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ADDITIONAL VIEWS OF SENATOR HATCH

The story of America is one of ever growing inclusiveness, as more and more Americans have become able to participate in the great mainstream of American life. Persons with disabilities, no less than other Americans, are entitled to an equal opportunity to participate in the American dream.

Indeed, through their own efforts, and with the benefit of a growing array of programs and antidiscrimination provisions at the local, state, and federal levels designed to enhance their abilities to lead lives of independence, not dependence, persons with disabilities have long been writing an inspiring chapter in this quintessential American story. Persons with disabilities, through their hard work and determination, have already made great advances and destroyed many stereotypes which have been used to deny them equal opportunities in the past. They have demonstrated they are no "insular minority" in America. But more can still be done to provide equal opportunity for persons with disabilities.

At the outset of the hearings on S. 933, I stated my support for a comprehensive federal civil rights bill banning discrimination against persons with disabilities. Such protection against discrimination is long overdue. At the same time, I also expressed the view that such legislation must be

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both meaningful and reasonable. Accordingly, I was unable to endorse S. 933, as introduced. There were several serious problems with S. 933, as introduced, including: its excessive penalty scheme; its breadth of coverage of "public accommodations"; its significant departure from the standards of Section 504 of the Rehabilitation Act of 1973, which bans disability discrimination in programs or activities receiving federal aid and in federally conducted programs; and its onerous treatment of the private bus industry.

The substitute version, which emerged from a period of negotiations and was adopted unanimously by the Labor and Human Resources Committee, is still not a perfect compromise. It retains features that I believe merit further improvement. But it incorporated enough important changes to enable me to cosponsor it at the mark-up, while I reserved my right to pursue further changes on the Floor.

At the mark-up, the Committee accepted an amendment which I offered, requiring the Attorney General, in consultation with other federal agencies, to develop and implement a plan to assist covered entities in understanding their duties under the bill.

I also have further concerns about the bill in certain areas.

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I. Small Business Exemption for Public Accommodations.

Title I of the bill bans employment discrimination and is effective in two years. At that time, the employment discrimination provisions will apply to employers with 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year. Two years thereafter -- four years after enactment -- the employment provisions will apply to employers of 15 or more employees.

Title III of the bill covers "public accommodations and services operated by private entities." Private entities defined as "potential places of employment" are subject only to accessibility requirements concerning new facilities designed and constructed for first occupancy later than 30 months after the bill's enactment. These entities include facilities intended for nonresidential use and whose operations affect commerce. Section 301(2).

Private entities defined as "public accommodations," which include much of the private sector, are subject not only to this new construction requirement but also to a wide variety of prohibitions and obligations with respect to their existing facilities and general policies. These prohibitions and obligations pertain to a business in its treatment of customers, clients, and visitors.

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The term "public accommodation" is defined very broadly. It includes not only businesses covered by Title II of the 1964 Civil Rights Act, which bans racial, ethnic, and religious discrimination in public accommodations, defined as places of eating; places of lodging; places of entertainment; and gasoline stations, but it also includes retail stores, service establishments, and other elements of the private sector. Section 301(3). [1]

This ban on discrimination in privately operated "public accommodations" in Title III of the bill is effective 18 months after enactment. In stark contrast to the small business exemption from the bill's employment provisions, however, the bill contains no small business entity exemption whatsoever from these public accommodations provisions.

Thus, the bill creates the following anomaly: a mom-and-pop grocery store is not subject to the bill when it hires a clerk as a new employee, but it is subject to all of the bill's requirements in its treatment of customers, as well

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1) Religicus organizations and entities controlled by religious organizations are completely exempt from coverage under Title III.

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as to an extremely onerous penalty scheme when it violates any of those requirements.

Even under the standards of the substitute bill, the costs some small businesses may incur can be significant[2]. In the disability rights area, nondiscrimination requirements, including those in this bill, not only require elimination of outright exclusion based on stereotypes, they often impose

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2) Some persons may assert that costs should not be a factor in designing a disability civil rights law. In the context of a disability rights law, however, costs may have to be incurred in order to provide nondiscriminatory treatment; e.g., putting in a ramp, providing auxiliary aids and services, and other accommodations. Indeed, the failure to incur reasonable costs in order to provide access is regarded as discriminatory. At some point, however, the undertaking of an accommodation can be so costly or represent such a fundamental alteration in the covered entity's program that the failure to undertake the accommodation is simply not discriminatory. This principle reflects Supreme Court caselaw interpreting Section 504 of the Rehabilitation Act of 1973. E.g. School Board of Nassau County v. Arline, 480 U.S. 273, 287 n. 17 (1987); Alexander v. Choate, 469 U.S. 287 (1985); Southeastern Community College v. Davis, 442 U.S. 397, 409-414 (1979).

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additional duties to make reasonable accommodations to the needs of persons with disabilities. I support these requirements. But, we must acknowledge that these accommodations can cost money. Sometimes the cost is not great, but even under the standards of this bill, these costs can be more than de minimus where necessary to provide accessibility. This is a crucial difference between a disability civil rights statute and a civil rights statute in the race area. In order to provide equal treatment to racial minorities, a business need only disregard race and judge a person on his or her merits. To provide equal opportunity for a person with a disability will sometimes require additional actions and costs than those required to provide access to a person without a disability.

For example, under the public accommodations title of this bill, covered entities must seek to provide "full and equal enjoyment of [their] goods, services, facilities, privileges, advantages and accommodations." Section 302(a). Among the specific requirements applicable to the smallest businesses are:

1. The obligation to provide auxiliary aids and services to persons with disabilities, unless to do so would cause either an undue burden to the entity or a fundamental alteration in its activities. Section 302(b)(2)(A)(iii).

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Auxiliary aids and services are defined in Section 3(1) and can include providing qualified interpreters, qualified readers, signage, taped texts; the acquisition or modifications of equipment or devices; and similar actions and devices.

2. The obligation to make reasonable modifications in policies, practices, and procedures, unless doing so fundamentally alters the entity's activities. Section 302(b)(2)(A)(ii).

3. The obligation to remove "architectural barriers, and communication barriers that are structural in nature, in existing facilities...where such removal is readily achievable." Section 302(b)(2)(A)(iv). The term "readily achievable" is defined in Section 301(5).

4. The obligation to remove "transportation barriers in existing vehicles used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles by the installation of a hydraulic or other lift), where such removal is readily achievable." Section 302(b)(2)((A)(iv)).

5. Where the removal of a barrier described in paragraphs 3 and 4 is not readily achievable, an obligation "to make [the entity's] goods, services, facilities, privileges, advantages

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available through alternative methods if such methods are readily achievable." Section 302(b)(2)(A)(v).

6. The elimination of eligibility criteria that screen out or tend to screen out a person or persons with disabilities unless the criteria are shown to be necessary to the conduct of the activity in question. Section 302(b)(2)(A)(i).

While these requirements will, in theory, generally translate into less actual cost the smaller the entity, any financial or administrative impact on the smallest businesses can be very troublesome for those businesses. Even comparatively "lesser" costs can be quite burdensome for a small business struggling to survive. Further, the determination as to whether an accommodation is an undue burden or a barrier removal is readily achievable may ultimately be made by a federal agency or judge. A small business is less able to absorb an overreaching determination by these authorities than a larger business.

Moreover, government compliance reviews (Section 308 (b)(1)), and the costs of private as well as Attorney General litigation, will add further to those expenses small businesses must bear under the bill's public accommodations title. Indeed, in a private enforcement action, a plaintiff can obtain injunctive relief and attorneys fees. For larger businesses,

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these costs can be more readily absorbed and passed on to a large consumer base. For some smaller businesses, the cost of compliance with injunctive relief combined with attorneys fees might be onerous.

But it is the penalty scheme in an Attorney General action to enforce the public accommodations title that is of particular concern. In an Attorney General action, a court, at the request of the Attorney General, can order the smallest business to pay monetary damages to aggrieved persons. Moreover, the court can order such a business to pay a civil penalty of up to $50,000 for a first violation and up to $100,000 for subsequent violations. This remedy scheme is potentially a very heavy burden, which I will also address as a separate concern.

Opponents of a small business exemption in the public accommodations title of S. 933 claim that since Title II of the 1964 Civil Rights Act has no small business exemption, neither should S. 933. There are several responses to this argument:

1. S. 933 already departs from Title II of the 1964 Civil Rights Act in two important ways:

A. Title II only covers places of eating, lodging, entertainment, and gasoline stations. S. 933 goes well beyond such coverage, encompassing virtually all elements of the private sector as "public accommodations" or "potential places

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of employment," except religious organizations and entities controlled by religious organizations.

B. Title II provides only for injunctive relief in Attorney General actions; this bill, as mentioned earlier, permits recovery of monetary damages and huge civil fines in Attorney General actions.

Thus, it is inconsistent for the opponents of a small business exemption to rely upon Title II as the basis for their opposition when they have so readily departed from that parallel statute in other important respects.

2. In any case, compliance with Title II of the 1964 Civil Rights Act imposes no costs -- it simply requires admitting and serving persons without regard to their color, ethnicity, or religion. As mentioned earlier, compliance with S. 933 can result in costs to covered entities. This difference between Title II and S. 933 alone justifies a small business exemption in public accommodations.

I favor an exemption of small businesses from the prohibitions and obligations in the public accommodations provisions of the bill, i.e., provisions relating to a business's existing facilities and general policies. I would not, however, exempt <u>any</u> public accommodation from the

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requirement that its new facilities be accessible. The cost of accessibility to a new facility when "built-in" to the plans and construction of such a new facility is not burdensome. But for businesses in the operation of their existing facilities and in the provision of auxiliary aids and services, modification of policies, procedures, and criteria, a small entity exemption is appropriate.

I also believe that even with an exemption for small businesses, the marketplace will exert pressure on small businesses which will lead to increased accessibility. When a small business operator sees a larger competitor gain customers with disabilities because the latter business is accessible, the small business operator is likely to take steps it can afford to get some of those customers -- even if those steps don't meet every single requirement of this title -- without exposure to the costs of compliance reviews and litigation.

With this voluntary activity, the requirement that <u>all new</u> facilities be accessible, and the full coverage of all "public accommodations" other than small businesses, I believe we can provide genuine access to public accommodations for persons with disabilities, while assuring that we do not overly burden small businesses in America.

II. <u>Excessive Penalties Against Public Accommodations</u>.

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Under Title II of the 1964 Civil Rights Act (hereinafter "Title II"), as mentioned earlier, a private plaintiff can obtain injunctive relief and attorneys fees. The Attorney General can obtain injunctive relief. No monetary damages or civil penalties are available in either action.

Under S. 933, in an action for a violation of the public accommodations title, a private plaintiff can obtain an injunction and attorneys fees. I believe such relief, paralleling that of Title II, is appropriate.

