving claims of discrimination based on contagious disease. However, because the Fair Housing Act and the ADA approach prohibitions against discrimination on the basis of alcohol and drug use differently than the approach in section 504, the legal precedents established under section 504 case law on alcohol and drug use may be of limited value in similar cases brought under the ADA.

Burden of Proof and a Drug-Free Workplace. A fundamental difference between the ADA and section 504 appears to be related to the burden of proof. Under section 504 an individual who is an alcoholic or drug addict is protected only if the individual with such a condition proves initially he or she is able to do the job and does not pose a direct threat to the safety of others. On these grounds if the individual fails to prove them, the court would dismiss the case.

In the ADA the covered entity is permitted to have a policy that excludes persons who use alcohol or drugs if they pose a direct threat to the property or safety of others. However, it would appear that the burden of proof is initially on the employer both to justify the policy and its application in the individual case.

The CCD letter states, "The ADA is completely consistent with the recently passed drug-free workplace law. The ADA does not grant any protection for the use of drugs in the workplace." This interpretation may not be universally accepted. It would seem that the ADA would require a covered entity to demonstrate that the use of alcohol or drugs poses a direct threat to the property and safety of others, before the court would agree a qualified individual could be denied a job or fired.

Alcoholism or Drug Addiction vs. Alcohol or Drug Use. Another distinction between section 504 and the ADA is one of degree. Section 504 specifically addresses alcoholism and drug addiction. The ADA addresses alcohol and drug use. It would appear that section 504 would not offer protection to the casual user, but the ADA may. It would be useful to state clearly in the ADA what types of users are and are not protected so that future courts have a clear sense of Congressional intent.

Contexts of Interpretation. There would appear to be some merit, as well as ability, to determine if alcohol and drug use poses a direct threat to the property and safety of others in a housing context, however, under the ADA establishing a direct threat in cases brought under the diverse titles in the ADA would not be so easy.

The Relationship between the ADA Alcohol and Drug Use Provision and Responsibilities to Provide Reasonable Accommodation. The alcohol and drug use provision in title I under "Qualification Standards" of the ADA would raise uncertainty in one additional area -- its relationship to the definition of qualified individual with a disability in title II, which deals with employment.

Title II states that a "qualified individual with a disability" is "...an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position...." If an employer establishes that an individual is a "direct threat", at what point is the employer responsible for offering "reasonable accommodation" to reduce or overcome such a threat, in order to avoid charges of discrimination because he or she failed to provide reasonable accommodation? The interaction of possible exclusionary criteria and reasonable accommodation arose during floor consideration of the contagious disease provision in the Civil Rights Restoration Act of 1988. The authors of the provision did not agree on its effect.

Direct Threat, Reasonable Accommodation, and Contagious Disease. The ADA contains parallel language ("...pose a direct threat to the health and safety...") with which covered entities must comply when dealing with an individual with a contagious disease. Originally, this provision was offered by Senators Harkin and Humphrey during consideration of the Civil Rights Restoration Act. Unfortunately, each Senator had a different interpretation of its application. Senator Humphrey viewed it as a provision that would function as a gatekeeper, limiting the number of individuals protected. Senator Harkin primarily viewed the provision as one that would help define the nature of reasonable accommodation an individual with a contagious disease could receive. It would seem very useful to attempt to clarify the relationship between the concept of direct threat and reasonable accommodation in the ADA so all parties would be able to establish, before hand, the validity of their positions in litigation.

REASONABLE ACCOMMODATION

The CCD letter says, "There is no inconsistency between the ADA's requirement that employers provide reasonable accommodations and that employers provide equal and effective benefits." When viewed in terms of specific situations this premise would sometimes be true, but the "equal opportunity" provision in title I of the ADA addresses more than benefits and would appear to encompass reasonable accommodation. It states:

> For purposes of this Act, aids, benefits, and services to be equally effective, must afford an individual with a disability an equal opportunity to obtain the same result, to gain the same benefit, or reach the same level of achievement, in the most integrated setting appropriate to the individual's needs.

This provision would seem to put qualitative and quantitative conditions on what may constitute reasonable accommodation in an employment setting. The section 504 regulations contain the "equal opportunity" concept, but it is not included in the part of those regulations pertaining to employment. The omission from the section 504 employment regulations suggests that in some instances there may be conflict or confusion if compliance involves both equal opportunity and reasonable accommodation. The CCD letter acknowledges such potential conflict, but defends the current provision by arguing if there is conflict, the employment title in the ADA would take precedence.

The interaction of the equal opportunity provision and those associated with reasonable accommodation raises another issue. In cases where there is no conflict between equal opportunity and reasonable accommodation requirements, but the equal opportunity requirements would seem to mandate "more" or "better" than would be mandated by the reasonable accommodation requirements alone, what would be expected?

Given the potential "umbrella" effect of the equal opportunity provision in the ADA, it would be very useful to clarify its intended effect on other provisions in the bill. If the effect is not clarified, the courts would be left with an under developed sense of Congressional intent.

UNDUE HARDSHIP

The CCD letter states:

> The requirement that employers do not have to provide a reasonable accommodation if such an action would cause an "undue hardship" on the business is a long standing concept under Section 504. There is over 15 years of case law interpreting this concept. The very essence of this concept is flexibility -- under Section 504 regulations and case law, a determination of undue hardship depends on the particular disability, the particular job, the nature and size of the employer, and the availability of accommodation alternatives and resources....

"Undue hardship" is not defined in the ADA. It would be an important addition to the bill to define it in terms of variables like those listed in the CCD letter, especially if case law over the last 15 years is consistent or complementary.

FINAL OBSERVATION

The concerns raised by Mr. McCollum, as well as others, about the Americans with Disabilities Act of 1989, can be addressed through drafting changes in the bill. Such clarifications would not seem to limit civil rights for individuals with disabilities, but would seem to ensure that they and those who will be expected to provide opportunities for such individuals, to the maximum extent possible, have a common understanding of what is expected and the consequences if such expectations are not met.

It is important that the final version of the ADA encourage the private sector to engage in a full range of proactive initiatives to expand the rights of individuals with disabilities. Also, the final version of the ADA should not function as an incentive to increase litigation, but function in a manner that encourages conciliation and resolution of complaints, fairly, quickly, and consistently at reasonable costs, both financial and non-financial ones, to all parties.

June 22, 1989

TO: All Interested Parties

FROM: The Disability Rights Working Group

The Disability Rights Working Group shares the goals of the authors of the Americans with Disabilities Act of 1989 (S. 933/H.R. 2273): All people with disabilities should enjoy equal opportunity in the many facets of life. The language of the bill, however, gives rise to a number of concerns in the business community. In that vein, the Disability Rights Working Group seeks to work with all interested parties to fashion a bill that addresses the needs of all. We are pleased to provide the enclosed information to highlight those provisions of the legislation that are of particular concern to the business community.

MEMORANDUM TO INTERESTED STAFF

Re: S.933, "Americans with Disabilities Act of 1989"
Date: May 24, 1989

We have received several inquiries about Senator Hatch's reasons for declining to co-sponsor S.933. Senator Hatch favors a comprehensive civil rights bill for persons with disabilities. He favors extending the substantive protections of Section 504 of the Rehabilitation Act of 1973 to employment; to public accommodations as that term is defined in the 1964 Civil Rights Act; to state and local governments, including their public transit activities; and to television broadcasters in the broadcast of videotapes. He is still reviewing with an open mind S.933's telecommunications relay services and the coverage of private transportation.

For reasons mentioned in the attached document, Senator Hatch will not co-sponsor S.933 in its current form. This document is not meant to be exhaustive.

Senator Hatch has met with Senator Harkin in an effort to reach a compromise and would still like to do so. He has thus far refrained from offering his own bill, and as of now, will continue to seek an agreed upon approach with Senator Harkin.

Mark R. Disler

Mark R. Disler
Minority Chief Counsel
Judiciary Subcommittee on Patents
(224-7703)

SOME CONCERNS ABOUT S. 933
"Americans with Disabilities Act of 1989"

Among the important concerns about S. 933 are:

I. Scope.

A. "Public" Accommodations. One section of this year's bill exceeds even that of S. 2345, the 1988 version of the bill. The coverage of public accommodations in S. 933 includes virtually the entire private sector except private homes and places of lodging of five rooms or less when the lodging is occupied by the owner. This coverage includes private schools, including religious schools; religious institutions such as churches and synagogues; farms; all retail establishments -- regardless of whether they receive federal aid or federal contracts. See S. 933, section 401. In effect, the entire private sector is treated as a "public" accommodation.

In contrast, S. 2345 applied to those public accommodations "covered by Title II of the Civil Rights Act of 1964." S. 2345, section 4(a)(3). Title II of the 1964 Act basically covers places of lodging, places of eating, places of entertainment, and gasoline stations. 42 U.S.C. section 2000a(b),(c),and(e). We favor applying Section 504's substantive requirements to public accommodations as the latter term is defined in Title II of the 1964 Civil Rights Act and S. 2345.

B. Small Entity Exemption. When originally enacted, Title VII of the 1964 Civil Rights Act, which bans racial, ethnic, gender and religious discrimination in employment, exempted employers of less than 25 employees (the exemption was reduced to 15 in 1972). S. 933 provides an exemption for employers with less than 15 employees, rather than 25.

Moreover, other than the employment section, no other section of S. 933 exempts small entities of any size, except that places of lodging with five rooms or less where the owner occupies the lodging are exempt from the public accommodations section.

II. Remedies. S. 933's remedies are often unnecessarily harsh and exceed the relief available under parallel civil rights statutes. For example, if a black person is discriminatorily turned away from a bar or hotel, he or she may obtain injunctive relief and attorneys fees in a private action under Title II of the 1964 Civil Rights Act. 42 U.S.C. 2000a-3. The Attorney General may obtain

an injunction in his or her Title II cases. 42 U.S.C. 2000a-5. Under S. 933, in stark contrast, a person may obtain not only an injunction and attorneys fees in a private action, but actual and punitive damages, as well. The Attorney General may obtain not only an injunction, but monetary damages for the aggrieved person, plus a civil penalty of up to $50,000 for a first violation and up to $100,000 for subsequent violations, as well. This is not parallel enforcement.

Further, in S. 933's remedial provisions for employment discrimination, instead of relying solely on the parallel remedial provisions of Title VII, S. 933 also makes the remedies and procedures of 42 U.S.C. section 1981 available. S. 933, section 205. Title VII permits an award of up to two years of backpay, the next available job, and retroactive seniority. Section 1981, which is a privately enforced Civil War era statute prohibiting certain private racial discrimination, provides relief that goes beyond that available under Title VII, including actual and punitive damages.

There are other excessive remedial provisions in the bill.

A number of substantive standards of S. 933 exceed section 504 standards.* For example, the employment section prohibits the use of "qualification standards, tests, selection criteria or eligibility criteria that identify or limit, or tend to identify or limit, a qualified individual with a disability, or any class of qualified individuals with disabilities, unless such standards, tests, or criteria can be shown by such entity to be necessary and substantially related to the ability of an individual to perform the essential functions of the particular" job. Section 202(b)(3) (emphasis supplied). This is a very onerous standard.

The bill does not make consistent use of the Supreme Court's interpretation of Section 504 that a covered entity need not undertake either a fundamental alteration in the entity's activities or an undue financial and administrative burden. Southeastern Community College v. Davis, 442 U.S. 397, 410, 412 (1979); see School Board of Nassau County v. Arline, 480 U.S. 273, 287, n.17 (1987).

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*Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability against "otherwise qualified individuals" with disabilities in federally assisted and federally conducted programs.

See, e.g. Section 402(b) (1)-(3) of S.933 (these subparagraphs either do not utilize the Davis/Arline standard or only utilize part of it).

In the page after page of highly prescriptive language, there are a number of other instances where the requirements of the bill appear to exceed Section 504 requirements.

The public transportation sections are well-intended but may be too burdensome. For example, public transit authorities (they principally provide intracity bus and subway service) are required to purchase all of their new buses and subway cars in a form accessible to wheelchair users if they solicit for such new vehicles 30 days after enactment of S.933. There is no undue burden limit to this duty. Section 303(b)(1). Moreover, public transit authorities are not permitted the option of using paratransit services in lieu of mainline accessibility to provide transportation for persons with disabilities. Public transit authorities in smaller communities and rural communities may be especially hard-hit by these requirements.

Indeed, the bill's provisions seem clearly to exceed Section 504 requirements. E.g. Rhode Island Handicapped Action Committee v. Rhode Island Public Transit Authority, 718 F.2d 490 (1st Cir. 1983)(providing paratransit can be consistent with section 504 and all new buses need not be lift-equipped); APTA v. Lewis, 655 F.2d 1272 (D.C. Cir. 1981); Disabled in Action of Baltimore v. Bridwell, 593 F.Supp. 1241 (D. Md. 1984); but see ADAPT v. Burnley, 867 F.2d 1471 (3rd Cir. 1989) (two to one decision; Bush Administration successfully sought rehearing; en banc decision pending). The Department of Transportation's current approach is set forth at 51 Federal Register 18994 (May 23, 1986)(49 CFR Parts 27; 609).

In APTA v. Lewis, 655 F.2d 1272 (D.C. Cir. 1981), the Court of Appeals for the District of Columbia invalidated the Department of Transportation's 1979 regulations in this area. This was an opinion by Judge Mikva, certainly not a member of that court's Reagan wing. To be sure, those regulations included some onerous provisions not present in S.933, including certain retrofitting requirements. S.933, however, does contain some of the same requirements as, and even more burdensome requirements than, the 1979 regulations -- requirements which were part of the package thrown out by Judge Mikva as excessive.

For example, the 1979 DOT regulations required all new buses to be lift-equipped and that, at the end of 10 years, half of the buses in any system had to be accessible to wheelchair users. 655 F.2d at 1276. S. 933 retains the lift requirement for all new buses, and provides no 50% cap on the number of buses that must be wheelchair accessible. Section 303 (b)(1).

Further, the 1979 regulations required at least one car per train to be accessible, and thus all new commuter rail cars purchased 3 1/2 years after the regulations were published had to be wheelchair accessible. 655 F.2d at 1276. Under S. 933, all new commuter rail cars must be wheelchair accessible when a solicitation for them is made a mere 30 days after the enactment. Section 303 (b)(1).

The 1979 regulations said that "extraordinarily expensive" structural changes to, or replacements of existing vehicles and facilities would be allowed to take place over 30 years, and there was a waiver available under certain conditions. 655 F.2d at 1275-76 (emphasis supplied). S.933 allows up to 20 years, for "extraordinarily expensive" structural changes to, or replacement of, existing facilities, not 30, and provides no waivers. Section 303(g)(3). Yet, even the 1979 regulatory provisions were found wanting. Judge Mikva said, "the regulations themselves recognize that some changes will be 'extraordinarily expensive'; such changes are nevertheless required, though they may be phased in over periods of time longer than the three-year limit otherwise applicable. These are the kind of burdensome modifications that the Davis court held to be beyond the scope of Section 504." 655 F.2d at 1278.

Not surprisingly, in contrast to last year's S. 2345 (Section 4(b)(1)), S. 993 explicitly incorporates its more onerous requirements in the public transportation area into section 504, e.g. sections 303(b)(1); 303(c); 303(d); 303(g). This is an implicit acknowledgement that S. 933's transportation requirements exceed current regulatory interpretations of section 504's requirements and the weight of section 504 caselaw.

Several hundred private bus companies provide virtually all intercity bus services in this country, a declining industry with a low-profit margin. The requirement that all of their new buses be accessible to wheelchair users (i.e. lift-equipped) (Section 403(b)(3)) could significantly curtail intercity bus service, especially in rural areas. The private bus companies receive virtually no federal subsidies.

IV. Miscellaneous. There are a variety of other important issues. For example, the bill should be effective one year from enactment, not upon enactment. Covered entities will need time to understand their obligations. Title VII of the 1964 Civil Rights Act was not effective until one year after enactment.

The bill does not outright exclude alcoholics and drug abusers from the definition of persons with disabilities. Instead, it only permits a covered entity from setting a qualification standard "requiring that the current use of alcohol or drugs by an alcoholic or drug abuser not pose a direct threat to property or the safety of others in the workplace or program." Section 101(b)(2)(A). But an employer cannot set any qualification unless he or she can show that it is "necessary and substantially related" to the job, a very onerous burden. Section 202(b)(3).

SCOPE OF "PUBLIC ACCOMMODATIONS" SECTION

Title II of the 1964 Civil Rights Act bans discrimination on the basis of race, color, religion and national origin in public accommodations. In Title II, public accommodations are defined to include essentially places of lodging, places of eating, places of entertainment, and gas stations. 42 U.S.C. 2000a(b), (c) and (e). Thus, hotels, bars, restaurants, theaters, stadia and the like are covered. In stark contrast, Section 401 of S. 933, states:

> "(2)(A) The term 'public accommodation' means privately operated establishments --
>
> (i)(I) that are used by the general public as customers, clients, or visitors; or
>
> (II) that are potential places of employment; and,
>
> (ii) whose operations affect commerce."

This covers virtually the entire private sector, except for private homes and places of lodging of five rooms or less when the owner occupies the lodging. Coverage includes: private schools, including religious schools; churches, synagogues and other religious institutions; farms; all retail establishments; and much more. See also section 401(2)(B). All of these private entities either serve customers, clients, or visitors or are potential places of employment. Moreover, relevant case law makes clear that the "affect commerce" requirement is a minimal one to meet. Thus, if a small, rural church received its organ or prayer books from across state lines, the religious institution would be covered.

Ironically, in 1988, the Americans with Disabilities Act (S. 2345) covered public accommodations as defined in Title II of the 1964 Civil Rights Act, S. 2345, section 4(a)(3). S. 933, however, goes much farther.

There are limits to the federal government's role. When the government regulates the private sector, costs are imposed. The federal government engages in compliance reviews, investigations, and often imposes paperwork requirements. Exposure to private lawsuits adds additional costs, including attorneys fees. Moreover, even under section 504 standards, assuring nondiscrimination for persons with disabilities requires undertaking reasonable accommodation. This, too, entails some costs, and properly so. But, the federal government should not impose these costs throughout the entire private sector without a better record and a showing of need

for federal action in each component of the private sector so covered.

Section 504 of the Rehabilitation Act of 1973, which bans disability discrimination against otherwise qualified persons with disabilities in federally assisted and federally conducted programs, does not require a covered entity to undertake an undue financial and administrative burden or fundamentally alter the nature of the program. Southeastern Community College v. Davis, 442 U.S. 397, 410, 412 (1979); see School Board of Nassau County v. Arline, 480 U.S. 273, 287 n.17 (1987).

Yet, under S. 933, covered "public accommodations" are prohibited from using eligibility criteria that limit any individual with a disability "from fully and equally enjoying" any good, service, facility, privilege, advantage or accommodation -- no matter how justified the eligibility criteria and whether or not the individual with a disability is qualified to participate. Section 402(b)(1). The Davis/Arline limits on a covered entity's duties are absent (note: even if section 101(b)(1) applies to "public accommodations" under this bill, which is very unclear, the covered entity must "demonstrate" the criteria are "both necessary and substantially related" to the ability to participate in the covered entity's activities, a very onerous standard which exceeds section 504 as interpreted in Davis/Arline.) See also sections 401(b)(2) and (3) (these subparagraphs utilize only one part of the Davis/Arline standards).

There is no small provider exemption in this section, except for places of lodging of five rooms or less when the owner occupies the lodging.

Relief available under S. 933 against "public" accommodations is far harsher than relief available under Title II of the 1964 Civil Rights Act, as the following comparison demonstrates:

	Title II (42 U.S.C. 2000a-3) (42 U.S.C. 2000a-5)	S. 933
Private Action	Injunctive Relief Attorneys Fees	Injunctive Relief Attorneys Fees Actual Damages* Punitive Damages*
Attorney General Action	Injunctive Relief	Injunctive Relief Monetary Damages for aggrieved person* Civil penalties* (up to $50,000/first

violation; up to $100,000/subsequent violations)

Hatch Position:

Favors: coverage of public accommodations as defined in Title II of the 1964 Civil Rights Act (42 U.S.C. 2000(a)(b)(1)-(4) and (e)) and S. 2345, the 1988 version of this bill; a small entity exemption for entities with less than 25 employees; substantive standards based on section 504; and remedies as provided under Title II of the 1964 Civil Rights Act (42 U.S.C. 2000a-3 and 2000a-5.)

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* S. 933 incorporates certain remedial provisions of the Fair Housing Act, as amended. This is the source of the new, harsher penalties for "public" accommodations. The argument that these harsher penalties are more appropriate than Title II's relief because they are contained in the most recent civil rights bill enacted by Congress is unpersuasive. Fair Housing Act remedies are apt for cases of housing discrimination against persons with disabilities; Title II of the 1964 Civil Rights Act is the appropriate model for the public accommodations section of a disability rights bill.

TRANSPORTATION OPERATED BY STATE/LOCAL GOVERNMENTS

The bill's public transportation provisions clearly exceed section 504 requirements. In APTA v. Lewis, 655 F.2d 1272 (D.C. Cir. 1981), the Court of Appeals for the District of Columbia invalidated the Department of Transportation's 1979 regulations in this area. This was an opinion by Judge Mikva, certainly not a member of that court's Reagan wing. To be sure, those regulations included some onerous provisions not present in S. 933, including certain retrofitting requirements. However, this bill does contain some of the same requirements as, and even more burdensome requirements than, the 1979 regulations -- requirements which were part of the package thrown out by Judge Mikva as excessive.

For example, the 1979 DOT regulations required all new buses to be lift-equipped and that, at the end of 10 years, half of the buses in any system had to be accessible to wheelchair users. S. 933 retains the new bus requirement, and provides no 50% cap on the number of buses that must be wheelchair accessible. Section 303(b)(1).

Further, the 1979 regulations required at least one car per train to be accessible, and thus all new commuter rail cars purchased 3 1/2 years after the regulations were published had to be wheelchair accessible. Under S. 933, all new commuter rail cars must be wheelchair accessible when a solicitation for them is made a mere 30 days after enactment. Section 303(b)(1).

The 1979 regulations said that "extraordinarily expensive" structural changes to, or replacements of existing vehicles and facilities would be allowed to take place over 30 years, and there was a waiver available under certain conditions. 655 F.2d at 1275-76 (emphasis supplied). S. 933 allows up to 20 years, for "extraordinarily expensive" structural changes to, or replacement of, existing facilities, not 30, and provides no waivers. Section 303(g)(3).

As Judge Mikva said, "the regulations themselves recognize that some changes will be 'extraordinarily expensive;' such changes are nevertheless required, though they may be phased in over periods of time longer than the three-year limit otherwise applicable. These are the kind of burdensome modifications that the Davis court held to be beyond the scope of section 504." 655 F.2d at 1278. See also, e.g., Rhode Island Handicapped Action Committee v. Rhode Island Public Transit Authority, 718 F.2d 490 (1st Cir. 1983); Disabled in Action of Baltimore v. Bridwell, 593 F.Supp. 1241 (D. Md. 1984); but see ADAPT v. Burnley, 867 F.2d 1471 (3rd Cir. 1989) (two to one decision; Bush Administration successfully sought rehearing; en banc decision pending.)

Statement of the U.S. Chamber of Commerce

ON: THE AMERICANS WITH DISABILITIES ACT OF 1989

TO: SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

BY: ZACHARY FASMAN

DATE: MAY 9, 1989

The U.S. Chamber of Commerce is the world's largest federation of business companies and associations and is the principal spokesman for the American business community. It represents nearly 180,000 businesses and organizations, such as local/state chambers of commerce and trade/professional associations.

More than 92 percent of the Chamber's members are small business firms with fewer than 100 employees, 59 percent with fewer than 10 employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business--manufacturing, retailing, services, construction, wholesaling, and finance--numbers more than 10,000 members. Yet no one group constitutes as much as 32 percent of the total membership. Further, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the 59 American Chambers of Commerce Abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross section of its members serving on committees, subcommittees and task forces. Currently, some 1,800 business people participate in this process.

STATEMENT
on
THE AMERICANS WITH DISABILITIES ACT OF 1989
before the
SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES
for the
U.S. CHAMBER OF COMMERCE
by
Zachary Fasman
May 9, 1989

I. STATEMENT OF INTEREST

I am Zachary Fasman, a partner in the Washington office of the law firm Paul, Hastings, Janofsky & Walker. I am a labor lawyer by trade and have substantial experience in the employment discrimination field. My firm is represented on the U.S. Chamber of Commerce's Labor Relations Committee, and it is in this capacity that I appear before you today.

I appreciate the opportunity to express the Chamber's views on the Americans with Disabilities Act of 1989. I will direct my comments this morning to the employment provisions of the Act.

The Chamber shares the goal of the authors of this Act: that all individuals should have the opportunity to participate in our society. Workers with disabilities have demonstrated that their job performance competes with and frequently exceeds that of other workers in productivity, efficiency and favorable accident and absentee rates. Full participation in our economic life by people with disabilities is essential as we face global economic challenges, as well as important for the dignity of the individuals in question.

We have concluded, however, that this legislation, as

presently drafted, is not an appropriate or equitable vehicle for achieving the Congressional goal with which we agree. We have several very significant concerns about this bill.

II. STRUCTURE OF THE ACT

Initially, I would note that two titles of this Act regulate the employment relationship. Title I of the Act contains broad general prohibitions that apply to "benefits, jobs, and other opportunities," while Title II is a more specific, traditional and straight-forward prohibition on employment discrimination. We see no reason for two separate prohibitions and especially are concerned because the provisions of Title I are extremely unclear and appear to impose unwarranted obligations in the workplace. For example, Title I states that it is discriminatory to provide "an individual with a service, program, activity, benefit, job or other opportunity that is less effective than that provided to others" (emphasis added) (Section 101(a)(1)(C)). We have no idea what the bill might mean by a "less effective" job or benefit. Nor do we understand what the bill means when it prohibits providing an individual "with a service, program, activity, benefit, job or other opportunity that is different or separate" (emphasis added). This vague language is an invitation to litigation. We believe that it would be a terrible mistake to empower the courts to determine whether one job or benefit is "less effective" than or "different from" another.