But, in an Attorney General action under this bill the court can award not only an injunction, but also civil penalties of up to $50,000 for a first violation, and up to $100,000 for subsequent violations. Further, the court can award monetary damages to aggrieved persons when requested to do so by the Attorney General. This relief is excessive and unjustifiable.

The threat of litigation, its cost to covered entities, the added expense of paying the plaintiff's attorneys fees in private litigation, and marketplace factors are all powerful incentives for a business to comply with this bill in the first instance.

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Moreover, if an entity is in noncompliance, injunctive relief is significant. An injunction requires the offending entity to cease its discrimination. If a ramp must be put in, a bathroom made accessible, or policies changed, pursuant to the entity's duties under the bill's public accommodations provisions, a court can order such relief.

Everyone knows that 25 years ago black people and other racial and ethnic minorities were routinely denied the opportunity to eat, to lodge, and to be entertained in places they could afford. Today, while there are still instances of racial and ethnic discrimination in public accommodations, we face an entirely different situation. The public accommodations covered by Title II are now essentially open on a nondiscriminatory basis. This resulted largely from Title II's enactment, with the injunctive relief and attorneys fees enforcement scheme previously described.

Yet, relief in an Attorney General action against a public accommodations under this bill goes well beyond the relief available in an Attorney General action under Title II.

Ironically, a private party, in his own action, cannot obtain monetary damages for himself. The court can award monetary damages, however, to an aggrieved person, <u>in an Attorney General action</u>.

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There is a further anomaly in the bill. The bill subjects state and local governments to the remedies available under Section 505 of the Rehabilitation Act of 1973. Under Section 505, a federal agency, in an enforcement action, may either terminate federal aid to the part of a covered entity where the discrimination occurs or it may refer the case to the Department of Justice for injunctive relief. Civil penalties are not recoverable by the federal government in an enforcement action. Thus, in an Attorney General action, state and local governments, with their enormous tax resources, are subject to lesser penalties than the private sector, which is not supported by tax revenues or, for the most part, federal aid. The potential for a sole proprietor, a mom-and-pop business, or any other business to be more harshly sanctioned than a state or local government in an Attorney General action requires further consideration.

Our purpose here should not be punitive. Providing for monetary damages and huge civil penalties in Attorney General actions is excessive. To the extent we are trying to provide access by enacting this bill, since such access can impose costs on covered entities, rather than penalize a public accommodation by imposing monetary damages and huge civil penalties, we should keep the money available to the entity for use in providing access pursuant to the injunctive relief.

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Proponents of the stiff remedy provisions in S. 933 assert that it parallels remedies now available in an Attorney General action under the Fair Housing Act, as amended last year. This analogy, however, is unpersuasive.

In the field of housing, the original remedies of the 1968 Fair Housing Act proved inadequate to the task of rooting out racial and ethnic discrimination in housing as quickly as hoped. Why? In my opinion, it is because housing discrimination is probably the most persistent form of racial discrimination in the nation today. Thus, toughening the penalties for such discrimination in 1988 made sense and I supported the effort to do so.

But the record in the public accommodations area is much different. As mentioned earlier, the Title II penalties -- injunctive relief and attorneys fees -- have been adequate to work a revolution of equal opportunity.

If the Fair Housing Amendments Act of 1988 had not added disability discrimination to the list of prohibited conduct under the Fair Housing Act, and a ban on housing discrimination on the basis of disability was being added in <u>this</u> bill, the use of Fair Housing Act remedies for such housing discrimination would be appropriate. It is inappropriate,

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I am especially concerned about this bill's impact on the private bus transportation industry. The bill imposes a variety of requirements on these companies, including:

1. The obligation to make reasonable modifications in policies, practices, and procedures, unless to do so would fundamentally alter the company's activities. Section 304(b)(2)(A).

2. The obligation to provide auxiliary aids and services to persons with disabilities, unless to do so would cause an undue burden or fundamentally alter the company's activities. Section 304(b)(2)(B).

3. The obligation to remove "transportation barriers in existing vehicles...where such removal is readily achievable." This obligation does not include the addition of a lift. Section 304(b)(2)(C).

4. Where the removal of a barrier described in paragraph 3 is not readily achievable, an obligation "to make [the entity's] goods, services, facilities, privileges, advantages available through alternative methods if such methods are readily achievable." Section 304(b)(2)(C).

I favor these provisions.

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The truly onerous provision, however, is the requirement that all small bus companies must purchase or lease all new over-the-road buses with lifts six years after the bill's enactment; large bus companies must do so beginning five years after enactment. In the meantime, ironically, having imposed this major requirement on the private bus transportation industry, the bill requires a three-year study to determine whether this requirement is, in effect, feasible. The requirement, however, is not contingent on the results of the study -- it remains in place under this bill even if the study shows that the requirement is excessive.

The bill, in its present form, presents the strong likelihood that private intercity and charter and tour bus service will be seriously curtailed soon after the bill's new bus requirements become effective, if not virtually eliminated at some point thereafter. The stakes are that high.

Unlike state and local government mass transit, which is heavily subsidized by the federal government, private transportation companies receive virtually no federal aid. Private companies provide virtually all of the intercity bus transportation in the country. There are well over one thousand such private, intercity bus companies, such as Greyhound, Gold Line, East Coast Parlor, and Peter Pan. Some

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of these companies provide two kinds of services: over the road regular route service -- that is, scheduled service between communities -- and charter and tour services. Other companies provide only charter and tour services.

These companies serve about 10,000 communities, most of which have no other intercity transportation available to them. The number of communities served has been declining in the last 30 years. According to an Interstate Commerce Commission staff analysis, there was a net loss of nearly 3,400 communities receiving intercity bus service between 1982 and 1986 alone. Ninety percent of the communities losing this service had populations of less than 10,000. This industry operates on a low profit margin. In many rural areas, including in Utah, this private bus service is the only available intercity transportation. There is only token Amtrak service available. Intercity buses provide transportation for those who need a low cost transportation alternative.

The requirement that all new buses have wheelchair lifts would quickly accelerate the loss of private, intercity bus service to our nation's communities, if not entirely end such service, according to the American Bus Association, United Bus Owners of America, and Greyhound (the largest company). Delaying this result by five or six years, in the hope an

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efficient and economical lift will appear on the scene, is small comfort.

A lift for an intercity bus is more expensive than for an intracity bus, such as the Metrobuses used in the District of Columbia, because with the baggage compartment and other differences, access to the intercity bus is higher off the ground -- as much as four or six feet, rather than one foot for an intracity bus.

The added costs for new buses for these private companies include not only the cost of the lift but widening the aisles and making the bathrooms accessible. There are maintenance costs -- and there is little experience with maintenance of intercity bus lifts. There will be a loss of as many as four seats, which especially hurts bus companies during their peak periods, such as holiday periods. Moreover, particularly in rural areas, these companies are successful because of their package express service. The room available for carrying such packages, however, is reduced in lift-equipped buses.

Even if the least expensive lift is used on all new buses -- and this is, I am told, a lift which has had little use in this country and one which not all bus companies might feel is suited to their operations -- the cost of this provision is unreasonable. Indeed, I understand that the principal basis

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for this provision is information from the Regional Transportation District of Denver, Colorado. According to the Department of Transportation, however, Denver has only 17 buses which use a "less expensive" lift developed in Germany. I understand these buses have been in use in Denver for about one year. Moreover, according to the Department of Transportation, Denver uses these buses on one-way routes of less than 30 miles. This usage is atypical for the private bus industry as a whole, which consists of some 20,000 buses which travel far greater distances on trips.

Representatives of the private bus transportation industry have stated that their lowest annual cost estimate for the bill's requirement regarding new buses, which includes lift and accessible restroom installation, loss of revenue seats for lift and restroom accessibility, maintenance costs, and training costs would be so high as to seriously threaten the viability of the private bus transportation industry. This lowest annual cost estimate is based on a cost of $10,100 per new bus for each year its service, and assumes a 10-year life span for the industry's 20,000 bus fleet. In other words, under this analysis, each new bus will cost a company $101,000 over the life of the bus. I note that representatives of the industry believe these estimates are unrealistic and actual costs will be higher.

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The Committee heard virtually no testimony on this vital issue.

I, along with proponents of the present provision, can point to correspondence from officials of the Denver system and the American distributor of the lift in question citing a variety of different figures and costs related to wheelchair accessibility for these over-the-road buses. Following the hearings on the bill, the cost figures have been flying back and forth concerning costs associated with the lift which has recently begun to be used in Denver. The dispute over the utility of any particular lift and its costs are precisely why a study is most appropriate.

I support a requirement that bans discrimination based on stereotypes against persons with disabilities in their use of privately operated buses. I also support a requirement that private bus companies make reasonable accommodations to the needs of persons with disabilities with respect to their current bus fleet.

The Committee, however, simply has not been presented with enough clear testimony and data to know what is reasonable with respect to requirements such as lifts on new buses purchased or leased by the private bus industry. That is why a study of private bus accessibility, followed by Congressional action

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based on the study, is the most sensible course of action with respect to any future requirements, such as lifts, concerning new buses.

It might be suggested that this bill will have no significant impact on bus companies for the next five years. Even this suggestion is doubtful. In an August 1, 1989,letter to Roger Porter, domestic policy advisor to the President, Theodore Knappen, a Senior Vice President at Greyhound Lines, Inc., opposed this provision of S. 933. He wrote, "Greyhound Lines Inc. is a new company, which is the result of the merger of two failing bus systems, Greyhound and Trailways. We are highly leveraged with $375 million in debt..." Greyhound "lost $17 million last year and will be marginally profitable this year. The annual cost of full implementation of S. 933 will be at a minimum, $40 million. Even if the start up is delayed for five years, the financial institutions upon which we rely are not likely to continue to support us in light of this burden. The system will inevitably crumble with the marginal rural service being the first to go. I should add that most small bus companies are in a similar financial situation."

In summary, the current provision regarding the private bus transportation industry's purchase and lease of readily accessible new buses rests on inadequate and contested data and

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runs a serious risk of unintentionally causing devastating effects in the private bus industry. The prudent course is to study the issue first and then to impose appropriate requirements based on the study -- not the reverse, as currently provided for in the bill.

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HATCH AMENDMENT # 3:

Purpose: To provide for a study regarding accessibility in public transportation services provided by private bus entities.

On page 27, line 18, after the word "air", insert the words "or bus".

On page 29, after line 23, insert:

"Sec. 406 Study regarding accessibility in public transportation services provided by private bus entities.

(a) The purpose of the study required by this section is to determine feasible means of providing access to persons with disabilities to bus transportation services provided by privately operated entities that are primarily engaged in the business of transporting people.

(b) The ~~Secretary of Transportation~~ Architectural and Transportation Barriers Compliance Board established under section 502 of the Rehabilitation Act of 1973 (29 U.S.C. 792) shall undertake a study of -

(1) the extent of the needs of persons with disabilities for access to bus transportation

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services provided by privately operated entities that are primarily engaged in the business of transporting people; and

(2) feasible means of meeting those needs.