In our view, if Congress wishes to regulate the employment relationship, it should do so directly. There are many useful models already on the books, and we believe that a straight-forward prohibition on employment discrimination avoids the disturbing questions. We see nothing to be gained by applying vague prohibitions of the sort contained in Title I of this Act to the employment relationship. We suggest that all references

to employment be deleted from Title I; that the bill clarify that the only obligations placed upon private employers are contained in Title II; and that the bill concentrate on creating an effective and specific prohibition on employment discrimination in Title II.

III. DEFINITIONS

Before turning to Title II itself, let me address two definitional sections in the Act.

The first is the Act's definition of "reasonable accommodation," which we believe is overly broad, unclear and unnecessary. The Act defines "reasonable accommodation" to include "adoption or modification of procedures and protocols, the provision of qualified readers or interpreters, and other similar accommodations" (Section 3(3)(B)). Does this language require all employers, as a matter of legal obligation, to provide interpreters and readers for all disabled employees or applicants who might benefit thereby? Would a job be deemed "less effective" for a visually or hearing-impaired employee if a reader or interpreter were not provided? Does the bill require employers to alter production methods to suit the needs of every disabled employee or applicant? If so, how broad must the modification be? What if the needs of different disabled employees conflict -- whose disability governs?

These are real questions that will be decided by the courts if the bill is passed as drafted. If Congress does not intend to impose such broad obligations upon all employers, we suggest that "reasonable accommodation" in employment not be defined in the proposed bill, but rather left to the courts, or that the term be defined in a specific and limited fashion in Title II.

If Congress intends to require all private employers to provide readers and interpreters and to engage in wholesale modification of the workplace, we believe that Congress is acting very unwisely. It is one thing to require recipients of federal grants to use some of those federal monies to ensure that the workplace is as hospitable as possible to the disabled, as Congress traditionally has done under Section 504 of the Vocational Rehabilitation Act of 1973. It is quite another to impose such obligations upon all employers as a matter of positive law.

The costs of this action would be enormous and obviously could have a disastrous impact upon many small businesses struggling to survive. If the bill is intended to impose such obligations, we suggest substantial revision in its jurisdictional reach so as to exclude small businesses entirely.

Moreover, the presence of foreign competition calls into question the ability of any American business, large or small, to pass on these very substantial costs to the consumer. Imposition of these costs on employers threatens to make American business even less competitive in our increasingly global economy.

Also, we would note that the definition of a handicap does not exclude alcohol or drug abuse, nor does it exclude individuals with a contagious disease, in cases where the alcohol or drug abuse or the contagious disease poses a direct danger to the property, health or safety of others. The Vocational Rehabilitation Act of 1973 properly excludes these conditions from the definition of a handicap for employment purposes, thus allowing employers to protect employees in the workplace whose health and safety otherwise might be endangered. See 29 U.S.C. Sections 706 (8)(B),(C). This Act does allow employers to create "qualification standards" based upon drug or alcohol use or

contagious disease but also provides that all qualification standards must "be both necessary and substantially related to the ability of an individual to perform . . . the essential components" of the job (Section 101 (b)(2)).

This is a significant limitation upon employers' ability to protect their employees and it creates safety ramifications regarding customers, clients and the public at large. It is particularly inappropriate that Congress should be considering such provisions at the same time that American business is increasingly being required, by federal agencies, to create and preserve a drug-free workplace. We suggest that contrary to the current provisions, this bill specify that casual use of drugs or alcohol is not a handicap and that alcohol or drug use by an alcoholic or drug addict is not a handicap unless the employee can show that the alcohol or drug use does not pose a direct threat to the property or safety of others in the workplace. We suggest that the statute incorporate the language of the Vocational Rehabilitation Act of 1973 (29 U.S.C. Section 706(8)(C)), dealing with contagious diseases, as an exclusion to the definition of handicap as well.

IV. TITLE II

Our concerns with regard to Title II of the bill are less global but still highly significant.

First, the bill defines a qualified individual with a disability as one who can, with or without reasonable accommodation, perform the "essential functions" of a job; subsequently, the bill provides that tests or selection criteria are appropriate so long as they test whether an employee or applicant can perform the "essential functions" of a job. We suggest that the concept of "essential functions" of a job makes

no sense and ought to be eliminated from the bill. Either a disabled person can perform the job, with reasonable accommodation, or he cannot. It is too substantial an intrusion on the legitimate prerogatives of employers to ask federal agencies, the courts and juries to define which aspects of a particular job are "essential" and which are not.

Second, we are troubled by the manner in which the term "discrimination" is defined. Section 202(b) not only makes it unlawful to deny a reasonable accommodation but also proscribes the "failure . . . to make reasonable accommodations to the known physical or mental limitations of a qualified individual with a disability. . ." (Section 202(b)(1)). As is currently the case under the Vocational Rehabilitation Act of 1973, the initial onus clearly should be placed upon the employee or applicant to identify himself as handicapped and to advise the employer of the type of accommodation that he or she desires. Any other construction would require employers to question employees or applicants about their disabilities. By ensuring that the employee or applicant must notify the employer both of the disability and the accommodation, employers would be protected from committing completely unintentional violations of the Act, and the privacy of individuals who would prefer not to disclose their handicaps would be preserved.

Finally, we believe that it is unwise to allow the employment provisions of the Act to be enforced under 42 U.S.C. Section 1981 as well as under Title VII procedures. The Title VII enforcement scheme, built around agency expertise and conciliation in order to provide rapid relief to charging parties, proceeds from a completely different premise than does the Civil Rights Act of 1866. The latter statute allows an injured party to proceed directly into federal court, with no requirement that a charge be filed with any administrative

agency. Title VII, by contrast, requires the filing of a charge as a prerequisite to suit, and thus necessarily involves an administrative agency in the prosecution process. This statute will require substantial administrative interpretation before its provisions achieve concrete form and thus would seem particularly suitable for administrative enforcement.

Moreover, Section 1981 cases are tried to a jury, while Title VII cases are not. Relief under Title VII does not include compensatory damages, while such relief may be available under Section 1981. In short, there are significant differences between these two enforcement schemes, and we suggest that Congress choose one or the other. We strongly would support the Title VII scheme, which is aimed directly at employment matters and embodies the considered judgment of Congress on how to enforce anti-discrimination provisions in the workplace.

On behalf of the Chamber, I thank the Committee for its attention and am prepared to answer any questions regarding my remarks.

89-43

Equal Employment Advisory Council

ROGER:
INTERESTING ANALYSIS FOR YOUR REVIEW.
-CRAIG CRASPI

MEMORANDUM

May 12, 1989

TO: EEAC Members

FROM: Jeffrey A. Norris
President

RE: Comprehensive Legislation Introduced to Eliminate Discrimination Against Individuals with Disabilities

S. 933, a revised version of last year's Americans With Disabilities Act (ADA), was introduced on May 9 by Senator Tom Harkin (D-IA). An identical version of the bill was introduced in the House of Representatives on the same day (H.R. 2273). A variety of structural and substantive changes have been made in the original version of the bill introduced last year. See EEAC Memorandum 88-73, June 10, 1988. The bill, however, remains a broad legislative package with separate titles addressing employment, public accommodations, public services and transportation, and telecommunication services.

The ADA is designed to be enforced in addition to, rather than in place of, existing federal, state and local laws which prohibit disability discrimination. Although it is to be enforced by the EEOC, the bill also provides for a private right of action under Section 1981, a post-Civil War statute which allows for jury trials and awards of punitive damages. In his news release announcing introduction of S. 933, Senator Harkin states that it is time that we "opened the courthouse door for persons with disabilities."

S. 933 has been targeted by its supporters for prompt action. While the White House has not given a formal endorsement to this or any other specific proposal on disability discrimination, it is clear that President Bush is interested in this issue and is eager to support an effort to increase opportunities for persons with disabilities. EEAC has heard from several member companies who have been contacted by organizations seeking employer support for the bill. To assist you in responding to such inquiries, our analysis seeks to highlight those sections which need to be clarified as the bill is debated.

Typically, EEAC member companies are among those employers recognized for their exemplary efforts in providing opportunities and accommodations to individuals with disabilities. Thus, most member companies would not quarrel with the stated goal of the

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legislation. As with last year's version of the bill, however, the specific statutory language of the 1989 legislation deserves close attention in assessing its impact on your business and employment practices.

For an employer assessing the practical impact of the legal requirements imposed by the ADA's section dealing with employment, the following points are noteworthy:

-- The bill's emphasis appears to be on litigation as a means of achieving results. S. 933 provides complaining parties with an option to circumvent the EEOC and to proceed directly to federal court by filing a law suit under Section 1981, which provides for jury trials and awards of compensatory damages (such as "pain and suffering") and punitive damages.

-- The bill adopts a definition of the impact theory of discrimination which places a greater burden on employers than the standard disparate impact theory applied by the Supreme Court to sex and race discrimination cases.

-- The bill seeks to adopt for private employers, without modification, a standard for accommodation of disabilities which was developed in the context of programs funded by the federal government.

-- The bill's approach to current use of drugs by a drug abuser is different from the approach under the Rehabilitation Act and appears to run counter to the requirements imposed by the Drug-Free Workplace Act passed by Congress last year.

-- The bill imposes new requirements concerning disability discrimination which will apply in addition to existing requirements imposed by state laws and other federal laws.

In this regard, it is interesting to compare ADA to the provisions in last year's legislation, which would have been a dramatic departure from the standards imposed under current law. This year, the drafters have revised the bill to include some definitions from Section 504 of the Rehabilitation Act. But, in moving these provisions to the new bill, there have been changes in wording which appear to make significant changes in the meaning and application of Section 504 standards as currently understood.

The drafters of ADA have been selective in deciding which provisions of existing law to include and which provisions to ignore. The net result is that S. 933 cannot accurately be characterized as simply an expansion of existing federal law to cover additional employers. A detailed analysis of ADA follows.

OVERVIEW OF ADA

The 1989 legislation begins with a series of "Findings and Purposes" which recognize discrimination against individuals with disabilities as a serious and pervasive social problem and conclude that there is a need for a clear and comprehensive national mandate to eliminate the problem and for a set of clear, strong, consistent, enforceable standards to address discrimination against individuals with disabilities.

Section 3 defines many of the terms used in the bill, including "disability," which draws upon the language in the definition of individual with handicaps in the Rehabilitation Act. 29 U.S.C. § 706. Thus, a disability is defined to mean "a physical or mental impairment that substantially limits one or more of the major life activities." The definition also includes "a record of such an impairment" or "being regarded as having such an impairment."

Next follow the six major segments of the bill. This year's version is an improvement over the 1988 draft in that it attempts to deal with employment matters in a single title, transportation matters in a separate title, public accommodation matters in a another, and so on. The primary exception, and perhaps the most confusing segment of the bill, is Title I which contains a series of general prohibitions on discrimination aimed at services, programs, activities, benefits, jobs, and other opportunities. These prohibitions are taken generally from the regulations issued under Section 504 of the Rehabilitation Act, 29 U.S.C. § 706. There are no specific enforcement provisions attached to Title I, but it appears that -- to the extent they relate to employment -- these provisions may be enforced under the employment discrimination provisions of Title II, either through the EEOC or through a direct lawsuit under Section 1981.

One of the provisions in Title I not found in Section 504 regulations is a ban on "discrimination on the basis of association." Specifically, Section 101(a)(5) of the ADA provides that it is discriminatory to deny "equal services, programs, activities, benefits, jobs, or other opportunities" to an individual or an entity because of "the relationship to, or association of, that individual or entity with another individual with a disability." The proponents have indicated that this provision is designed primarily to prohibit discrimination against the families and friends of individuals with disabilities, particularly AIDS victims.

Employment -- Title II of the bill is the section devoted to employment discrimination. The bill's threshold is identical to that in Title VII of the Civil Rights Act of 1964, covering employers with 15 or more employees. Title II of ADA incorporates many of the standard definitions found in Title VII, and directs the EEOC to issue regulations to carry out the ADA within 180 days of enactment. The Title II provisions are written to prohibit discrimination against any "qualified individual with a disability," defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."

Title II's prohibition on discrimination applies to "job application procedures" as well as the standard aspects of employment listed in the prohibition in Title VII of the Civil Rights Act of 1964; that is, hiring, discharge, compensation, etc.

The term "discrimination" is specifically defined to include three situations. They are:

(a) the failure to make reasonable accommodation to the known physical or mental limitations of a qualified individual with a disability unless the employer can demonstrate that "the accommodation would impose an undue hardship on the operation of its business;"

(b) to deny employment opportunities because of the need of an individual for reasonable accommodation; and

(c) the imposition of "qualification standards," tests, or selection criteria "that identify or limit, or tend to identify or limit," a qualified individual with a disability, or any class of qualified individuals with disabilities, unless justified by the employer.

The employer's burden of justification is also spelled out in subsection (c). That is, to defend such standards, tests, or criteria, the employer must show that they are "necessary and substantially related to the ability of an individual to perform the essential functions of the particular employment position."

The enforcement scheme of Title II is spelled out in Section 205. It makes available the remedies and procedures of Title VII of the Civil Rights Act of 1964 (Sections 706, 709, and 710). These are the sections of Title VII which provide for an individual who has been the victim of discrimination to file a charge of discrimination with the EEOC. The agency then investigates the charge and attempts through conciliation to bring the parties to a voluntary resolution of the matter. If conciliation fails, the charging party has the right to initiate

a lawsuit in federal court to receive back pay and other appropriate remedies such as rightful seniority. In addition, Title II of the ADA makes available the remedies and procedures of 42 U.S.C. § 1981, a post-Civil War statute which provides for an extended statute of limitations, jury trials, and awards of compensatory and punitive damages. There is no requirement that an individual first exhaust the Title VII procedures before filing a Section 1981 lawsuit.

A unique aspect of this ADA enforcement scheme is that the right to file a charge or lawsuit is not limited to those who have been discriminated against. An action can be initiated by any individual who believes that he or she "is about to be subjected to discrimination." In addition, the language of Title II specifically makes the Title II enforcement process available for violations of "any provisions of this Act ... concerning employment." Presumably this means that charges could be filed under Title II alleging violations of the general prohibitions in Title I.

Title II also requires employers to post notices in an accessible format describing the employment provisions of the law.

Public Services -- The public services section of the ADA, Title III, prohibits discrimination on the basis of disability in all activities of state and local governments. This marks an extension of the coverage of Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination in those state and local government activities and programs receiving federal financial assistance. The provisions place particular emphasis on accessibility of public transportation.

Public Accommodations -- Title IV of the ADA is designed to apply to many establishments operated by private businesses. This provision guarantees individuals with disabilities "full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation."

The term public accommodation is defined to mean any privately-operated establishments that are used by the general public as "customers, clients, or visitors" or "that are potential places of employment" and whose operations affect commerce. The bill lists numerous examples of such establishments: shopping centers, hotels, restaurants, office buildings, gas stations, sales establishments, public transportation terminals, etc. The Title IV requirements focus on accessibility, and should be reviewed by anyone who operates such establishments.

This section incorporates sections of the Fair Housing Act providing for enforcement through private lawsuits as well as by the Attorney General. In such lawsuits by private persons, the court is authorized to award actual and punitive damages to the plaintiff, to enjoin the defendant from engaging in such practices, and to order the defendant to take such affirmative action as may be appropriate. (42 U.S.C. § 3613).

Telecommunications -- Title V of the ADA requires those companies which provide telephone services to the general public to, within one year, provide telecommunication relay services so that individuals who use non-voice terminal devices or Telecommunication Devices for the Deaf (TDDs) will have opportunities for communications equal to those provided to customers who use voice telephone services.

Miscellaneous Provisions -- Title VI contains several miscellaneous provisions which are important to employers. Specifically, Section 601(a) provides that nothing in the ADA shall be construed to reduce the coverage of the Rehabilitation Act or to apply a lesser standard of protection than required under the Rehabilitation Act. Similarly, Section 601(b) provides that nothing in the ADA shall be construed to limit any state or federal law that provides any greater protection for the rights of individuals with disabilities than the ADA. Section 602 contains a prohibition on retaliation, similar to that found in Section 704 of Title VII of the Civil Rights Act of 1964. Section 605 provides for an award of attorney's fees to the prevailing party in any action or administrative proceeding commenced under the ADA.

ANALYSIS

DIFFERENCES BETWEEN ADA AND EXISTING LAW

Proponents of the ADA have stressed that the primary differences between the ADA and the Rehabilitation Act are not differences of substance, but simply differences in scope, in that the ADA will apply to more employers. In fact, however, a careful reading of the provisions of the new ADA indicates there are significant changes from existing law.

Before detailing those differences, it should be emphasized that in talking about the "existing law" under the Rehabilitation Act, we are talking about a body of law which was not developed with the concerns of private employers in mind. This is a particularly important point for those whose familiarity with the Rehabilitation Act is mainly a result of their experience under Section 503, the requirements applied to government contractors. The proponents of the ADA view the existing law under the

Rehabilitation Act as including primarily the law developed under Section 504 (which applies to recipients of federal grants) and Section 501 (which applies to the employment practices of federal agencies). Section 503 is an affirmative action requirement while Section 504 is only a non-discrimination statute.

Thus, to the extent that the Rehabilitation Act requirements have developed in the context of private sector employers, it has generally been with regard to situations where the employer has had a responsibility to take affirmative action, that is, a responsibility to do something more than simply not discriminate.

On the other hand, to the extent that the law of non-discrimination has been developed under the Rehabilitation Act, it has primarily involved situations where the employer was either the federal government or an entity which owed its existence to receipt of significant federal financial assistance. This means, for example, that most of the law with regard to accommodations has been developed in the context of programs which were funded with tax dollars from the federal government, not in the context of a private sector workplace.

Thus, to the extent that the ADA does simply incorporate "existing law" under the Rehabilitation Act, that law will consist primarily of regulations and decisions developed under Section 504 rather than under Section 503.

Reasonable Accommodations -- The ADA defines the term "reasonable accommodation" in Section 3(3) and then discusses the application of the concept in Section 202(b). In each instance, there is some variation between the ADA language and the current law under the Rehabilitation Act.

As you may recall, under last year's version of the ADA, any accommodation whose economic effect was less than "bankruptcy" was reasonable. An employer would have been required to make any accommodation which did not threaten the existence of the business. The "bankruptcy" standard does not appear in this year's version of the bill. Instead, an employer is not required to make an accommodation if the employer can demonstrate that the accommodation would impose "an undue hardship on the operation of its business." Section 202(b)(1).

This language follows the wording of the reasonable accommodation provision in the Section 504 regulations issued by the Department of Health and Human Services at 45 CFR § 84.12. Actually, however, the standard as spelled out by the Supreme Court has been that "accommodation is not reasonable if it either imposes 'undue financial and administrative burdens' on a grantee, ... or requires 'a fundamental alteration in the nature of the program.'" See School Board of Nassau County v. Arline,

107 S.Ct. 1123, 1131 n.17 (1987) citing Southeastern Community College v. Davis, 442 U.S. 397, 410-412 (1979). See also, Alexander v. Choate, 469 U.S. 287, 300 (1985).

To the extent that the ADA does not include the second prong of the standard, it is inconsistent with existing Supreme Court interpretations. The drafters may have assumed, however, that courts or agencies interpreting the ADA would incorporate the entire standard, as restated in Arline. However as Congress is presumed to be aware of existing Supreme Court precedent, the courts are likely to view the language of S. 933 as broadening the accommodation requirements. Accordingly, it would be desirable to have the entire standard restated with the refinements necessary to indicate that the standard is being applied to "employers" and "jobs" rather than "grantees" and "programs."

The deviation between the ADA and existing law is much more obvious in Section 3(3) which defines the term "reasonable accommodation." In this definition, the drafters of the ADA have incorporated some familiar language from the Section 504 regulations. (See Health and Human Services regulations, 45 CFR § 84.12) But, a very significant change has been made in that language. The term "may" in the Section 504 regulations has been changed to read "shall" in the ADA.

Thus, the Section 504 regulations provide that "Reasonable accommodation may include: ... job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions." (emphasis added) 45 CFR § 84.12(b). The ADA incorporates each of these suggested items as part of the definition of reasonable accommodation, by stating that the term reasonable accommodation "shall include - job restructuring,... ." (emphasis added).

This change, albeit only a single word, necessarily creates questions about the interpretation and application of the term reasonable accommodation in the ADA. Under Section 504, an accommodation which involves job restructuring would be examined to determine whether that particular accommodation is reasonable in that particular situation. The literal meaning of the new language of the ADA appears to be that each of the listed steps is a required accommodation, the reasonableness having already been determined by the statute. While this change in language may be the result of a simple oversight in drafting, the courts routinely read the terms "may" and "shall" as having different meanings. If the drafters do not intend to change the substantive law of the Rehabilitation Act, they should use the same language used in the Section 504 regulations. Clarity on the meaning of this provision is particularly important for private employers because this list of specific accommodations

was never included in the Section 503 regulations issued by the Department of Labor.

It may be noted that while the ADA has incorporated subparts (a) and (b) of the Section 504 regulation on reasonable accommodation, (45 CFR § 84.12) the drafters chose not to include subpart (c) which spells out the factors to be included in determining whether an accommodation would impose an undue hardship. That subpart specifies that the factors to be considered include:

(1) the overall size of the recipient's program with respect to the number of employees, number and type of facilities, and size of budget;

(2) the type of the recipient's operation, including composition and structure of the recipient's workforce; and

(3) the nature and cost of the accommodation needed.

It is not clear why the sponsors of the ADA have chosen to include one segment of the regulation in the ADA while excluding another. If the statute is going to define "reasonable accommodation," it should define it fully and correctly. Otherwise the result will be confusion when a court attempts to ascertain the intent behind incorporating only a portion of the definition.

Of course, if the above-cited language from § 84.12(c) were to be included, it would have to be rewritten to focus on private employment rather than on recipients of federal financial assistance. Indeed, some additional refinements would seem to be appropriate if the Section 504 standards are to be transported generally into the ADA provisions applicable to private employers.

The difficulty of simply applying existing Section 504 law to private employers can be seen, for example, in the court's decision in Nelson v. Thornburgh, 567 F. Supp. 369 (E.D. Pa. 1983), a case cited frequently by proponents of the ADA as an example of how the reasonable accommodation analysis is to be made. The questions raised by that decision are not directed at the particular accommodation which the court ordered; that is, the hiring of several part-time readers for several blind caseworkers at the Pennsylvania Department of Public Welfare. Rather, the concerns focus on the court's rationale in reaching that decision. The court estimated that the part-time readers would cost approximately $6,600 per year for each caseworker, who received a salary of approximately $21,400 per year. The court noted that the agency that employed the caseworkers had suffered

budget cutbacks and that its financial resources were limited. However, the court concluded, the cost of the readers was modest when compared to the agency's overall administrative budget.

> I am not unmindful of the very real budgetary constraints under which the [agencies] operate, and recognize that accommodation of these plaintiffs will impose some further dollar burden on an already overtaxed system of delivery of welfare benefits. But the additional dollar burden is a minute fraction of the [agencies'] personnel budgets. Moreover, in enacting section 504, Congress recognized that failure to accommodate handicapped individuals also imposes real costs upon American society and the American economy. ... When one considers the social costs which would flow from the exclusion of persons such as plaintiffs from the pursuit of their profession, the modest cost of accommodation ... seems, by comparison, quite small.

567 F. Supp. at 382. Before the ADA is acted upon by Congress, it would be useful to clarify whether this type of analysis, perhaps appropriate when the employer is a public agency operating with federal financial assistance, is to be followed when the employer is a private entity receiving no federal grants. The question is an important one because even the most expensive accommodations can be found to be "modest expenditures" if the point of comparison is the company's overall administrative or personnel budget.

In examining this point, of course, it is fair to note that the general experience of many EEAC member companies has been that many innovative and successful accommodations have been made with only minor expenditures. At the same time, however, it cannot be ignored that there are requests for accommodations which involve considerably more expense. It is legitimate for employers to be concerned about the open-ended nature of an analysis such as that found in the Nelson decision. The sponsors of the ADA have been sending mixed signals in this regard. Although Senator Harkin offered a list of accommodations that have been made, each of which cost less than $50, his response to the question of cost was similar to that made by Senator Weicker last year. That is, the ADA is a civil rights statute and cost is not a legitimate factor to be considered in applying a civil rights statute. In addition, the sponsors have emphasized that whatever the costs of the ADA may be, those costs are justified because they will result in a reduction of the federal deficit as more individuals with disabilities move off of public assistance and into jobs.

Qualified Individual with a Disability -- The employment provisions in Title II are framed in terms of prohibiting discrimination against a qualified individual with a disability, or qualified individuals with disabilities. The definition of such an individual as a person who can, with reasonable accommodation, perform the essential functions of the job is drawn from the regulations issued under Section 504. See, for example, the Department of Health and Human Services regulations at 45 CFR § 84.3(k). The ADA modifies the definition slightly to include individuals who can do the essential functions of the job without an accommodation.

Although the concept that "qualification" is related to only the essential functions of the job has been part of the regulations under Section 504, it was never included in the regulations issued under Section 503. The practical impact of the concept is closely related to the employer's obligation to provide reasonable accommodation by modifying certain aspects of an individual's job duties. A key factor in determining the extent of that obligation will be the definition of "essential functions," a term which is not defined in the ADA. It may be noted that when it issued the regulations containing the term "essential functions," the Department of Health and Human Services explained that term was used to assure that handicapped persons would not be disqualified simply because they "may have difficulty in performing tasks that bear only a marginal relationship to the particular job." See 45 CFR § 84, Appendix A. If no definition of "essential elements" is placed in the statute, the statements made in congressional committee reports and during the congressional debate may be instrumental in suggesting how broad the obligation on private employers will be to modify or restructure jobs.