(c) Factors to be considered. The study required by subsection (a) shall take into account -

(1) anticipated demand by persons with disabilities for accessible bus transportation services;

(2) the degree to which accessibility is currently provided by private entities primarily engaged in the business of transporting people;

(3) the cost of providing accessibility, including recent technological and cost-saving developments in equipment and devices providing accessibility; and

(4) other relevant factors as determined by the ~~Secretary of Transportation~~ ATBCB.

(d) In conducting the study required by subsection (a), the ~~Secretary of Transportation~~ ATBCB shall conduct one public hearing and solicit the comments of the public, including

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persons with disabilities and private operators of entities primarily engaged in the business of transporting people.

(e) The report required by subsection (a) shall be completed and made available to the public within 18 months of the enactment of this Act.".

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The substitute version, which emerged from a period of negotiations and was adopted unanimously by the Labor and Human Resources Committee, is still not a perfect compromise. It retains features that I believe merit further improvement. But it incorporated enough important changes to enable me to cosponsor it at the mark-up, while I reserved my right to pursue further changes on the Floor.

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This ban on discrimination in privately operated "public accommodations" in Title III of the bill is effective 18 months after enactment. In stark contrast to the small business exemption from the bill's employment provisions, however, the bill contains no small business entity exemption whatsoever from these public accommodations provisions.

Thus, the bill creates the following anomaly: a mom-and-pop grocery store is not subject to the bill when it hires a clerk as a new employee, but it is subject to all of the bill's requirements in its treatment of customers, as well

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Even under the standards of the substitute bill, the costs some small businesses may incur can be significant[2]. In the disability rights area, nondiscrimination requirements, including those in this bill, not only require elimination of outright exclusion based on stereotypes, they often impose

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2) Some persons may assert that costs should not be a factor in designing a disability civil rights law. In the context of a disability rights law, however, costs may have to be incurred in order to provide nondiscriminatory treatment; e.g., putting in a ramp, providing auxiliary aids and services, and other accommodations. Indeed, the failure to incur reasonable costs in order to provide access is regarded as discriminatory. At some point, however, the undertaking of an accommodation can be so costly or represent such a fundamental alteration in the covered entity's program that the failure to undertake the accommodation is simply not discriminatory. This principle reflects Supreme Court caselaw interpreting Section 504 of the Rehabilitation Act of 1973. E.g. School Board of Nassau County v. Arline, 480 U.S. 273, 287 n. 17 (1987); Alexander v. Choate, 469 U.S. 287 (1985); Southeastern Community College v. Davis, 442 U.S. 397, 409-414 (1979).

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additional duties to make reasonable accommodations to the needs of persons with disabilities. I support these requirements. But, we must acknowledge that these accommodations can cost money. Sometimes the cost is not great, but even under the standards of this bill, these costs can be more than de minimus where necessary to provide accessibility. This is a crucial difference between a disability civil rights statute and a civil rights statute in the race area. In order to provide equal treatment to racial minorities, a business need only disregard race and judge a person on his or her merits. To provide equal opportunity for a person with a disability will sometimes require additional actions and costs than those required to provide access to a person without a disability.

For example, under the public accommodations title of this bill, covered entities must seek to provide "full and equal enjoyment of [their] goods, services, facilities, privileges, advantages and accommodations." Section 302(a). Among the specific requirements applicable to the smallest businesses are:

1. The obligation to provide auxiliary aids and services to persons with disabilities, unless to do so would cause either an undue burden to the entity or a fundamental alteration in its activities. Section 302(b)(2)(A)(iii).

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Auxiliary aids and services are defined in Section 3(1) and can include providing qualified interpreters, qualified readers, signage, taped texts; the acquisition or modifications of equipment or devices; and similar actions and devices.

2. The obligation to make reasonable modifications in policies, practices, and procedures, unless doing so fundamentally alters the entity's activities. Section 302(b)(2)(A)(ii).

3. The obligation to remove "architectural barriers, and communication barriers that are structural in nature, in existing facilities...where such removal is readily achievable." Section 302(b)(2)(A)(iv). The term "readily achievable" is defined in Section 301(5).

4. The obligation to remove "transportation barriers in existing vehicles used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles by the installation of a hydraulic or other lift), where such removal is readily achievable." Section 302(b)(2)((A)(iv)).

5. Where the removal of a barrier described in paragraphs 3 and 4 is not readily achievable, an obligation "to make [the entity's] goods, services, facilities, privileges, advantages

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available through alternative methods if such methods are readily achievable." Section 302(b)(2)(A)(v).

6. The elimination of eligibility criteria that screen out or tend to screen out a person or persons with disabilities unless the criteria are shown to be necessary to the conduct of the activity in question. Section 302(b)(2)(A)(i).

While these requirements will, in theory, generally translate into less actual cost the smaller the entity, any financial or administrative impact on the smallest businesses can be very troublesome for those businesses. Even comparatively "lesser" costs can be quite burdensome for a small business struggling to survive. Further, the determination as to whether an accommodation is an undue burden or a barrier removal is readily achievable may ultimately be made by a federal agency or judge. A small business is less able to absorb an overreaching determination by these authorities than a larger business.

Moreover, government compliance reviews (Section 308 (b)(1)), and the costs of private as well as Attorney General litigation, will add further to those expenses small businesses must bear under the bill's public accommodations title. Indeed, in a private enforcement action, a plaintiff can obtain injunctive relief and attorneys fees. For larger businesses,

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these costs can be more readily absorbed and passed on to a large consumer base. For some smaller businesses, the cost of compliance with injunctive relief combined with attorneys fees might be onerous.

But it is the penalty scheme in an Attorney General action to enforce the public accommodations title that is of particular concern. In an Attorney General action, a court, at the request of the Attorney General, can order the smallest business to pay monetary damages to aggrieved persons. Moreover, the court can order such a business to pay a civil penalty of up to $50,000 for a first violation and up to $100,000 for subsequent violations. This remedy scheme is potentially a very heavy burden, which I will also address as a separate concern.

Opponents of a small business exemption in the public accommodations title of S. 933 claim that since Title II of the 1964 Civil Rights Act has no small business exemption, neither should S. 933. There are several responses to this argument:

1. S. 933 already departs from Title II of the 1964 Civil Rights Act in two important ways:

A. Title II only covers places of eating, lodging, entertainment, and gasoline stations. S. 933 goes well beyond such coverage, encompassing virtually all elements of the private sector as "public accommodations" or "potential places

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of employment," except religious organizations and entities controlled by religious organizations.

B. Title II provides only for injunctive relief in Attorney General actions; this bill, as mentioned earlier, permits recovery of monetary damages and huge civil fines in Attorney General actions.

Thus, it is inconsistent for the opponents of a small business exemption to rely upon Title II as the basis for their opposition when they have so readily departed from that parallel statute in other important respects.

2. In any case, compliance with Title II of the 1964 Civil Rights Act imposes no costs -- it simply requires admitting and serving persons without regard to their color, ethnicity, or religion. As mentioned earlier, compliance with S. 933 can result in costs to covered entities. This difference between Title II and S. 933 alone justifies a small business exemption in public accommodations.

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I favor an exemption of small businesses from the prohibitions and obligations in the public accommodations provisions of the bill, i.e., provisions relating to a business's existing facilities and general policies. I would not, however, exempt any public accommodation from the

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requirement that its new facilities be accessible. The cost of accessibility to a new facility when "built-in" to the plans and construction of such a new facility is not burdensome. But for businesses in the operation of their existing facilities and in the provision of auxiliary aids and services, modification of policies, procedures, and criteria, a small entity exemption is appropriate.

I also believe that even with an exemption for small businesses, the marketplace will exert pressure on small businesses which will lead to increased accessibility. When a small business operator sees a larger competitor gain customers with disabilities because the latter business is accessible, the small business operator is likely to take steps it can afford to get some of those customers -- even if those steps don't meet every single requirement of this title -- without exposure to the costs of compliance reviews and litigation.

With this voluntary activity, the requirement that all new facilities be accessible, and the full coverage of all "public accommodations" other than small businesses, I believe we can provide genuine access to public accommodations for persons with disabilities, while assuring that we do not overly burden small businesses in America.

II. Excessive Penalties Against Public Accommodations.

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Under Title II of the 1964 Civil Rights Act (hereinafter "Title II"), as mentioned earlier, a private plaintiff can obtain injunctive relief and attorneys fees. The Attorney General can obtain injunctive relief. No monetary damages or civil penalties are available in either action.

Title II

Under S. 933, in an action for a violation of the public accommodations title, a private plaintiff can obtain an injunction and attorneys fees. I believe such relief, paralleling that of Title II, is appropriate.

S. 933

But, in an Attorney General action under this bill the court can award not only an injunction, but also civil penalties of up to $50,000 for a first violation, and up to $100,000 for subsequent violations. Further, the court can award monetary damages to aggrieved persons when requested to do so by the Attorney General. This relief is excessive and unjustifiable.

S. 933

The threat of litigation, its cost to covered entities, the added expense of paying the plaintiff's attorneys fees in private litigation, and marketplace factors are all powerful incentives for a business to comply with this bill in the first instance.

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Moreover, if an entity is in noncompliance, injunctive relief is significant. An injunction requires the offending entity to cease its discrimination. If a ramp must be put in, a bathroom made accessible, or policies changed, pursuant to the entity's duties under the bill's public accommodations provisions, a court can order such relief.

Everyone knows that 25 years ago black people and other racial and ethnic minorities were routinely denied the opportunity to eat, to lodge, and to be entertained in places they could afford. Today, while there are still instances of racial and ethnic discrimination in public accommodations, we face an entirely different situation. The public accommodations covered by Title II are now essentially open on a nondiscriminatory basis. This resulted largely from Title II's enactment, with the injunctive relief and attorneys fees enforcement scheme previously described.

Yet, relief in an Attorney General action against a public accommodations under this bill goes well beyond the relief available in an Attorney General action under Title II.

Ironically, a private party, in his own action, cannot obtain monetary damages for himself. The court can award monetary damages, however, to an aggrieved person, in an Attorney General action.

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There is a further anomaly in the bill. The bill subjects state and local governments to the remedies available under Section 505 of the Rehabilitation Act of 1973. Under Section 505, a federal agency, in an enforcement action, may either terminate federal aid to the part of a covered entity where the discrimination occurs or it may refer the case to the Department of Justice for injunctive relief. Civil penalties are not recoverable by the federal government in an enforcement action. Thus, in an Attorney General action, state and local governments, with their enormous tax resources, are subject to lesser penalties than the private sector, which is not supported by tax revenues or, for the most part, federal aid. The potential for a sole proprietor, a mom-and-pop business, or any other business to be more harshly sanctioned than a state or local government in an Attorney General action requires further consideration.