ENFORCEMENT PROVISIONS

The employment discrimination provisions of ADA would combine the enforcement procedures and remedies of Title VII of the Civil Rights Act of 1964 and a post-Civil War statute, 42 U.S.C. § 1981. The Title VII procedure, of course, is one focused on an investigation and conciliation efforts by the EEOC to promote voluntary resolution by the parties. If the EEOC process fails to resolve the dispute, there is the opportunity for a lawsuit as a final resort. Section 1981, on the other hand, involves direct resort to the federal courts, with the opportunity for a jury trial and the potential of a verdict that includes a large award of compensatory and punitive damages, not available under Title VII.

In announcing the new version of the ADA, the bill's chief sponsor, Senator Harkin, pointed to disability discrimination as a serious economic problem for our society. He then suggested that

victims of other kinds of discrimination can "march over to the courthouse, file a lawsuit and win." But, he added, there is still one group of Americans who do not have this right. "To this day," he said, "nothing prevents an employer ... from excluding Americans with disabilities. It's time we changed that -- and opened the courthouse door for persons with disabilities." The new draft of the ADA clearly reflects this special emphasis on litigation as a primary means of achieving results.

Senator Harkin has mentioned several times that he wants the ADA to be passed in 1989 because this is the 25th anniversary of the Civil Rights Act of 1964 which prohibited employment discrimination on the basis of race, sex, and national origin. But, the sponsors of the ADA seem to have overlooked the fact that the effectiveness of the 1964 law is due to the vision of legislators who pushed to create a prohibition on employment discrimination which focused on cooperation and voluntary compliance as the preferred means for achieving its goal. By providing for Section 1981-type lawsuits which allow -- indeed, encourage -- individuals to circumvent the EEOC's conciliation process, the sponsors of the ADA have opted for an enforcement scheme which ignores the heart of the Civil Rights Act of 1964. The inclusion of the Section 1981 procedures and remedies makes it fair to ask whether the first priority is opportunities in the workplace or opportunities in the courthouse.

The Section 1981 procedures provide individuals an incentive to circumvent the conciliation process. As the Supreme Court recognized in Johnson v. Railway Express, 421 U.S. 454, 461 (1975), the filing of a lawsuit under Section 1981 can tend to deter efforts at conciliation. Indeed, when Congress established the current enforcement scheme for Title VII, it deliberately selected cooperation and voluntary compliance as the preferred means for achieving the goal of eliminating employment discrimination. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974). See also Ford Motor Co. v. EEOC, 458 U.S. 219, 228 (1982), indicating that voluntary compliance can end "discrimination far more quickly than could litigation proceeding at its often ponderous pace."

Courts construing the Age Discrimination in Employment Act have recognized that claims for compensatory and punitive damages would interfere with statutorily-mandated conciliation. See e.g., Rogers v. Exxon Research & Engineering Co., 550 F.2d 834, 840-41 (3d Cir. 1977), cert. denied, 434 U.S. 1022 (1978). That court noted that introducing the "vague and amorphous concept" of pain and suffering damages into the administrative setting "might strengthen the claimant's bargaining position" but it also would "introduce an element of uncertainty which would impair the conciliation process." 550 F.2d at 841. The court also observed that "[t]he possibility of recovering a large verdict for pain and suffering will make a claimant less than enthusiastic about

accepting a settlement for only out-of-pocket loss in the administrative phase of the case." Id.

The motivation behind combining these two distinct enforcement schemes of Title VII and Section 1981 appears to be simply a desire to assure that individuals with disabilities have available to them whatever rights and remedies might be available to other victims of employment discrimination. This simple logic has only superficial appeal, however. In fact, not all of the protected groups have access to Section 1981, which is a race discrimination statute that has been interpreted to include some forms of religious or national origin discrimination. But, it clearly provides no rights to a victim of sex discrimination, or age discrimination. In addition, the prohibitions on sex, race, national origin and age discrimination do not contain any requirement comparable to the "reasonable accommodation" aspect of the prohibition on disability discrimination which requires employers to respond on an individual basis. That unique aspect of the ADA would seem to dictate the need for a consistent administrative scheme, with courts playing a role only as a last resort.

A better approach would seem to be to proceed on the basis of the years of experience we already have, under Title VII as well as under the Rehabilitation Act, to assess what enforcement structure is most likely to be effective and efficient in producing the desired goals of this legislation. While there is currently an open issue in Patterson v. McLean Credit Union, (U.S. No. 87-107), with regard to whether Section 1981 properly applies to claims of private sector employment discrimination at all, few would maintain that Section 1981 has been the most effective law in our arsenal against employment discrimination. The remedies offered by Section 1981 may be attractive on an individual basis as a potential windfall for a plaintiff, but there is an inherent conflict between that law and the provisions of Title VII.

In setting up an enforcement framework, the drafters have surprisingly failed to include one of the provisions of the Rehabilitation Act regulations which has generally been a most useful and efficient mechanism. Those who have had experience in working with the procedures of Section 503 generally acknowledge that one of the best devices included in the Rehabilitation Act enforcement scheme is the provision which allows the agency, upon receipt of a complaint of discrimination, to refer the matter to the employer's internal complaint procedure for up to sixty days. See 41 CFR § 60-741.26(b). This can assure an opportunity for the parties to resolve the complaint where the alleged discrimination is the result of an oversight or misunderstanding. The addition of such a provision to the ADA procedures would be a positive step for employers and employees, as well as for the enforcement agency and the courts.

DRUG AND ALCOHOL ABUSE

By virtue of reworking certain definitions, the ADA changes the approach to issues of drug and alcohol abuse currently found in the Rehabilitation Act. The existing law under the Rehabilitation Act excludes from coverage as an "individual with handicaps" any person who is an alcoholic or drug abuser and whose current use of drugs or alcohol prevents the individual from performing the duties of the job in question. The existing definition also excludes from coverage any alcoholic or drug abuser whose current use would constitute a direct threat to property or the safety of others. See 29 U.S.C. § 706.

The ADA takes a somewhat different approach. The issue of coverage of drug addicts and alcoholics is not addressed as part of the basic definition of who is an individual with a disability. Rather, the ADA provides that as part of its "qualification standards" an employer may require that the current use of alcohol or drugs by an alcoholic or drug abuser does not pose a direct threat to property or the safety of others in the workplace. Under the ADA, "qualification standards" which tend to identify or limit individuals with disabilities must be shown by the employer to be necessary and substantially related to the ability of the individual to do the job in question. Thus, the approach of the ADA clearly places on the employer the burden of demonstrating that a drug addict who is currently using drugs poses a direct threat in the workplace. Otherwise, that individual presumably is protected by the ADA.

The combination of this new definition and the ADA's restriction on tests which "tend to identify" individuals with disabilities could arguably restrict employer drug screening practices. An individual screened out by such a test arguably would be able to challenge the exclusion and thereby put the employer in the position of having to demonstrate that the exclusion is necessary and substantially related to the ability of an individual to perform the essential functions of the particular job.

This approach of the ADA also appears to be in conflict with the responsibilities placed on employers under the Drug-Free Workplace legislation passed by Congress last year. That law requires covered government contractors to certify that they are maintaining a drug-free workplace. A false certification, or failure to carry out the specific requirements of the law, can subject the contractor to debarment from future government contracts for up to five years. The ADA, however, appears to create a situation where a contractor who becomes aware of an employee's drug use can take no action to remove that employee from the job unless the employer can demonstrate that the

employee poses a direct threat to others in the workplace. At hearings this week, Senator Harkin indicated he did not believe there was a conflict between the ADA and the drug-free workplace requirements. If no conflict is intended, then clearer language is called for. As it stands now, the ADA approach to drug and alcohol abuse raises questions about exactly how Congress expects employers to respond to drug and alcohol abuse issues in the workplace.

The ADA's approach to contagious diseases is the same as that explained above for drug and alcohol abusers. That is, the employer may adopt a qualification standard which requires that individuals with a currently contagious disease not pose a direct threat to the health or safety of other individuals in the workplace. The ADA, thus, would take an approach somewhat different from the Rehabilitation Act, which was amended last year to exclude from the definition of "individual with handicaps" any person whose currently contagious disease constituted a direct threat to the health or safety of others in the workplace. 29 U.S.C. § 706(c).

GENERAL PROHIBITIONS

One of the most ambiguous segments of S. 933 is Title I, which is a series of general prohibitions on disability discrimination. The essence of these provisions is drawn from the regulations issued under Section 504 of the Rehabilitation Act. (See 45 CFR § 84.4). While the meaning of these provisions may be clear if viewed in the context of a program funded by a federal grant, the application of these prohibitions to private employers becomes uncertain. For example, Section 101(a)(1)(C) of ADA prohibits providing an individual with disabilities a job which is "less effective" than the job provided to others. Section 101(a)(2) provides an explanation of the meaning of "effective" in terms of benefits and services, but nowhere in the bill is the term "effective" defined as it relates to a job. Does it mean something which is not otherwise covered by the provisions in Title II dealing with employment? If so, what? If not, what is the need for this ambiguous general prohibition?

Another aspect of the general provisions which raises questions is the language in Section 101(a)(1)(E) which makes it illegal to provide significant assistance to an organization or individual that discriminates. Again, the apparent genesis of this provision is in regulations which related to programs which were funded by federal grants. An entity which takes federal grant money and then uses it to support another organization which discriminates runs the risk of losing its federal funding. Section 504 regulations have been interpreted to prohibit providing support to a community recreation group or social organization which discriminates against handicapped persons. See 45 CFR § 84.

Appendix A. But, how is this provision to be applied in the context of the private employers to be covered by the ADA?

For example, if an employer has made significant financial contributions to an educational institution, and that institution is accused of handicap discrimination, is the employer subject to some sort of joint or vicarious liability under the ADA? Is the standard one of strict liability, or does the employer first have to be aware of the discrimination? Are there any limitations on the reach of this provision? Is it limited to financial support or does it apply to other forms of support? For example, if a manager of a little league team excludes an individual with disabilities from that team, would that individual be able to file a lawsuit in federal court against the employer which provided all the uniforms and equipment to the league? If an employer allows a community social organization to meet on its premises, is that employer subject to a federal lawsuit if that organization excludes an individual with a disability from participating? While the sponsors have said nothing to indicate that they intend to impose expansive vicarious liability, the plain language of the legislation says nothing to indicate that there are any limitations.

Indeed, the problem here is typical of other aspects of the legislation where the sponsors simply appear to assume that standards devised to limit discrimination by the recipients of federal grants can easily be transported into a program intended to prohibit employment discrimination in the private sector.

Finally, there is one additional troublesome aspect to the general prohibitions in Title I. This problem, however, appears to be the result of a deliberate decision by the drafters rather than merely an oversight. As noted above, the general provisions are drawn from language in regulations issued under Section 504. In the Section 504 regulations, however, these provisions specifically protect "qualified handicapped persons." In incorporating each of these provisions into the ADA, the term "qualified" has been deleted. In fact, the term "qualified" appears nowhere in Title I. The plain language of Title I would seem to make it illegal for an employer to deny a job to an individual with a disability where that disability made the individual unqualified for the job. To this extent, Title I appears to expand upon -- rather than conflict with -- the employment provisions in Title II which limit the protection of the law to qualified individuals. Again, the question which must be answered is precisely what are the provisions in Title I intended to add to the specific provisions in Title II? If they are merely duplicative, is there any need for the Title I provisions? If they are not intended to be duplicative, the sponsors should spell out clearly how these provisions will apply to private employers and why the term "qualified" has been excised.

DISPARATE IMPACT

The provisions in Title I as well as language in Title II appear to envision the application of the disparate impact theory as a means of proving discrimination. In simple terms, the disparate impact theory is that theory which permits an individual to make out a prima facie case of discrimination simply on the basis of statistics, without any showing of discriminatory intent. This theory does not appear specifically in the language of Title VII of the Civil Rights Act of 1964, but was devised by courts as a means of scrutinizing the discriminatory impact of certain facially-neutral selection criteria -- such as a height requirement or a requirement that an individual have a high school diploma -- which did not specifically exclude women or minorities but which did have a disproportionate impact on a protected group.

The manner in which the disparate impact theory has been incorporated into the ADA raises several concerns. First, unlike the disparate impact theory under Title VII, which applies to practices which disproportionately exclude women or minorities from job opportunities, the drafters of the ADA have applied the theory to standards, tests or criteria which tend to identify or limit any class of qualified individuals with disabilities.

The inclusion of the term "identify" is new. That term does not appear in the Section 504 regulations. What is a test which tends to identify individuals with disabilities? Is this provision intended as a subtle prohibition on the use of pre-employment physical examinations? Last year's version of the bill specifically prohibited such examinations. Does the language in this year's version also prohibit the use of post-employment physicals, used by many employers as a baseline examination? None of the explanatory materials provided by the sponsors discusses the term "identify", so it is difficult to determine what is intended by the addition of that term. Some proponents have suggested that its use in the bill is designed simply to prevent employers from making inappropriate pre-employment inquiries about an individual's disability. If this is all that is intended, it would seem that a better provision could be drafted.

For example, government contractors subject to Section 503 of the Rehabilitation Act are required routinely to give individuals an opportunity to identify themselves as an "individual with handicaps." The Section 503 regulations issued by the Department of Labor spell out language that is used to advise a handicapped individual that the employer has an affirmative action plan and to inquire about any accommodations that might be made. See 41 CFR § 60-741, Appendix B. This

Section 503 approach properly recognizes identification as the first step, and a necessary step, toward providing reasonable accommodation. An individual who chooses not to identify himself or herself as an "individual with handicaps" is free to decline the invitation to self-identify and to work without any employer-provided accommodation.

Of course, there is a basic tension between the desire of the drafters to not have individuals with disabilities identified and the desire of the drafters to apply the disparate impact theory which requires employers to count people according to categories. The adverse impact approach as applied under Title VII of the Civil Rights Act of 1964 requires adequate statistical information about the number of minorities and females in the relevant labor market with appropriate qualifications for a particular job. These statistics are then used as a basis of comparison with the number of minorities and females identified in the employer's workforce. There is at this time no adequate source of comparable statistics about the availability of qualified individuals with disabilities. Moreover, given the number of individuals with a particular disability in comparison to the overall workforce, it is doubtful that such statistical analysis would have legal or practical significance.

Apart from the "identify" issue, there are other serious questions about the manner in which the ADA has incorporated the disparate impact theory. Do the sponsors intend to eliminate those limitations which already exist in the law with respect to the application of the disparate impact theory? Specifically, is the statutory language in the ADA intended to incorporate or to overrule the Supreme Court's decision in Alexander v. Choate, 469 U.S. 287 (1985)?

The Supreme Court was very clear in its unanimous decision in Alexander v. Choate that there are limitations in the way the disparate impact theory can be applied under the Rehabilitation Act. That case involved a challenge to a Medicaid rule which limited the number of days of inpatient services which were covered during a year. It was argued that such a limitation was illegal under the Rehabilitation Act because it had a disproportionate effect on handicapped persons. The Supreme Court, in an opinion by Justice Marshall, rejected this argument stating that Congress would have to give some indication in the form of statutory language or legislative intent if it wanted to require each recipient of federal funds to evaluate the effect on the handicapped of every proposed action that might touch the interests of the handicapped, and then consider alternatives for achieving the same objectives with a less severe impact on the handicapped. Without such a clear signal from Congress, the Court was reluctant to rule that Section 504 embraced all claims of disparate impact discrimination. Is the language in the ADA designed to give the courts that signal? Are there any

limitations on the disparate impact theory embraced by the ADA? The sponsors should make their intentions clear.

Revision of Traditional Disparate Impact Theory -- In examining the ADA's requirements with regard to proof of discrimination based on the effects of an employer's job criteria or tests, it should be noted that the burden of proof allocation in the ADA is not consistent with either the standard applied under the Section 504 regulations or the standard applied by the Supreme Court in race and sex discrimination cases.

Under the Section 504 regulations issued by the Department of Health and Human Services, for example, a recipient of federal funding has the obligation not to use any selection criterion that screens out handicapped persons, unless the recipient could show the criterion "to be job-related for the position in question." The burden of demonstrating the existence of alternative criteria with less discriminatory impact was placed on the enforcement agency (that is, the Director of the Office of Civil Rights At HHS). See 45 CFR § 84.13.

In transporting this theory into the ADA, several changes have been made. First, the burden on the employer is described not as showing that the criterion is job-related, but rather the employer is expected to demonstrate that it is "both necessary and substantially related to the ability of the individual to perform ... the essential components of such particular ... job." Section 101(b). Is the change from "job-related" to "substantially related" intended to increase the burden on the employer who must justify a selection criterion?

Second, the ADA shifts the burden with respect to alternative criteria, requiring the employer to demonstrate that "the essential components cannot be accomplished by applicable reasonable accommodation, modifications, or the provision of auxiliary aids or services." Section 101(b)(1). This shifting of the burden with respect to available alternatives is not only contrary to the Section 504 regulations, it is also a departure from the traditional theory of disparate impact discrimination as applied by the Supreme Court since 1971. See Albemarle Paper Company v. Moody, 422 U.S. 405, 425 (1975) ("it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest... ."). The analysis of the bill prepared by the sponsors does not address this departure from established law.

Definitions and Drafting Issues - Finally, with regard to this aspect of the bill, there are again several drafting inconsistencies that need to be pointed out because they raise uncertainty about how the ADA might be interpreted and applied. One of these has to do with the term "essential components" which

is used in Section 101(b) of the ADA, referred to above. In Section 201 (5), the ADA defines a qualified individual with a disability as one who can perform the "essential functions" of the job, but the employer's burden is described in Section 101 (b) in terms of "essential components." Is there a distinction intended by the use of these different terms?

In Section 101(b), the ADA sets forth the employer's burden to demonstrate that the essential components of the job cannot be accomplished with the use of "auxiliary aids or services." This term, "auxiliary aids or services" is specifically defined in the ADA, Section 3(1), as meaning qualified interpreters for individuals with hearing impairments, qualified readers for individuals with visual impairments, and various other devices and services traditionally thought of as accommodations. Of course, the employers duty to provide an accommodation is subject to the reasonableness standard. However, the reasonableness standard does not appear either in the definition of auxiliary aids and services, or in the statement of the employer's obligation with respect to such aids and services. Again, this may be simply a drafting oversight, but because auxiliary aids and services have been defined separately from accommodations, questions are likely to arise about the application of this requirement.

DUPLICATION IN COVERAGE

As noted above, the ADA is intended to be an addition to, not a replacement for, existing prohibitions on handicap discrimination. Employers who are government contractors, for example, will be expected to comply with both Section 503, enforced by the Department of Labor, and with the ADA, enforced by the EEOC and private lawsuits. In addition, there are 44 states which have current prohibitions on handicap discrimination, many of which include requirements for accommodation of individuals with disabilities. Section 601 of the ADA specifically provides that the new law should not be interpreted as reducing the scope of the Rehabilitation Act. Thus, for many employers, the ADA will provide at least a third layer of enforcement with respect to handicap discrimination issues.

Proponents of the ADA have argued that the 44 state laws vary so greatly from one to another that these state laws are no substitute for a comprehensive federal statute establishing national standards. Indeed, the proponents are correct in stating that there are significant differences among the various state laws in this area. But there is nothing in the ADA to protect employers from these multiple layers of enforcement or from simultaneous enforcement actions in different forums. Moreover, nothing in the bill assures a government contractor

that the Department of Labor and the EEOC will both reach the same conclusion with respect to whether a particular accommodation is sufficient or insufficient. And, even when the employer has satisfied both the EEOC and the DOL, there is no assurance that the employer's accommodation will be accepted as satisfactory by a federal court in a private suit under the ADA, or by the state agency which also has jurisdiction over the same workplace. The unnecessary duplication created by having multiple agencies with overlapping jurisdiction means that resources are not being used as efficiently as they might be to promote opportunities and accommodations for individuals with disabilities.

CONCLUSION

A careful review of the new ADA indicates that there are a series of specific problems with the bill. These fall into four general categories. First, the bill's emphasis on litigation reflects a preference for lawsuits, as opposed to conciliation and voluntary compliance as the preferred manner of achieving the bill's laudable goals. Second, the new draft of the bill does not simply take the law as it stands under the Rehabilitation Act, but rather seeks to make significant changes in that law by a series drafting changes in the commonly-understood interpretations of the Rehabilitation Act. Third, to the extent that the ADA does incorporate existing law from the Rehabilitation Act, it is adopting law which has been developed in the context of federal grant programs and applied to organizations which were the recipients of federal funding, not private sector workplaces. There are refinements which must be made in these provisions if they are to be practical, realistic standards for private employers.

Finally, the new draft of the ADA has not responded to the concerns about multiple layers of enforcement which were clearly expressed in response to last year's proposal. This year's version again seeks to impose a layer of enforcement on top of existing disability discrimination requirements without eliminating any of the burden, or seeking to assure consistent enforcement for those employers who would be subject to multiple enforcement schemes. The ironic twist to the sponsors' insistance on overlapping enforcement efforts is that the companies which have demonstrated a strong, consistent commitment to creating opportunities for individuals with disabilities will be among those employers who feel the weight of the duplication and inconsistency which multiple enforcement schemes inevitably create.

Because several draft versions of the new ADA have been circulating for the past few weeks, we have already heard from a number of member companies with questions or concerns about particular provisions. Their comments have been incorporated into the above analysis. We will continue to monitor the progress of this legislation and will welcome any additional comments. For your information, a copy of S. 933, as introduced, is included in this mailing. Your questions concerning this memorandum may be directed to Larry Kessler or John Tysse at (202) 789-8650.

Memorandum

To: Members of the Committee on Education and Labor
From: Pat Morrissey, Professional Staff and
Randy Johnson, Labor Counsel
Subject: Reactions to the letter on the Americans with Disabilities Act of 1989 from the Consortium for Citizens with Disabilities

Background

On May 9, 1989, the Americans with Disabilities Act of 1989 (ADA) (H.R. 7723 and S. 933) was introduced in the House and Senate. The ADA would prohibit discrimination on the basis of disability in most areas of the private sector -- employment, transportation, public accommodations, and telecommunications -- as well as in services and opportunities provided by State and local governments not now covered under Federal law. For more information on this legislation see staff memos of 4/21, 5/23, and 6/5 in 1989.

On June 1, 1989, the Consortium for Citizens with Disabilities (CCD) sent letters to Mr. Bartlett, Mr. Gunderson, and possibly other Members of the Committee on Education and Labor (attached) objecting to a "Dear Colleague" sent by Mr. McCollum on the ADA. This memo clarifies and expands on points in the CCD letter.

REMEDIES

The ADA includes a wide range of remedies and procedures; they vary across its four principal titles. CCD contends that such remedies -- encompassing the full range from injunctive relief and attorney's fees to punitive damages -- are necessary to provide "... true protection and ... to parallel the remedies available to other minorities."

Complying with prohibitions against discrimination on the basis of race and sex is not always the same as it is for disability. Such compliance, in terms of disability, involves not only the question of access but often involves reasonable accommodation in order to achieve access. This places special burdens on both the covered entity and the individual with a disability. Such an individual's needs for reasonable accommodation must be known by the covered entity and the covered entity must respond to them. In other civil rights laws there are no comparable considerations.

Given such a conceptual difference, the use of the remedies and procedures in title V of the Rehabilitation Act of 1973 and title VII of the Civil Rights Act of 1964, would provide administrative entities and the courts the opportunity to build

section 1981 provision has not been the only law, or in most cases the primary law, used in employment disputes decided in the courts. Moreover, section 1981 is not available to individuals seeking private right of action in sex discrimination cases. The use of section 1981 also appears to run counter to an emerging trend in some courts and States that have put limits on the amounts that can be awarded for punitive damages by juries.

Given these points, the fact that the ADA provides access to the remedies in title VII of the Civil Rights Act of 1964 in employment cases, and the failure of Congress to place the section 1981 provision in other labor statutes, the argument for retaining section 1981 as a remedy in the ADA would seem marginal.

Selective Exclusion of Administrative Procedures from Another Civil Rights Law. Title IV of the ADA, Public Accommodations, allows an individual who claims to be discriminated against on the basis of disability or one who believes he or she is about to be, up to two years to file for appropriate relief in Federal court. If the individual is successful, he or she may be awarded actual and punitive damages, a temporary or permanent injunction, and "such affirmative action as may be appropriate."

In addition in title IV of the ADA, the Attorney General may file for similar relief in "pattern or practice of resistance" to protected rights cases. Besides the availability of the remedies that are available to the individual, in cases brought by the Attorney General civil penalties of up to $50,000 (first offense) and up to $100,000 for each subsequent offense are authorized.

These provisions in title IV of the ADA do parallel those pertaining to disability in the Fair Housing Amendments of 1988 (amendments to the Fair Housing Act of 1968). However, the availability of an administrative procedure to expedite the resolution of complaints, which is in the Fair Housing statute is not included in the title IV remedies and procedures section in the ADA.

Since the ADA, when enacted, will apply to a full range of entities not previously covered and since individuals with disabilities should be able to understand their rights, determine if their rights have been abridged, and easily seek relief, the remedies in the ADA should lend themselves to clear and consistent interpretations by all parties including the courts. In addition, inclusion of administrative procedures in the ADA wherever appropriate and practical, would seem to encourage fair and expeditious consideration of civil rights complaints by individuals with disabilities and minimize the need to use the courts for resolution of complaint charges.

ANTICIPATORY DISCRIMINATION

The CCD letter says, "The ADA permits a person to sue if he or she believes an act of discrimination is about to occur. This is precisely the right that has been included as part of civil rights acts for years." The letter then cites language in the Fair Housing Act of 1968 as an example. The information in the letter on this point may be interpreted in other ways.