Our purpose here should not be punitive. Providing for monetary damages and huge civil penalties in Attorney General actions is excessive. To the extent we are trying to provide access by enacting this bill, since such access can impose costs on covered entities, rather than penalize a public accommodation by imposing monetary damages and huge civil penalties, we should keep the money available to the entity for use in providing access pursuant to the injunctive relief.

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Proponents of the stiff remedy provisions in S. 933 assert that it parallels remedies now available in an Attorney General action under the Fair Housing Act, as amended last year. This analogy, however, is unpersuasive.

In the field of housing, the original remedies of the 1968 Fair Housing Act proved inadequate to the task of rooting out racial and ethnic discrimination in housing as quickly as hoped. Why? In my opinion, it is because housing discrimination is probably the most persistent form of racial discrimination in the nation today. Thus, toughening the penalties for such discrimination in 1988 made sense and I supported the effort to do so.

But the record in the public accommodations area is much different. As mentioned earlier, the Title II penalties -- injunctive relief and attorneys fees -- have been adequate to work a revolution of equal opportunity.

If the Fair Housing Amendments Act of 1988 had not added disability discrimination to the list of prohibited conduct under the Fair Housing Act, and a ban on housing discrimination on the basis of disability was being added in this bill, the use of Fair Housing Act remedies for such housing discrimination would be appropriate. It is inappropriate,

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however, to use the Fair Housing Act, rather than Title II of the 1964 Civil Rights Act, as the analogue for the remedies in the public accommodations context in this bill.

I note that, with respect to employment discrimination, S. 933 uses the remedies available under the parallel civil rights statute, Title VII of the 1964 Civil Rights Act. Unfortunately, this parallelism was not maintained with respect to public accommodations.

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I prefer to retain such parallelism in remedies. I am prepared, however, to break the parallelism with Title II and to consider a more modest enforcement scheme in this area that goes beyond Title II relief but is more reasonable than the provision currently in the bill.

III. The Bill's Threat to the Private Bus Transportation Industry.

The bill applies to transportation services "provided by a privately operated entity that is primarily engaged in the business of transporting people," except for air carriers. Section 304(a). This coverage includes private rail, limousine, taxi, and bus companies.

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I am especially concerned about this bill's impact on the private bus transportation industry. The bill imposes a variety of requirements on these companies, including:

1. The obligation to make reasonable modifications in policies, practices, and procedures, unless to do so would fundamentally alter the company's activities. Section 304(b)(2)(A).

2. The obligation to provide auxiliary aids and services to persons with disabilities, unless to do so would cause an undue burden or fundamentally alter the company's activities. Section 304(b)(2)(B).

3. The obligation to remove "transportation barriers in existing vehicles...where such removal is readily achievable." This obligation does not include the addition of a lift. Section 304(b)(2)(C).

4. Where the removal of a barrier described in paragraph 3 is not readily achievable, an obligation "to make [the entity's] goods, services, facilities, privileges, advantages available through alternative methods if such methods are readily achievable." Section 304(b)(2)(C).

I favor these provisions.

Joint subcmte for private transportation

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The truly onerous provision, however, is the requirement that all small bus companies must purchase or lease all new over-the-road buses with lifts six years after the bill's enactment; large bus companies must do so beginning five years after enactment. In the meantime, ironically, having imposed this major requirement on the private bus transportation industry, the bill requires a three-year study to determine whether this requirement is, in effect, feasible. The requirement, however, is not contingent on the results of the study -- it remains in place under this bill even if the study shows that the requirement is excessive.

The bill, in its present form, presents the strong likelihood that private intercity and charter and tour bus service will be seriously curtailed soon after the bill's new bus requirements become effective, if not virtually eliminated at some point thereafter. The stakes are that high.

Unlike state and local government mass transit, which is heavily subsidized by the federal government, private transportation companies receive virtually no federal aid. Private companies provide virtually all of the intercity bus transportation in the country. There are well over one thousand such private, intercity bus companies, such as Greyhound, Gold Line, East Coast Parlor, and Peter Pan. Some

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of these companies provide two kinds of services: over the road regular route service -- that is, scheduled service between communities -- and charter and tour services. Other companies provide only charter and tour services.

These companies serve about 10,000 communities, most of which have no other intercity transportation available to them. The number of communities served has been declining in the last 30 years. According to an Interstate Commerce Commission staff analysis, there was a net loss of nearly 3,400 communities receiving intercity bus service between 1982 and 1986 alone. Ninety percent of the communities losing this service had populations of less than 10,000. This industry operates on a low profit margin. In many rural areas, including in Utah, this private bus service is the only available intercity transportation. There is only token Amtrak service available. Intercity buses provide transportation for those who need a low cost transportation alternative.

The requirement that all new buses have wheelchair lifts would quickly accelerate the loss of private, intercity bus service to our nation's communities, if not entirely end such service, according to the American Bus Association, United Bus Owners of America, and Greyhound (the largest company). Delaying this result by five or six years, in the hope an

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efficient and economical lift will appear on the scene, is small comfort.

A lift for an intercity bus is more expensive than for an intracity bus, such as the Metrobuses used in the District of Columbia, because with the baggage compartment and other differences, access to the intercity bus is higher off the ground -- as much as four or six feet, rather than one foot for an intracity bus.

The added costs for new buses for these private companies include not only the cost of the lift but widening the aisles and making the bathrooms accessible. There are maintenance costs -- and there is little experience with maintenance of intercity bus lifts. There will be a loss of as many as four seats, which especially hurts bus companies during their peak periods, such as holiday periods. Moreover, particularly in rural areas, these companies are successful because of their package express service. The room available for carrying such packages, however, is reduced in lift-equipped buses.

Even if the least expensive lift is used on all new buses -- and this is, I am told, a lift which has had little use in this country and one which not all bus companies might feel is suited to their operations -- the cost of this provision is unreasonable. Indeed, I understand that the principal basis

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for this provision is information from the Regional Transportation District of Denver, Colorado. According to the Department of Transportation, however, Denver has only 17 buses which use a "less expensive" lift developed in Germany. I understand these buses have been in use in Denver for about one year. Moreover, according to the Department of Transportation, Denver uses these buses on one-way routes of less than 30 miles. This usage is atypical for the private bus industry as a whole, which consists of some 20,000 buses which travel far greater distances on trips.

Representatives of the private bus transportation industry have stated that their lowest annual cost estimate for the bill's requirement regarding new buses, which includes lift and accessible restroom installation, loss of revenue seats for lift and restroom accessibility, maintenance costs, and training costs would be so high as to seriously threaten the viability of the private bus transportation industry. This lowest annual cost estimate is based on a cost of $10,100 per new bus for each year its service, and assumes a 10-year life span for the industry's 20,000 bus fleet. In other words, under this analysis, each new bus will cost a company $101,000 over the life of the bus. I note that representatives of the industry believe these estimates are unrealistic and actual costs will be higher.

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The Committee heard virtually no testimony on this vital issue.

I, along with proponents of the present provision, can point to correspondence from officials of the Denver system and the American distributor of the lift in question citing a variety of different figures and costs related to wheelchair accessibility for these over-the-road buses. Following the hearings on the bill, the cost figures have been flying back and forth concerning costs associated with the lift which has recently begun to be used in Denver. The dispute over the utility of any particular lift and its costs are precisely why a study is most appropriate.

I support a requirement that bans discrimination based on stereotypes against persons with disabilities in their use of privately operated buses. I also support a requirement that private bus companies make reasonable accommodations to the needs of persons with disabilities with respect to their current bus fleet.

The Committee, however, simply has not been presented with enough clear testimony and data to know what is reasonable with respect to requirements such as lifts on new buses purchased or leased by the private bus industry. That is why a study of private bus accessibility, followed by Congressional action

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based on the study, is the most sensible course of action with respect to any future requirements, such as lifts, concerning new buses.

It might be suggested that this bill will have no significant impact on bus companies for the next five years. Even this suggestion is doubtful. In an August 1, 1989,letter to Roger Porter, domestic policy advisor to the President, Theodore Knappen, a Senior Vice President at Greyhound Lines, Inc., opposed this provision of S. 933. He wrote, "Greyhound Lines Inc. is a new company, which is the result of the merger of two failing bus systems, Greyhound and Trailways. We are highly leveraged with $375 million in debt..." Greyhound "lost $17 million last year and will be marginally profitable this year. The annual cost of full implementation of S. 933 will be at a minimum, $40 million. Even if the start up is delayed for five years, the financial institutions upon which we rely are not likely to continue to support us in light of this burden. The system will inevitably crumble with the marginal rural service being the first to go. I should add that most small bus companies are in a similar financial situation."

In summary, the current provision regarding the private bus transportation industry's purchase and lease of readily accessible new buses rests on inadequate and contested data and

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runs a serious risk of unintentionally causing devastating effects in the private bus industry. The prudent course is to study the issue first and then to impose appropriate requirements based on the study -- not the reverse, as currently provided for in the bill.

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Hatch Amendment #2

Purpose: To require appropriate federal agencies to provide assistance to covered entities in understanding their duties under the Act.

In the appropriate place, insert the following new section and renumber accordingly:

TECHNICAL ASSISTANCE.

"(a) PLAN FOR ASSISTANCE.--The Attorney General, in consultation with the Secretary of Transportation, the Chairman of the Federal Communications Commission, and the Secretary of Commerce shall, within 180 days of enactment of this Act, develop and implement a plan to assist entities covered under this Act in understanding the responsibilities of such entities under this Act.

"(b) AGENCY ASSISTANCE--The Attorney General is authorized to obtain the assistance of other Federal agencies in carrying out the responsibilities as described in subsection (a).".

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JESSE HELMS
NORTH CAROLINA

Rec'd 2pm
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SR, JW,
Maureen, ...

United States Senate

WASHINGTON, DC 20510

August 30, 1989

The Honorable Bob Dole
Minority Leader
United States Senate
S-230 The Capitol
Washington, D.C. 20510

Dear Bob:

I will object to any time agreement or unanimous consent request with respect to consideration of S. 933, The Americans with Disabilities Act. I request that I be given as much notice as possible of any attempt to bring this matter up for consideration by the Senate.

Many thanks and kindest personal regards.

Sincerely,

Jesse

JESSE HELMS:ad

cc: Howard O. Greene, Jr.

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HATCH AMENDMENT #1

Purpose: To include Congress within the coverage of the Americans with Disabilities Act of 1989.

On page 11, strike lines 15 through 23 and insert in lieu thereof:

"(B) CONGRESSIONAL EMPLOYEES. -- The term "employee includes an employee of Congress who is not involved in advising a member of Congress on a policy issue.

"(C) EXCEPTION. -- The term "employee" shall not include any individual elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any individual chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.".

On page 11, line 24, strike "(C)" and insert in lieu thereof "(D)".