Injunctive relief to stop or prevent injury from a discriminatory act is available in current civil rights laws, but a claim must be based on facts not "beliefs." The concept of anticipatory discrimination would seem to make sense when the issue is settlement on a house. In addition, in the area of construction and the sale or rental of housing, the right to file a prospective complaint has merit. However, how to prove or disprove such a complaint in many other contexts seems less workable, especially in the area of employment. A CRS American Law Division brief characterizes this language as "...a relatively novel, and far broader, concept of legal standing to complain of prospective violations than traditionally embodied in other statutory contexts."

In the section of the CCD letter pertaining to anticipatory discrimination, it also addresses Mr. McCollum's concern about coverage of unintentional discrimination in the ADA. In defense of covering unintentional discrimination in the bill, the letter cites 15 years of case law under section 504 of the Rehabilitation Act of 1973 (which prohibits discrimination on the basis of handicap by Federal grantees) and a Supreme Court Case, Alexander v. Choate.

Covering unintentional discrimination by Federal grantees may be easier to defend and justify, than covering all forms of such discrimination in all situations in the private sector. Until the private sector develops experience, expertise, and resources to provide access and reasonable accommodation in a proactive manner, coverage of unintentional discrimination in the ADA in some circumstances may appear as problematic. The situations in which unintentional discrimination would be covered in the ADA should be clarified. The decision in the Alexander v. Choate case would seem to reinforce this suggestion.

Alexander v. Choate involved a class action suit in which the plaintiffs contended that reducing the annual in-hospital days for Medicaid patients in Tennessee would have a disparate impact on individuals with handicaps and therefore would be a violation of section 504. The Supreme Court held that "... section 504 and its implementing regulations reach some claims of disparate-impact discrimination, the effect of Tennessee's reduction in annual inpatient hospital coverage is not among them."

Justice Marshall, writing for the Court, acknowledged that section 504 of the Rehabilitation Act covered some forms of unintentional discrimination. He offered some examples where such discrimination might be prohibited -- but again this was in the context of applying such prohibitions to recipients of Federal funds -- "transportation and architectural barriers, the discriminatory effect of job qualifications...procedures, and the denial of special education....." Thus, although cases involving unintentional discrimination may be covered in these areas within the context of section 504, others may not (e.g., inpatient hospital days, as in the Choate case). Given this distinction made under section 504 by Justice Marshall, it would seem useful to have a full discussion about where, when, and how unintentional discrimination should be prohibited in the private sector, and then express it clearly in the ADA.

CONTAGIOUS DISEASES, ALCOHOLISM, AND DRUG ADDICTION

Much discussion and debate is likely to occur over the provisions related to alcohol and drug use, and contagious diseases in the ADA. Additional clarity in the provisions seem warranted, especially for the one which addresses alcohol and drug use.

Parallelism with other civil rights laws. The CCD letter is correct in stating that the same language on alcohol and drug use and contagious diseases is contained in the Fair Housing Amendments of 1988 and the in ADA, but not correct in stating that such language is contained in the Civil Rights Restoration Act and the ADA.

The Civil Rights Restoration Act did amend section 504 in the same manner for coverage of contagious diseases, however, it did not amend the section 504 language on alcoholism and drug addiction (Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of handicap by Federal grantees; the 1978 amendments to this Act added a provision excluding individuals who are alcoholics or drug addicts from the definition of individuals with handicaps). Thus, the Civil Rights Restoration Act did not alter the current understanding of protection of individuals with alcoholism or drug addiction under section 504 of the Rehabilitation Act.

With the same language in the Fair Housing Law, section 504, and the ADA, the courts may draw on section 504 case law for many interpretations in cases involving claims of discrimination based on contagious disease. However, because the Fair Housing Act and the ADA approach prohibitions against discrimination on the basis of alcohol and drug use differently than the approach in section 504, the legal precedents established under section 504 case law on alcohol and drug use may be of limited value in similar cases brought under the ADA.

Burden of Proof and a Drug-Free Workplace. A fundamental difference between the ADA and section 504 appears to be related to the burden of proof. Under section 504 an individual who is an alcoholic or drug addict is protected only if the individual with such a condition proves initially he or she is able to do the job and does not pose a direct threat to the safety of others. On these grounds if the individual fails to prove them, the court would dismiss the case.

In the ADA the covered entity is permitted to have a policy that excludes persons who use alcohol or drugs if they pose a direct threat to the property or safety of others. However, it would appear that the burden of proof is initially on the employer both to justify the policy and its application in the individual case.

The CCD letter states, "The ADA is completely consistent with the recently passed drug-free workplace law. The ADA does not grant any protection for the use of drugs in the workplace." This interpretation may not be universally accepted. It would seem that the ADA would require a covered entity to demonstrate that the use of alcohol or drugs poses a direct threat to the property and safety of others, before the court would agree a qualified individual could be denied a job or fired.

Alcoholism or Drug Addiction vs. Alcohol or Drug Use. Another distinction between section 504 and the ADA is one of degree. Section 504 specifically addresses alcoholism and drug addiction. The ADA addresses alcohol and drug use. It would appear that section 504 would not offer protection to the casual user, but the ADA may. It would be useful to state clearly in the ADA what types of users are and are not protected so that future courts have a clear sense of Congressional intent.

Contexts of Interpretation. There would appear to be some merit, as well as ability, to determine if alcohol and drug use poses a direct threat to the property and safety of others in a housing context, however, under the ADA establishing a direct threat in cases brought under the diverse titles in the ADA would not be so easy.

The Relationship between the ADA Alcohol and Drug Use Provision and Responsibilities to Provide Reasonable Accommodation. The alcohol and drug use provision in title I under "Qualification Standards" of the ADA would raise uncertainty in one additional area -- its relationship to the definition of qualified individual with a disability in title II, which deals with employment.

Title II states that a "qualified individual with a disability" is "...an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position...." If an employer establishes that an individual is a "direct threat", at what point is the employer responsible for offering "reasonable accommodation" to reduce or overcome such a threat, in order to avoid charges of discrimination because he or she failed to provide reasonable accommodation? The interaction of possible exclusionary criteria and reasonable accommodation arose during floor consideration of the contagious disease provision in the Civil Rights Restoration Act of 1988. The authors of the provision did not agree on its effect.

Direct Threat, Reasonable Accommodation, and Contagious Disease. The ADA contains parallel language ("...pose a direct threat to the health and safety...") with which covered entities must comply when dealing with an individual with a contagious disease. Originally, this provision was offered by Senators Harkin and Humphrey during consideration of the Civil Rights Restoration Act. Unfortunately, each Senator had a different interpretation of its application. Senator Humphrey viewed it as a provision that would function as a gatekeeper, limiting the number of individuals protected. Senator Harkin primarily viewed the provision as one that would help define the nature of reasonable accommodation an individual with a contagious disease could receive. It would seem very useful to attempt to clarify the relationship between the concept of direct threat and reasonable accommodation in the ADA so all parties would be able to establish, before hand, the validity of their positions in litigation.

REASONABLE ACCOMMODATION

The CCD letter says, "There is no inconsistency between the ADA's requirement that employers provide reasonable accommodations and that employers provide equal and effective benefits." When viewed in terms of specific situations this premise would sometimes be true, but the "equal opportunity" provision in title I of the ADA addresses more than benefits and would appear to encompass reasonable accommodation. It states:

> For purposes of this Act, aids, benefits, and services to be equally effective, must afford an individual with a disability an equal opportunity to obtain the same result, to gain the same benefit, or reach the same level of achievement, in the most integrated setting appropriate to the individual's needs.

This provision would seem to put qualitative and quantitative conditions on what may constitute reasonable accommodation in an employment setting. The section 504 regulations contain the "equal opportunity" concept, but it is not included in the part of those regulations pertaining to employment. The omission from the section 504 employment regulations suggests that in some instances there may be conflict or confusion if compliance involves both equal opportunity and reasonable accommodation. The CCD letter acknowledges such potential conflict, but defends the current provision by arguing if there is conflict, the employment title in the ADA would take precedence.

The interaction of the equal opportunity provision and those associated with reasonable accommodation raises another issue. In cases where there is no conflict between equal opportunity and reasonable accommodation requirements, but the equal opportunity requirements would seem to mandate "more" or "better" than would be mandated by the reasonable accommodation requirements alone, what would be expected?

Given the potential "umbrella" effect of the equal opportunity provision in the ADA, it would be very useful to clarify its intended effect on other provisions in the bill. If the effect is not clarified, the courts would be left with an under developed sense of Congressional intent.

UNDUE HARDSHIP

The CCD letter states:

> The requirement that employers do not have to provide a reasonable accommodation if such an action would cause an "undue hardship" on the business is a long standing concept under Section 504. There is over 15 years of case law interpreting this concept. The very essence of this concept is flexibility -- under Section 504 regulations and case law, a determination of undue hardship depends on the particular disability, the particular job, the nature and size of the employer, and the availability of accommodation alternatives and resources....

"Undue hardship" is not defined in the ADA. It would be an important addition to the bill to define it in terms of variables like those listed in the CCD letter, especially if case law over the last 15 years is consistent or complementary.

FINAL OBSERVATION

The concerns raised by Mr. McCollum, as well as others, about the Americans with Disabilities Act of 1989, can be addressed through drafting changes in the bill. Such clarifications would not seem to limit civil rights for individuals with disabilities, but would seem to ensure that they and those who will be expected to provide opportunities for such individuals, to the maximum extent possible, have a common understanding of what is expected and the consequences if such expectations are not met.

It is important that the final version of the ADA encourage the private sector to engage in a full range of proactive initiatives to expand the rights of individuals with disabilities. Also, the final version of the ADA should not function as an incentive to increase litigation, but function in a manner that encourages conciliation and resolution of complaints, fairly, quickly, and consistently at reasonable costs, both financial and non-financial ones, to all parties.

April 14, 1988

TO: SHEILA BAIR

FROM: JOE FAHA

SUBJECT: AMERICAN WITH DISABILITIES ACT

Attached for your information is a copy of the ADA bill that Harkin and Weicker will be introducing on April 29th. There are some significant changes from previous drafts. Also attached is a copy of Bush's "position statement on disabled Americans".

On Bush's position notice where highlighted that he supports "Federal legislation that gives people with disabilities the same protection in private employment that is now enjoyed by women and minorities." Earlier he talks about access to public accommodations and public transportation. Transportation, Housing and Communications are not discussed to the level that ADA does but it would seem that Bush supports ADA on extension of coverage to the levels of the Civil Rights Act of 64.

I was briefed by Bob Bergdorf and Andy Farbman of the National Council on the Handicapped yesterday. The attached package on the bill has a summary of each section. The bill itself seems rather easy to read. The following are my comments after my discussions with them.

Purpose:

The stated purpose of the legislation is to eliminate discrimination yet section 8 (c)(2) places an affirmative action requirement on employers that is not in the CR of 64. While the burden seems rather minimal, I am concerned about EEOC regs in this regard and the administrative burden it may cause small employers.

Definitions:

The definitions used are primarily from existing legislation. One note, however, is that there has been a change in the definition of "reasonable accommodation." The "undue hardship" language is eliminated in favor of section 7 (a)(1) which uses a criteria of fundamentally altering the essential nature and threatening the existence of the program, activity, etc. This is a higher standard than many courts have applied.

Housing:

Provisions mimic the House version of the Fair Housing bill including the universal design requirements for multi-family dwellings. No retrofitting is required. Dwellings that are open for first occupancy 30 months after the enactment of this bill must meet the universal design standards. (It is my understanding that the House Housing and Banking Committee is reviewing the Judiciary bill to see about jurisdiction because of the universal design requirements.)

If the Fair Housing bill is enacted, it is their intention to remove housing from the bill.

Transportation:

The requirements in this bill are in line with what I am working with the American Public Transit Association on. APTA has not as of yet bought into the entire package but is committed to supporting a policy that requires 100% of all newly purchased fixed route vehicles (buses and rail) be accessible. The number of years this bill requires for completion would really require retrofitting, however, Bob and Andy indicated that the Council is more concerned with movement in the right direction and would be willing to negotiate the time requirements.

Employment:

Under section 8 (c)(2) there is an affirmative action requirement as stated earlier.

The discussions in sec. 8 (c)(3) "Preemployment Inquiries" is a repeat of existing EEOC policy. It seems that the Epilepsy Foundation was concerned that if given the chance EEOC would turn back from these policies.

The Council is not under an illusion that this bill will clear through Congress this session.

DISTRICT OF COLUMBIA SCHOOL OF LA

FAX TRANSMITTAL SHEET

TO: Maureen West

of: Sen. Dole's Office

Fax No. 224-8952

FROM: Bob Burgdorf

FAX NUMBER: (202) 727-9608

RE: Constitutionality of Chapman Amendment

DATE: 6/22/90

PAGES: 9 (INCLUDING TRANSMITTAL SHEET)

FAX OPERATOR: Burgdorf (727-9599)

PLEASE CONTACT FAX OPERATOR IF YOU DO NOT RECEIVE ALL PAGES.

NOTES: Hope this is helpful.