On page 11, line 25, strike "(B)" and insert in lieu thereof "(C)".

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On page 12, line 13, after "United States,", insert "except in the employment of an individual described in paragraph (2)(B),".

On page 15, line 7, strike out "The" and insert in lieu thereof "(a) IN GENERAL. -- Except as provided in subsection (b), the".

On page 15, between lines 15 and 16, add the following new subsection:

"(b) CONGRESSIONAL EMPLOYEES. --

(1) A Congressional employee or applicant for employment who has an action for a violation of this title by a Member of Congress or other Congressional employer may bring an action in the District Courts of the United States which shall have jurisdiction of proceedings instituted pursuant to this subsection and shall exercise such jurisdiction without regard to whether such employee or applicant has exhausted any administrative or other remedies that may be provided by law.

"(2) The remedies available under section 706(g) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(g)) shall be made available to an individual bringing an action under this subsection.

"(3) The Attorney General or an executive agency of the Federal government shall not be authorized to bring,

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or intervene in, an action under this title against Congress or a member of Congress in his or her official capacity.".

On page 23, strike lines 6 through 13 and insert in lieu thereof:

"(A) IN GENERAL. -- The term 'public accommodation' means --

"(i) a privately operated establishment --

"(I) (aa) that is used by the general public in the capacity of a customer, client, ,or visitor; or

"(bb) that is a potential place of employment; and

"(II) whose business operations affecting commerce; or

"(ii) an establishment operated on behalf of Congress.".

On page 29, line 11, strike out "Sections" and insert in lieu thereof "(a) IN GENERAL. -- Except as provided in subsection (b), sections".

On page 29, after line 23, add the following new subsection:

"(b) ACTIONS AGAINST CONGRESS. --

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(1) An individual who has an action for a violation of this title by an establishment operated on behalf of Congress may bring an action in the District Courts of the United States which shall have jurisdiction of proceedings instituted pursuant to this subsection and shall exercise such jurisdiction without regard to whether such individual has exhausted any administrative or other remedies that may be provided by law.

"(2) The remedies available under section 204 of the Civil Rights Act of 1968 (42 U.S.C. 2000a-3) shall be made available to an individual bringing an action under this subsection.

"(3) The Attorney General or an executive agency of the Federal government shall not be authorized to bring, or intervene in, an action under this title against Congress or a member of Congress in his or her official capacity.".

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Small Business Exemption for Public Accommodations.

Title I of the bill bans employment discrimination and is effective in two years. At that time, the employment discrimination provisions will apply to employers with 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year. Two years thereafter -- four years after enactment -- the employment provisions will apply to employers of 15 or more employees.

Title III of the bill covers "public accommodations and services operated by private entities." Private entities defined as "potential places of employment" are subject only to accessibility requirements concerning new facilities designed and con[illegible]ted for first occupancy later than 30 months after the bil[illegible] These entities include facilities intende[illegible]se and whose operations affect commer[illegible]

[illegible]blic accommodations," which inclu[illegible] are subject not only to this[illegible]ut also to a wide variety of proh[illegible]espect to their existing faci[illegible]These prohibitions and obli[illegible]in its treatment of cus[illegible]

The term "pub[illegible]on" is defined very broadly. It includes not only busin[illegible]overed by Title II of the 1964 Civil Rights Act, which bans racial, ethnic, and religious discrimination in public accommodations, defined as places of eating; places of lodging; places of entertainment; and gaasoline stations, but it also includes retail stores, service establishments, and other elements of the private sector. Section 301(3).

This ban on discrimination in privately operated "public accommodations" in Title III of the bill is effective 18 months after enactment. In stark contrast to the small business exemption from the bill's employment provisions, however, the bill contains no small business entity exemption from these public accommodations provisions.

Thus, the bill creates the following anomaly: a mom-and-pop grocery store is not subject to the bill when it hires a clerk as a new employee, but it is subject to all of the bill's requirements in its treatment of customers, as well as to an extremely onerous penalty scheme when it violates any of those requirements.

Even under the standards of the substitute bill, the costs some small businesses may incur can be significant. In the disability rights area, nondiscrimination requirements, including those in this bill, not only require elimination of outright exclusion based on stereotypes, they often impose

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Title III of the bill covers "public accommodations and services operated by private entities." Private entities defined as "potential places of employment" are subject only to accessibility requirements concerning new facilities designed and constructed for first occupancy later than 30 months after the bill's enactment. These entities include facilities intended for nonresidential use and whose operations affect commerce. Section 301(2).

Private entities defined as "public accommodations," which include much of the private sector, are subject not only to this new construction requirement but also to a wide variety of prohibitions and obligations with respect to their existing facilities and general policies. These prohibitions and obligations pertain to a business in its treatment of customers, clients, and visitors.

The term "public accommodation" is defined very broadly. It includes not only businesses covered by Title II of the 1964 Civil Rights Act, which bans racial, ethnic, and religious discrimination in public accommodations, defined as places of eating; places of lodging; places of entertainment; and gaasoline stations, but it also includes retail stores, service establishments, and other elements of the private sector. Section 301(3).

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additional duties to make reasonable accommodations to the needs of persons with disabilities. I support these requirements. But, we must acknowledge that these accommodations often cost money. Sometimes the cost is small, but even under the standards of this bill, those costs can be more than de minimus where necessary to provide accessibility. This is a crucial difference between a disability civil rights statute and a civil rights statute concerning race. In order to provide equal treatment to racial minorities, a business need only disregard race and judge a person on his or her merits. To provide equal opportunity for a person with a disability will sometimes require additional action and costs than those required to provide access to persons without a disability.

The specific requirements applicable to the smallest businesses include the obligation to provide auxiliary aids and services to persons with disabilities, unless to do so would cause either an undue burden to the entity or a fundamental alteration in its activities; the obligation to make reasonable modifications in policies, practices, and procedures, unless doing so fundamentally alters the entity's activities; the obligation to remove "architectural barriers, and communication barriers that are structural in nature, in existing facilities...where such removal is readily achievable"; the obligation to remove "transportation barriers in existing vehicles used by an establishment for transporting individuals (not including barriers that can only be removed through retrofitting of vehicles by the installation of a hydraulic or other lift), where such removal is readily achievable"; and, where the removal of a barrier just described is not readily achievable, an obligation "to make [the entity's] goods, services, facilities, privileges, advantages available through alternative methods if such methods are readily achievable." See generally Section 302.

While these requirements will, in theory, generally translate into less actual cost the smaller the entity, any financial or administrative impact on the smallest businesses can be very troublesome for those businesses. Even comparatively "lesser" costs can be quite burdensome for a small business struggling to survive. Further, the determination as to whether an accommodation is an undue burden or a barrier removal is readily achievable may ultimately be made by a federal agency or judge.

Moreover, government compliance reviews (Section 308(b)(1)), and the costs of private as well as Attorney General litigation, will add further to those expenses small businesses must bear under the bill's public accommodations title.

The penalty scheme in an Attorney General action to enforce the public accommodations title is of particular concern. In an Attorney General action, a court can order the

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smallest business to pay a civil penalty of up to $50,000 for a first violation and up to $100,000 for subsequent violations. Further, the court can award monetary damage to a victim of discrimination when the Attroney General requests such damages. This penalty scheme is potentially a very heavy burden.

Opponents of a small business exemption in the public accommodations title of S.933 claim that since Title II of the 1964 Civil Rights Act has no small business exemption, neither should S.933.

Compliance with Title II of the 1964 Civil Rights Act, however, imposes no costs -- it simply requires admitting and serving persons without regard to their color, ethnicity, or religion. As mentioned earlier, compliance with this bill can result in costs to covered entities. This difference between Title II and S.933 alone justifies a small business exemption in public accommodations.

I favor an exemption of small businesses from the prohibitions and obligations in the public accommodations provisions of the bill, i.e. provisions relating to a business's existing facilities and general policies. I would not, however, exempt <u>any</u> public accommodation from the requirement that its new facilities be accessible. The cost of accessibility to a new facility when "built-in" to the plans and construction of such a new facility is not burdensome. But for businesses in the operation of their existing facilities and in the provision of auxiliary aids and services, modification of policies, procedures, and criteria, a small entity exemption is appropriate.

I also believe that even with an exemption for small businesses, the marketplace will exert pressure on small businesses. When a small business operator sees a larger competitor gain customers with disabilities because the latter business is accessible, the small business operator is likely to take steps it can afford to get some of those customers -- even if those steps don't meet every single requirement of this title -- without the burden of the costs of compliance reviews and litigation.

With this voluntary activity, the requirement that <u>all</u> <u>new</u> facilities be accessible, and the full coverage of all "public accommodations" other than small businesses, I believe we can provide genuine access to public accommodations for persons with disabilities, while assuring that we do not overly burden small business in America.

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Excessive Penalties Against Public Accommodations.

Under Title II of the 1964 Civil Rights Act, a private plaintiff can obtain injunctive relief and an attorney's fee. The Attorney General can obtain injunctive relief. No monetary damages or civil penalties are available in either action.

Under this bill, in an action for a violation of the public accommodations title, a private plaintiff can obtain an injunction and an attorney's fee. I believe such relief, paralleling that of Title II, is appropriate.

But, in an Attorney General action under this bill the court can award not only an injunction but also civil penalties of up to $50,000 for a first violation, and up to $100,000 for subsequent violations. Further, the court can award monetary damages to a victim of discrimination when the Attorney General requests such damages. This relief is excessive and unjustifiable.

The threat of litigation, its cost to covered entities, and, in private litigation, the added expense of paying the plaintiff's attorneys fees, and marketplace factors are all powerful incentives for a business to comply with this bill in the first instance.

Moreover, if an entity is in noncompliance, injunctive relief is significant. An injunction requires the offending entity to cease its discrimination. If a ramp must be put in, a bathroom made accessible, or policies changed, pursuant to the entity's duties under the bill's public accommodations provisions, a court can order such relief.

Everyone knows that 25 years ago black people and other racial and ethnic minorities were routinely denied the opportunity to eat, to lodge, and to be entertained in places they could afford. Today, while there are still instances of racial and ethnic discrimination in public accommodations, we face an entirely different situation. The public accommodations covered by Title II are now essentially open on a nondiscriminatory basis. This resulted largely from Title II's enactment, with the injunctive relief and attorneys fees enforcement scheme previously described.

Yet, relief in an Attorney General action against a public accommodations under this bill goes well beyond the relief available in an Attorney General action under Title II.

Ironically, a private party, in his own action, cannot obtain monetary damages for himself. The court can award

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monetary damages, however, to an aggrieved person, in an Attorney General action.

There is a further anomaly in the bill. The bill subjects state and local governments to the remedies available under Section 505 of the Rehabilitation Act of 1973. Under Section 505, a federal agency, in an enforcement action, may either terminate federal aid to the part of a covered entity where the discrimination occurs or it may refer the case to the Department of Justice for injunctive relief. Civil penalties are not recoverable by the federal government in an enforcement action. Thus, in an Attorney General action, state and local governments, with their enormous tax resources, are subject to lesser penalties than the private sector, which is not supported by tax revenues or, for the most part, federal aid. This harsher penalty scheme, wherein a sole proprietor or mom-and-pop business, or any other business, can be much more harshly penalized than a state or local government in an Attorney General action, requires further consideration.

Our purpose here should not be punitive. Providing for monetary damages and huge civil penalties in Attorney General actions is excessive. To the extent we are trying to provide access by enacting this bill, since such access can impose costs on covered entities, rather than penalize a public accommodation by imposing monetary damages and huge civil penalties, we should keep the money available to the entity for use in providing access pursuant to the injunctive relief.

Proponents of this stiff penalty scheme assert that it parallels remedies now available in an Attorney General action under the Fair Housing Act, as amended last year. This analogy, however, is unpersuasive.

In the field of housing, the original remedies of the 1968 Fair Housing Act proved inadequate to the task of rooting out racial and ethnic discrimination in housing as quickly as hoped. Why? In my opinion, it is because housing discrimination is probably the most persistent form of racial discrimination in the nation today. Thus, toughening the penalties for such discrimination in 1988 made sense, and I supported the effort to do so.

But the record in the public accommodations area is much different. As mentioned earlier, the Title II penalties -- injunctive relief and attorneys fees -- have been adequate to work a revolution of equal opportunity.

If the Fair Housing Amendments Act of 1988 had not added disability discrimination to the list of prohibited conduct under the Fair Housing Act, and a ban on housing discrimination on the basis of disability were being added in this bill, the

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use of Fair Housing Act remedies for such housing discrimination would be appropriate. It is inappropriate, however, to use the Fair Housing Act, rather than Title II of the 1964 Civil Rights Act, as the analogue for the remedies in the public accommodations context in this bill.

I note that, with respect to employment discrimination, S. 933 uses the remedies available under the parallel civil rights statue, Title VII of the 1964 Civil Rights Act. Unfortunately, this parallelism was not maintained with respect to public accommodations.

I prefer to retain such parallelism in remedies. I am prepared, however, to break the parallelism with Title II and to consider a more modest remedial scheme available in Attorney General actions.

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The Threat to Private Bus Transportation

The bill applies to transportation services "provided by a privately operated entity that is primarily engaged in the business of transporting people," except for air carriers. Section 304(a). The bill's impact on the private bus transportation industry deeply concerns me.

This industry includes over 1000 companies. Some of these companies provide two kinds of services: over-the-road regular route service, that is, scheduled service between communities, and charter and tour services. Other companies provide only charter and tour services.

This industry operates on a low-profit margin. In many rural areas, this private bus service is the only available intercity transportation.

The number of communities receiving intercity bus service has been declining in the last 30 years -- from about 25,000 communities to about 10,000 communities. According to an Interstate Commerce Commission staff analysis, there was a net loss of nearly 3,400 communities receiving intercity bus service between 1982 and 1986 alone. Ninety percent of the communities losing this service had populations of less than 10,000.

I believe we should tread very carefully before imposing further costs on this industry lest we unintentionally cause severe adverse consequences on the availability of transportation they currently provide. Mass transit systems operated by municipalities receive massive federal subsidies, unlike the private bus transportation industry.

I favor the bill's provisions which impose accessibility requirements on private bus transportation in the operation of their current buses because I do not believe they will cause an undue burden. These requirements include making reasonable modifications in policies, practices and procedures and providing auxiliary aids and services as set forth in Sections 304(b)(1) and (2).

I believe, however, that the requirement that all small bus companies must purchase or lease all new buses with lifts six years after the bill's enactment (for large companies, five years after enactment) is unreasonable and unsupported by an adequate record. The costs resulting from this requirement create the strong likelihood that private intercity and charter and tour bus service will be seriously curtailed, if not virtually eliminated at some point thereafter. This concern is shared by the American Bus Association, United Bus Owners of America, and Greyhound (the largest private bus transportation company).

In the meantime, ironically, having imposed this major requirement on the private bus transportation industry, the

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bill requires a three-year study to determine whether this requirement is, in effect, feasible.

A lift for an intercity bus is more expensive than for an intracity bus, such as we use in the District of Columbia, because with the baggage compartment and other differences, access to the intercity bus is higher off the ground -- as much as four or six feet, rather than one foot for an intracity bus.

The added costs for new buses for these private companies include not only the cost of the lift but widening the aisles, and making the bathrooms accessible. There are maintenance costs -- and there is little experience with maintenance of intercity bus lifts. There will be a loss of as many as four seats, which especially hurts bus companies during their peak periods, such as holiday periods. Moreover, particularly in rural areas, these companies are successful because of their package expresss service. The room available for carrying such packages, however, is reduced in lift-equipped buses.

Representatives of the private bus transportation industry have stated that their lowest annual cost estimate for the bill's requirement regarding new buses, which includes lift and accessible restroom installation, loss of revenue seats for lift and restroom accessibility, maintenance costs, and training costs would be so high as to seriously threaten the viability of the private bus transportation industry. This lowest annual cost estimate is based on a cost of $10,100 per new bus for each year of service and assumes a 10-year life span for the industry's 20,000 bus fleet. In other words, under this analysis, each new bus will cost a company $101,000 over the life of the bus.

There is a great deal of dispute as to the cost of accessibility for new, over-the-road buses used by this industry. Representatives of the private bus transportation industry believe that their lowest cost estimates are unrealistic and that the actual cost will be higher. Others believe that their lowest cost estimates are inflated.

It seems to me, however, that the proponents of the new bus requirement have implicitly acknowledged the concern over cost by delaying its implementation by five and six years, depending on a bus company's size. The problem with this approach, however, is that we have a totally inadequate basis to believe that, even with this delay, the requirement is reasonable. The Labor Committee heard virtually no testimony on this vital issue.

Since the hearing, I have seen a variety of correspondence with conflicting views on costs. This uncertainty is precisely why Congress should direct a study of this issue first, and then determine what requirements to impose on the purchase or lease of new buses by private bus companies.

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POSSIBLE REVISION TO ADA BILL
SECTION 312

On page 35, paragraph (C) of subsection 302(b)(1) is revised to read as follows:

(c) OPPORTUNITY TO PARTICIPATE.--Notwithstanding the existence of separate or different services, programs, or activities provided in accordance with this section, qualified individuals with disabilities shall be afforded the choice of participating in such services, programs, or activities that are not separate or different. Modifications to accommodate the participation of such individuals shall not impair an individual's choice to participate in an unmodified manner. The Attorney General shall set forth guidelines to help assure that modifications made pursuant to this section to accommodate the participation of individuals with disabilities will be appropriate to such individuals' disabilities and not require such individuals to use a separate accommodation which is not appropriate.

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with a disability in the most integrated setting as appropriate to the needs of the individual.

(C) OPPORTUNITY TO PARTICIPATE.—Notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different.

(D) ADMINISTRATIVE METHODS.—An individual or entity shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration—

(i) that have the effect of discriminating on the basis or disability; or

(ii) that perpetuate the discrimination against others who are subject to common administrative control.

(E) ASSOCIATION.—It shall be discriminatory to exclude or otherwise deny equal goods, services, privileges, advantages, and accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

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Mo –

Here's a copy of the Danforth amendment materials.

Dennis

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United States Senate

MEMORANDUM

Dennis -

Here's a copy of our amendment and some explanatory material. I would appreciate it if you keep the explanation + examples to yourself because we are still working on Danforth's floor statement and don't want any confusion later as to his arguments.

Thanks for your help.

-Kevin

(P.S. - Let me know if Dole would like to cosponsor the amendment)

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S. 933
AMENDMENT

Section 101(7) Qualified Individual With a Disability

Designate existing language as paragraph (A); Add a new paragraph (B), as follows:

(B) The term "qualified individual with a disability" shall not apply to any employee or applicant who uses illegal drugs.

EXPLANATION OF AMENDMENT

Title I of S. 933 extends to individuals with disabilities the protections now available against employment discrimination on the basis of race, sex, and national origin. In fashioning this legislation, the drafters relied heavily on the language of the Rehabilitation Act of 1973, and the regulations issued under that law.

S. 933 is quite different, however, from the existing law in the manner in which it deals with the issue of drug abuse. Rather than providing an exclusion for current drug users, such as that found in the Rehabilitation Act definition, S. 933 permits drug users to be deemed "disabled" under the Act and entitled to its protections, and then provides a series of narrow "defenses" employers may use if discrimination claims are filed by drug users. Because S. 933 has chosen this different approach, it is necessary to clarify that the protections of the new law will not be available to individuals who are current users of illegal drugs.

The term "qualified individual with a disability" is the operative term used in Title I of S. 933 to describe the persons protected by the new law and the persons for whom employers are required to make reasonable accommodations in the workplace. This amendment to the definition of "qualified individual with a disability" is intended to make it clear that an employer's obligation not to discriminate on the basis of disability does not include any obligation to an employee or an applicant who is currently using illegal drugs. The term "illegal drugs" is defined in the bill, and specifically excludes drugs taken in accord with a doctor's prescription.

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WHY IS THIS AMENDMENT NEEDED?

1. As drafted, S. 933 would permit a person disciplined for illegal drug use to sue the employer for disability discrimination. Under the bill, a current user of drugs would appear to be entitled to employment protections as an individual with a disability.

2. The Senate Committee Report states specifically that drug addiction is a disability under S. 933.

3. S. 933 uses the same definition of disability found in the Vocational Rehabilitation Act. That definition was adopted in 1974 without any focus the issue of drug abuse. Because federal agencies and courts interpreted that definition to include drug addicts as handicapped individuals, Congress amended the law in 1978 to provide a specific exclusion for current users of drugs.

4. The exclusionary language added to the Rehabilitation Act in 1978 has not been included in S. 933.

5. Although "Drug Addicts" are protected under S. 933, the term "drug addict" is nowhere defined in the bill or the Committee Report. Is a drug addict anyone who claims to have a drug dependency? Is a drug addict anyone who uses drugs on a regular basis? The legislation is silent.

6. The definition of "Disability" in S. 933 has been drafted to provide protection to those who are "regarded" as having an impairment, even though they in fact may not have such an impairment. Since drug addiction is recognized as a disability, can an drug user who is something less than an addict claim the protection of the law by arguing that the employment action taken against him was because the employer "regarded" him as having the disability of drug addiction? The legislation is unclear.

7. The Committee Report states that the legislation prohibits the use of any blanket rule excluding all people with a certain disability in the presumption that all people with that disability would be unable to do the job. How does this prohibition on such blanket rules work in the case of the disability of drug addiction? The bill is unclear.