710 12th Street, N.W. • Washington, D.C. 20005 • (202) 727-5325

DISTRICT OF COLUMBIA SCHOOL OF LAW

MEMORANDUM

TO: Robert Tate, General Counsel
Subcommittee on Select Education of the House
Committee on Education and Labor

FROM: Robert L. Burgdorf Jr. RLB
Associate Professor of Constitutional Law

SUBJECT: Constitutionality of the Chapman Amendment

DATE: June 20, 1990

This memorandum presents my opinion on the constitutionality of the amendment to the Americans with Disabilities Act dealing with "Food Handling Jobs," offered by Representative Chapman and adopted by the House of Representatives on May 17, 1990 (136 Cong. Rec. H 2478; Amendment no. 5 in House Report 101-488). For reasons stated herein, my conclusion is that the amendment is unconstitutional.

CONGRESSIONAL DISCRETION

At the outset, it should be noted that the courts accord "great weight to the decisions of Congress" (Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 102 (1973); Fullilove v. Klutznick, 448 U.S. 448, 473 (1980) (opinion of Burger, Chief J.)). Congress has wide discretion to exercise its constitutionally-granted legislative power, and courts generally exhibit appropriate deference to this Congressional authority. The Supreme Court has declared: "When we are required to pass on the constitutionality of an Act of Congress, we assume 'the gravest and most delicate duty that this Court is called on to perform'" (Fullilove v. Klutznick, supra, at 473, quoting, Blodgett v. Holden, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.)). The Supreme Court has held that Congressional discretion in its lawmaking function, particularly in fashioning legislation to ensure equality pursuant to its authority to enforce the Fourteenth Amendment, is sufficient to justify it in establishing a federal minority set-aside program that might be unconstitutional if enacted by a state or local government (compare Fullilove, supra, with City of Richmond v. J.A. Croson Co., 109 S.Ct. 706 (1989)).

LIMITATIONS ON CONGRESSIONAL AUTHORITY

The existence of broad Congressional discretion does not mean that its legislative acts are unreviewable -- that Congress can do whatever it wishes. The Supreme Court has provided the following framework regarding its review of federal laws:

> Here we pass, not on a choice made by a single judge or a school board, but on a considered decision of the Congress and the President. However, in no sense does that render it immune from judicial scrutiny, and it "is not to say we 'defer' to the judgment of the Congress ... on a constitutional question," or that we would hesitate to invoke the Constitution should we determine that Congress has overstepped the bounds of its constitutional power. (Fullilove, supra, at 474, quoting, Columbia Broadcasting System, supra, at 103)

THE REQUIREMENT OF EQUAL PROTECTION

One limit upon Congressional authority in enacting laws is the requirement of Equal Protection of the Laws. Congress may employ classifications and criteria in exercising its legislative powers "only if those classifications do not violate the equal protection component of the Due Process Clause of the Fifth Amendment." (Fullilove, supra, at 2775). "The federal sovereign, like the States, must govern impartially. The concept of equal justice under law is served by the Fifth Amendment's guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment." (Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976) Further, the Supreme Court has declared that "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment" (Buckley v. Valeo, 424 U.S. 1, 94 (1976).

In various circumstances, the courts have had occasion to strike down a number of federal statutes that were held to violate Equal Protection: e.g., Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (invalidated provision of the Social security Act that discriminated against female wage earners); Schneider v. Rusk, 377 U.S. 163 (1964) (struck down provision of the Immigration and Nationality Act of 1952 that discriminated against naturalized citizens); Jiminez v. Weinberger, 417 U.S. 628 (1974) (invalidated provision of the Social Security Act that discriminated against certain illegitimate children); Frontiero v. Richardson, 411 U.S. 677 (1973) (struck down federal statutory provisions regarding military benefits that discriminated against servicewomen); U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973) (invalidated provision of the Food Stamp Act of 1964 that discriminated against households containing an unrelated member). Statutory provisions that violate equal protection are subject to judicial review and invalidation.

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His indicated purpose, rather, was to protect food handling businesses from loss of customers who "would refuse to patronize any food establishment if an employee were known to have a communicable disease." (Id.) He noted that "There is a perceived risk from AIDS," and defended his proposed amendment as "an affirmative reaction of this body to a perceived risk to public health." (136 Cong. Rec. H 2482). Other members of the House who spoke in favor of the amendment, including Representatives Bartlett and Douglas, likewise pointed to loss of customers as the reason why the amendment was needed. Congressman Douglas responded to opponents' arguments and scientific evidence that AIDS could not be communicated through the handling of food: "We agree with you. We understand, Doctor, that you can't get AIDS because the cook cuts his finger and bleeds into the roast beef when he is preparing it, but the customer out there may not buy that." (136 Cong. Rec. H 2480) He declared further that "perception is reality. Everyone in this room knows that. We run election campaigns on perception. It is reality for our voters." (Id.)

Thus, the classification created by the Chapman amendment can be summed up as follows: it carves out an exception for a single class of people -- persons with AIDS or other infectious or communicable diseases -- from the general nondiscrimination mandate of the ADA. The differential treatment afforded this class under the amendment is not justified on the grounds of some intrinsic characteristic of such individuals or their diseases, nor of any actual threat to customers. Instead its rationale is a response to admittedly unfounded perceptions of risk on the part of customers of food handling establishments. All in all, this anomalous provision represents a highly unusual and problematic instance of Congressional line-drawing.

APPLICATION OF EQUAL PROTECTION ANALYSIS TO THE CLASSIFICATION

The courts have not yet had occasion to create a significant body of precedent on the issue of whether persons with AIDS or HIV infection will be afforded heightened scrutiny in equal protection cases. This class does appear to match several of the criteria for "suspectness" established in decisions of the United States Supreme Court, i.e., as being "a discrete and insular minority" (United States v. Carolene Prod. Co., 304 U.S. 144, 152-53 n.4 (1938)); "saddled with disabilities" and "subjected to ... a history of purposeful unequal treatment" (San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 48 (1973)); characterized by a condition that is "immutable" and subject to "social opprobrium" (Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 ((1972); see, also, Frontiero v. Richardson, 411 U.S. 677, 687 (1973)); and regarded with "prejudice and antipathy -- a view that those in the burdened class are not as worthy or deserving as others" (Cleburne v. Cleburne Living Center, Inc.,

473 U.S. 432 (1985)). If AIDS or HIV infection were determined to be a "suspect classification," then the courts would examine legislation providing differential treatment to this class with "strict judicial scrutiny" -- the harshest equal protection standard that is applied to such classifications as race, alienage, and national origin.

Failing to qualify for "strict scrutiny," such a classification might still be afforded "moderate level scrutiny" that is applied to such classifications as gender and illegitimacy. The Supreme Court has indicated that this intermediate level of heightened scrutiny is appropriate for legislative distinctions that "very likely reflect outmoded notions" and that "bears no relation to the individual's ability to participate in and contribute to society" (Cleburne v. Cleburne Living Center, Inc., supra, at 441, quoting Frontiero v. Richardson, 411 U.S. 677, 686 (1973), and Mathews v. Lucas, 427 U.S. 495, 505 (1976)).

It is hard to imagine the classification established in the Chapman amendment surviving either strict or moderate scrutiny equal protection analysis. Indeed, in my opinion, this legislative classification runs afoul of even the minimal equal protection review -- the rational basis test.

The least difficult standard of equal protection requires that a legislative classification must be "rationally based and free from invidious discrimination" (Dandridge v. Williams, 397 U.S. 471, 487 (1970); Richardson v. Belcher, 404 U.S. 78, 81 (1971); Weinberger v. Salfi, 422 U.S. 749 (1975)). "Under traditional equal protection analysis, a legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest" (U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 533 (1973) and cases cited therein).

"Invidious discrimination" refers to differential treatment that is "repugnant" or "obnoxious." It may well be that the Chapman amendment's affording different treatment for people with AIDS grounded in the prejudice and unfounded fears of potential customers may constitute invidious discrimination. But whether or not this is true, it is hard to see how the amendment can satisfy the test of being "rationally related to a legitimate governmental interest."

LEGITIMATE GOVERNMENTAL INTEREST?

It is difficult to identify a "legitimate" governmental interest that is promoted by the legislative classification. Certainly, mere disfavor of individuals with AIDS or condemnation of them as a class is not a legitimate governmental objective. In a case in which it struck down a provision of the Food Stamp Act that was designed to make "hippies" ineligible, the Supreme Court declared that "if the constitutional conception of 'equal protection of

the laws' means anything, it must at least mean that a bare Congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest" (U.S. Dept. of Agriculture v. Moreno, supra, at 534). The proponents of the amendment largely conceded that here is no actual safety interest being promoted. The only proffered interest in favor of the amendment was the economic implications of customer aversion to people with AIDS.

Our country and its courts have long rejected the notion that the preferences and prejudices of customers or co-workers are a legitimate reason for discrimination. In the case of United States v. Gulf-State Theaters, Inc., 256 F. Supp. 549, 552 (N.D. Miss. 1966), the federal court rejected the contention of a theater owner that it was not guilty of racial discrimination because its motivation was "purely economic, i.e., Negroes are unacceptable to the non-Negro patrons upon whose continued support the business depends." The court said, "This distinction is one without a difference and is predicated upon a misunderstanding of the law." Likewise the courts have rejected the use of customer preference as a legitimate excuse for discriminating on the basis of gender. For example, in Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir. 1971), cert. denied, 404 U.S. 950 (1971), the Fifth Circuit Court of Appeals declared that "it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid" (Id. at 442 F.2d 389). In Gerdom v. Continental Airlines, Inc., 692 F.2d 602, 609 (9th Cir. 1982), the Ninth Circuit ruled that "gender-based discrimination cannot be upheld on the basis of customer preferences unrelated to abilities to perform the job."

Even where customer preferences are so strong as to seriously threaten a business, courts are not favorable to allowing customer preferences to justify discrimination; in Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276-77 (9th Cir. 1981), a business refused to hire a woman for a position in another country, where it claimed that none of its customers would do business with her which would "destroy the essence of the business." The Court of Appeals ruled this was not a legitimate defense, "[n]or does stereotyped customer preference justify a sexually discriminatory practice" (Id. at 1276-77). Except for a narrow exception for genuineness and authenticity in performances (i.e., actors and actresses), EEOC regulations expressly disallow "the preferences of coworkers, the employer, clients, or customers" as a defense to a claim of gender discrimination (29 C.F.R. sec. 1604.2(a)(2).

In the case of Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring), Justice Marshall argued that classifications that "put the weight of the government behind racial hatred and separatism -- are invalid without more." Likewise, the Chapman amendment may be viewed as putting the

weight of the government behind prejudice and ill-informed aversions toward people with AIDS. It is hard to see how this can be a "legitimate" governmental interest.

LACK OF RATIONALITY

In addition to the absence of a legitimate governmental interest served by the Chapman amendment, the amendment is subject to challenge in regard to the criterion of rationality.

The most pertinent Supreme Court decision for the application of rationality analysis in this context is Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985). In that case, the Court declared unconstitutional under rational basis analysis a city ordinance that required a special permit for a group home for individuals with mental retardation. The Court ruled that the ordinance "appears to rest on an irrational prejudice against the mentally retarded" and that "the record does not reveal any rational basis for believing that the ... home would pose any special threat to the city's legitimate interests" (Id., at 450, 448). In a portion of the opinion particularly instructive for present purposes, the Court examined rational bases asserted for the ordinance -- "the negative attitude of the majority of property owners" and "the fears of elderly residents of the neighborhood" (Id. at 448). To these proffered claims of rationality, the Court responded:

> But mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable ... are not permissible bases for treating a home for the mentally retarded differently.... It is plain that the electorate as a whole, whether by referendum or otherwise, could not order a city action violative of the Equal Protection Clause, and the city may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."
> (Id., citations omitted)

Ultimately the Court declared that "The question is whether it is rational to treat the mentally retarded differently" (Id. at 449), and concluded that it was not.

Likewise, in the context of the Chapman amendment, negative attitudes and fears of potential customers of food-handling establishments cannot provide a rational basis for the amendment, nor, consistent with equal protection, can Congress give effect to "private biases" by "deferring to the wishes or objections of some fraction of the body politic," i.e., misinformed, fearful customers.

In School Bd. of Nassau County, Fla. v. Arline, 107 S.Ct. 1123, 1123, 1129 (1987), the Supreme Court identified the "basic purpose" of Section 504 of the Rehabilitation Act, which is the primary statutory predecessor and model for the ADA, as being "to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others." The Court observed:

> [S]ociety's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment. Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness....The Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments....
> (Id. at 1129)

It is blatantly irrational for Congress to rely upon the very same prejudiced attitudes, ignorance, myths, fears, misapprehensions, and reflex reactions about contagiousness that the Court described in the Arline case as the basis for an exception from the ADA's nondiscrimination mandate. Such an exception has no rational relation to any legitimate governmental objective and is directly inconsistent with the underlying principles, premises, and requirements of the very piece of legislation it is attached to.

As with the discriminatory provision of the Food Stamp Act in the Moreno case discussed above, it is my conclusion that the Chapman amendment "creates an irrational classification in violation of the equal protection component of the Due Process Clause of the Fifth Amendment" (Moreno, supra, 413 U.S. at 532-33).