8. [need point re defense (4) -- another example of how drug addicts are to be treated as disabled]

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WHY SHOULDN'T WE SIMPLY USE THE LANGUAGE FROM THE REHABILITATION ACT?

The Rehabilitation Act of 1973, as initially passed, provided protection for "handicapped individuals" without any reference to drug use. In 1974, Congress amended the law to define "handicapped individuals" with essentially the same definition used in S. 933, again without focusing on drug use as an issue. But, within a short time, it became apparent that agencies and courts were going to read the definition of impairment as being broad enough to include drug addicts. Thus, in 1978, Congress amended the definition of "handicapped individual" to create an exclusion for those persons currently using drugs.

It can be assumed that the definition in S. 933, which does not include the language of the 1978 amendment added to the Rehabilitation Act, will similarly be interpreted to include protections for drug addicts.

It might appear that this problem could be fixed by simply adding the language from the 1978 amendment to S. 933. But, such an approach would not be satisfactory today. The 1978 amendment, as it finally came out of the conference committee, was not a complete exclusion of drug users. Rather, it provided drug users with protection so long as they could perform the job and did not create any danger to other employees. Clearly, the 1978 approach was an improvement on the initial definition which made no reference to drug use, but it fell short of a complete exclusion for drug users. Rather it reflected the prevailing attitude of the 1970s that "a little bit of drugs is okay." So long as a person was able to perform the essential functions of his/her job, the fact that he/she was using drugs was thought to be irrelevant to the employer. Employers were expected to close their eyes to everything except job performance. Today, of course, a different standard -- zero-tolerance -- is being demanded. The Drug-Free Workplace Act, for example, requires government contractors to certify that they are taking steps to maintain a drug-free workplace.

The 1978 amendment to the Rehabilitation Act was passed by the House as a flat prohibition stating that no one who was a drug addict (or alcoholic) in need of rehabilitation could be considered a "handicapped person." This was modified in the Senate, where the floor debate reflected a permissive attitude toward drugs which today is a thing of the past.

Senator Cannon offered the amendment, explaining that it differed from the House approach in that it would not be a blanket exclusion on all drug abusers (and alcoholics). Using the airline industry as an example, he suggested that such

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individuals should not be employed as pilots but could be employed as baggage handlers. (Cong. Record, September 20, 1978 at S15567). Senator Harrison Williams spoke in favor of the amendment, stating that: "Perhaps the major obstacle in controlling [alcoholism and] drug abuse is the continued stigma from these illnesses." He suggested that to exclude such individuals from the Rehabilitation Act entirely would only add to that stigma. (Cong. Record, September 20, 1978, at S15568). Senator Hathaway stated: "Many 'active' alcoholics and drug addicts hold jobs and perform them satisfactorily." He suggested that these people should not be fired solely because of their addiction. (Cong. Record, September 20, 1978 at S15568).

If this were the approach we wanted to follow today, perhaps the Rehabilitation Act definition would be appropriate. But, our feelings about drug abuse have matured and today we recognize the use of illegal drugs as being a legitimate reason for an employer to take action against an individual, regardless of whether the person's drug use interferes with satisfacotry performance of the job.

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WHY ARE THE DEFENSES LISTED IN S.933 NOT ADEQUATE?

The first problem with the defenses in Section 103(c) is that they indeed are only defenses. That means that they can be used by an employer in defending against a disability discrimination claim filed by a drug user. But, they are not sufficient to prevent the EEOC (and employers as well) from expending valuable resources in investigating, conciliating and litigating such claims.

The whole thrust of the equal employment opportunity requirements in Title I of S. 933 is that people should be evaluated simply on the basis of the fact that they possess a particular impairment. Rather, they are to be looked at in the context of their ability to do a particular job. The defenses in Section 103(c) are part of this approach, requiring an employer to deal with drug users on a case-by-case basis. The concept of defenses inevitably means that the EEOC will be involved in investigating, and the employer will be involved in responding to, the facts in each case where a drug user files a claim of alleged discrimination.

But this approach flies in the face of our other efforts with regard to drug use. Unlike the disabilities of the persons described in the initial pages of the Committee Report, drug use is one impairment where we do not want to inhibit employers freedom to make decisions simply on the basis of that impairment. In plain and simple terms, drug use is not a disability. The issues surrounding the elimination of drug users from the workplace are not issues to be decided under the guise of disability discrimination claims.

The fear that S.933 could become the mechanism for long-drawn out litigation over drug use issues is justified by looking at some of the recent cases decided under the Rehabilitation Act.

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WITHOUT THIS AMENDMENT, HOW WOULD THE DEFENSES IN S. 933 WORK?

How would the defenses in Section 103(c) work when an employer is confronted with a claim by a drug user? An example is provided by a case decided a couple of years ago under the Rehabilitation Act. The facts of that case were as follows: A police officer in New York City was placed on desk duty by the department because of his repeated lateness and absenteeism. One day in 1982, while sitting at his desk, he apparently fainted and fell out of his chair. He was taken to the emergency room where, as part of normal emergency room procedures, a sample of his blood was taken. This sample was subsequently tested and revealed that the officer was addicted to heroin. The officer was dismissed, but subsequently filed a lawsuit against the police commissioner and numerous other city officials alleging, among other things, that he was protected as a handicapped person under the federal Rehabilitation Act. The matter was finally decided in October 1986, when the U.S. Court of Appeals for the Second Circuit ruled that, because it had been shown that his drug addiction impaired his ability to respond to emergency and life threatening situations, he was unable to perform the duties of his job and therefore was not entitled to the protections of the Rehabilitation Act. (HERON v. McGUIRE, 803 F.2d 67 (2nd Cir. 1986).

A second example involves a police officer in Philadelphia. This officer was accused by a fellow officer of having used illegal drugs in her presence. Subsequently, an investigation was conducted and the officer was discharged in February 1986. He then filed a lawsuit against the city and police officials alleging, among other things, that he was a "handicapped individual" under the Rehabilitation Act and that the city had a duty to accommodate him because he was able to perform the essential elements of the job. More than two years after the discharge, the U.S. Court of Appeals for the Third Circuit dismissed the officer's claim. (COPELAND v. PHILADELPHIA POLICE DEPARTMENT, 46 FEP Cases 272 (3rd Cir. 1988).

A third example is provided by a case involving applicants for a job as a firefighter in the City of Detroit. The applicants were rejected in 1982 when, in two successive tests, they tested positive for use of illegal drugs. They subsequently sued the city alleging, among other things, that they were protected under the federal laws prohibiting handicap discrimination. Three years later, following a trial, the allegations of handicap discrimination were dismissed. (McCLEOD v. CITY OF DETROIT, 39 FEP Cases 225 (E.D. Mich. 1985).

These examples bring home the limited value of "defenses"

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in this context. Indeed, it is noteworthy that in two of the three cases, the drug users were police officers who were using illegal drugs. There were police officer who had engaged in illegal conduct, and yet it still took years for the employer to put the matter to rest because the person was able to make a claim that a drug user is protected by the federal law prohibiting handicap discrimination.

The proposed amendment is necessary to make it clear that we do not want the EEOC spending any of its limited resources investigating and pursuing claims by drug users that they have been the victim of disability discrimination. Furthermore, we do not want employers expending large amounts of money in legal fees defending claims brought by drug users who claim their drug use entitles them to protection under S. 933.

Of course, resources expended on such claims are only a part of the problem. The purpose of this legislation is to prevent disability discrimination. We want employers to make decisions for job-related reasons, not because an applicant or employee may have a certain impairment. In the case of drug users, however, employers can and should be able to make decisions simply on the basis of that individual's status as a drug user. The employer should not be encouraged or expected to delay such decisions until there is enough evidence to prove absolutely that the person is failing in the job. If employers fear that any action they take against a person for illegal drug use is likely to generate an EEOC investigation and a federal lawsuit alleging disability dicrimination, employers are going to be recluctant to take any action against such individuals, until they are absolutely sure that they have compiled enough evidence to prove in court that the drug user is incapable of doing his or her job. Is that the message we want to send? Do we want employers to feel that they have to wait until a serious accident occurs before removing a drug user from the job? Obviously not.

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COLLOQUY ON IMPACT OF ADA ON THE TEMPORARY WORKSITE

SENATOR A

Mr. President, I believe the intent and purpose of this bill, the Americans with Disabilities Act, to be important in providing the disabled with the rights and opportunities necessary to enjoy full participation in our society. However, there are questions in my mind regarding the practical implications of the requirements of this legislation on certain situations. Specifically, I am thinking of the employment section of the bill, Title I, and how the standards of "reasonable accommodation" and "undue hardship" would be ~~equitably~~ applied across the board to the varying types of industries and businesses in our nation. Therefore, I would like to enter into a colloquy with my friend from _____, in hopes that he could clarify for me some of the mechanisms created in S.933 to prohibit discrimination against the disabled in various employment settings.

It is my understanding that a reasonable accommodation, as required in Section 102 (b)(1)(E), would take into consideration the nature of a particular industry for the purposes of determining what type of accommodation would, or would not, constitute an "undue hardship." In other words, the Americans with Disabilities Act would not require that a specific accommodation, which could be easily made in a traditional office setting, be implemented in a non-traditional work setting, such as a construction worksite, if it posed an "undue hardship."

Would my colleague please comment on whether or not my interpretations of the language and intent of this legislation is correct, with regards to different industries employing different types of accommodation?

SENATOR B

I would say to my friend from _____ that he has correctly interpreted the "reasonable accommodation" requirement in Title I of the ADA bill. Just as each person with a disability is unique in his or her requirements for accommodation to help meet their potential in the workplace, each industry, and indeed, each separate business, may be unique in the type of accommodation ~~they are~~ able to provide without significant difficulty or expense. ~~The mandates of the Americans with Disabilities Act are to be applied to employers and the other entities covered in this bill, with common sense.~~ As outlined in the Committee report, no action on the part of an employer that is "unduly costly, extensive, substantial, disruptive, or that will fundamentally alter the nature of the program" is required under S. 933. This is the basic framework that is to apply to all ~~the~~ types of different covered industries & workplaces under the bill.

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SENATOR A

To follow up on this question, I would ask my colleague if I may logically, and correctly deduce that if a specific industry or business finds that it cannot provide certain types of accommodations, because such action would impose an undue hardship on that business or industry, the employer in that business or industry may not be able to hire persons with certain types of disabilities?

SENATOR B

Yes, my colleague is correct. It is clearly stated in the bill and in the Committee report that an employer is not required to hire a qualified person with a disability if the employer cannot provide the needed accommodation for that person, ~~as it~~ would cause the employer undue hardship. The exception to this situation is in the case of an employee who offers to provide such accommodation for himself ~~(or herself)~~. In this case, the employer cannot refuse employment to the disabled individual using the "reasonable accommodation requirement" as the reason for the rejection.

SENATOR A

If my colleague would be so good as to indulge me for one last inquiry, I would like to bring to his attention a specific example. ~~This example highlights the potential problems a "unique industry" with a less than traditional place of employment the construction jobsite could have if the requirements of the ADA are not clearly and specifically defined.~~

I have heard from several contractors who do not wish to exempt themselves from doing their part in assisting the disabled find meaningful employment in the construction field, ~~but~~ are confused as to what latitude they will have under the ADA. ~~to provide only those accommodations which are reasonable and practical on a temporary worksite.~~ To state the obvious, construction is physically demanding work. The construction site is a place of employment where permanence and consistency are virtual unknowns. From the digging and pouring of the foundation, to painting and decorating, a project undergoes a metamorphosis in which a plot of land may be transformed into a highway, an office building, an apartment complex, or perhaps a single-family house. Points of accessibility for the workers may change daily as a project enters different stages of completion.

Safe accommodation of a disabled person with limited physical mobility or capabilities could be a full-time job for a construction employer. As more earth is moved or more equipment installed, and the level and scope of the jobsite changes, an accommodation provided yesterday may be unsuitable or insufficient today. For all practical purposes, all construction projects, and all accommodations made thereon, are temporary. Major changes, for accommodation, could

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KRISTINE A. IVERSON, MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON LABOR AND
HUMAN RESOURCES
WASHINGTON, DC 20510-6300

September 6, 1989

Dear Colleague:

Today, the Americans with Disabilities of 1989, S. 933, is likely to be considered on the floor. We have compiled information on the provisions dealing with small business, private transportation, and drugs for your review.

As you may know, the Bush Administration has endorsed S. 933 and opposes all amendments to the bill. We look forward to your support in passing this historic piece of legislation. For further assistance, please contact Bob Silverstein, staff director of the Subcommittee on the Handicapped, at 4-6265, and Carolyn Osolinik, counsel to Senator Kennedy, at 4-7878.

Sincerely,

Tom Harkin
Chairman
Subcommittee on the Handicapped

Edward M. Kennedy
Chairman
Committee on Labor and Human Resources

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RESPONSE TO NFIB MEMORANDUM CONCERNING THE AMERICANS WITH DISABILITIES ACT OF 1989

Following is a summary of statements made by the National Federation of Independent Businesses (NFIB) in a recent memo regarding the Americans with Disabilities Act (ADA), and responses based on the provisions of the bill.

1. NFIB statement: A business owner could be forced to pay "up to $50,000 for the first violation and $100,00 for subsequent violations plus unlimited monetary damages" for not accommodating a customer with a disability.

Response: This statement is completely misleading. The NFIB's description ignores the major compromise sought and achieved by the Bush Administration before it lent its support to the ADA. Under that compromise, the right of individual plaintiffs to bring large damage actions against employers or businesses was deleted from the bill. In its place, the Administration suggested that authority be given solely to the Attorney General to bring suits where there was a demonstrated pattern or practice of discrimination. In those cases, limited damages would be available: a court could assess defined civil penalties of up to $50,000 for the first violation and up to $100,00 for subsequent violations, if the court concluded that it would "vindicate the public interest." In addition, if the Attorney General requested it, monetary damages could be given to the aggrieved person. The ADA specifically does not allow individual plaintiffs to bring actions for "unlimited monetary damages," as suggested by the NFIB. (See ADA, sec. 308, pp. 85-87; Committee Report, pp. 76-77).

2. NFIB concern: Employees who use drugs casually cannot be fired. An employee who causes an accident in the workplace while under the influence of drugs or alcohol can avoid all sanctions such as firing or demotion by claiming he is addicted to drugs.

Response: Both of these statements are flat misstatements of the ADA. As a result of the insistence of the Administration and others, there was extensive discussion and modification of the coverage of drug addicts and alcoholics under the ADA in order to ensure that nothing in the ADA would be contrary to the goal of achieving drug-free workplaces. The ADA therefore explicitly allows employers to take sanctions against those who use illegal drugs or alcohol in the workplace and against those who are simply under the influence of illegal drugs

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or alcohol. In addition, the ADA explicitly allows employers to conduct drug tests of applicants and employees and to make employment decisions based on those tests. The NFIB's hypothetical is, in fact, explicitly rejected by the ADA. (See ADA, sec. 103(c), pp. 52-53; Committee Report, pp. 40-42).

3. NFIB statement: A business owner will have to accommodate 900 types of disabilities under the ADA; a business owner will have to make all kinds of accessibility modifications (provide ramps, wider aisles) even if a "wheelchair-bound person" never enters the business; owners will have to provide telecommunication devices for the deaf (TDD's) and interpreters for the blind "upon request."

Response: The ADA has a carefully thought-out framework for providing access to businesses for people with disabilities. This framework is based directly on Section 504 of the Rehabilitation Act of 1973, a law which has operated without difficulty or major expense for 15 years. Just like Section 504, the ADA covers all people with "physical or mental impairments" (the bill does not list 900 disabilities) and requires that businesses modify policies or provide additional aids for people with disabilities if such actions would not place an undue burden on the business. An owner does not have to guess about the modification or aid a person with a particular disability may need -- the person will usually make that need clear. Further, owners do not have to provide TDDs and interpreters "upon request." The ADA explicitly provides that such aids must be provided only if they do not place an undue burden on the business, which includes consideration of financial cost. [See especially Committee Report, p. 64, noting that the Committee does not intend that individual stores and businesses must provide TDD's.) Finally, the physical access requirements for existing businesses are minimal under the ADA. The bill explicitly provides that such changes must be made only if they are "able to be carried out without much difficulty or expense." These minimal changes should be made regardless of whether a person who uses a wheelchair has ever entered the business in the past. In fact, the reason for making these minimal changes is to ensure that people who have not even attempted to enter a business in the past because of accessibility problems can now gain access. (See ADA, sec. 301(5), 302(b)(2)(ii)-(iii), pp. 70, 74-75; Committee Report, pp. 63-66.)

4. NFIB statement: There is no differentiation made in the ADA between "willful refusal to accommodate the disabled and unintentional violations of the law." Such a distinction should be made, with "higher penalties for egregious cases."

Response: The ADA is patterned directly on Section 504,

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which does not include higher penalties for willful violations. Under Section 504, there have not usually been instances of "wilful refusals" to accommodate people with disabilities. Rather, most cases deal with whether an accommodation would be effective and whether it would pose an undue burden. In any event, it is disingenuous, and indeed somewhat illogical, to recommend "higher penalties" under the ADA for egregious, willful violations. Under the compromise ADA, the right to seek any type of monetary penalties, including any form of punitive damages, has been removed for individual plaintiffs. Therefore, the only remedy under the ADA for plaintiffs, for any type of violation, is injunctive relief--for which it is difficult to create "higher" and "lower" types. If the NFIB wishes to recommend that punitive damages for egregious cases be reinserted in the bill for willful violations; it should present the suggestion in that form.

5. NFIB statement: The "small business exemption" in the bill is inadequate. While businesses have an exemption in the employment section of the ADA (employers with 15 or fewer employees are not covered), there is no exemption for the public accommodations section of the bill.

Response: The small business exemptions in the ADA track the exemptions that exist in other civil rights laws. Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the basis of race, sex, religion or national origin, exempts employers with 15 or fewer employees. The ADA adopts the same exemption. By contrast, Title II of the Civil Rights Act of 1964, which prohibits discrimination in public accommodations on the basis of race, religion or national origin, does not have a small business exemption. This differentiation is logical: the point of a public accommodations provision is to ensure that people with disabilities (or people of a certain race) can gain access into public places, such as restaurants, movie theatres and stores. The fact that such a business may have only five or ten employees is irrelevant to the issue of providing access. To the extent that the NFIB is concerned about the requirement to provide auxiliary aids for people with disabilities, the ADA effectively incorporates a small business exemption in the public accommodations area by not requiring such provisions if they would impose an undue burden. Consideration of the size of the business and the cost of the accommodation are the explicit factors that are to be taken into account in deciding whether an action would be an undue burden. In addition, as part of the compromise with the Administration, the concerns of small businesses were taken into account in the area of new construction, by providing an exemption for installing elevators in facilities that are less than three stories high or have less than 3,000 square feet per story. (See ADA, sec. 101(4) and (9); 302(b)(2)(A), 302(b)(2)(A)(vi) and

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303(b), p. 44 and pp. 46-47; p. 74 and 76.)

6. NFIB statement: No recognition of a "good faith effort" is made in the ADA. A business owner could be sued "if the owner fails to provide a specific type of accommodation even if a good faith effort was being made to provide for other types."

Response: This statement is misleading. As the Committee Report makes clear in great detail, an accommodation must simply meet two basic requirements: it must achieve its purpose (that is, it must allow the person to perform the essential functions of the job), and it may not impose an undue hardship. Within those two requirements, the employer has great flexibility to decide what accommodation it chooses to provide. If an accommodation achieves its purpose, an employee cannot get a court to substitute another accommodation which he or she may have preferred. As the Committee Report states clearly: "In situations where there are two effective accommodations, the employer may choose the accommodation that is less expensive or easier for the employer to implement as long as the selected accommodation provides meaningful equal employment opportunity." See Committee Report, p. 35. The same is true for modification of policies and provision of aids under the public accommodations section. As the Report makes clear, for example, a restaurant would not be required to provide menus in braille if it provided a waiter or other person who was willing to read the menu. Report, p. 63. Therefore, contrary to the NFIB's implication, there is not only one accommodation or aid that is the "right" accommodation under the ADA, with the unlucky employer who has in "good faith" provided another reasonable accommodation or aid suddenly discovering in court that it has not chosen the magical "right" one. Employers and businesses have flexibility under the ADA to provide a range of effective accommodations or aids.

7. NFIB statement: The ADA requires retrofitting of existing structures when the structures are "altered," but the bill "does not define what constitutes an alteration." This makes it difficult for owners to know how to comply with the law.

Response: This statement is misleading. The bill provides specific guidance with regard to what type of alterations are covered, the Committee Report provides further guidance, and regulations to be issued by the Attorney General will, as regulations always do, provide yet more guidance in probably great detail. We think it is safe to say that lack of information and clarity will not be the barrier to compliance in this area. The bill provides that "structural alterations" that "affect the usability of the facility" require accessible altered portions and "major structural alterations" that "affect the usability of the facility" require accessibility of the services

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to the altered portions. See ADA, sec.302(b)(2)(A)(vi), p. 76. The Committee Report explains that the term "structural" means "elements that are a permanent or fixed part of the building, such as walls, suspended ceilings, floors, or doorways." The Report further explains that "major structural alterations" refers to "structural alterations or additions that affect the primary functional areas of a building, e.g., the entrance, a passageway to an area in the building housing a primary function, or the areas of primary functions themselves. For example, structural alteration to a utility room in an office building would not be considered major." Committee Report, p. 67.

8. NFIB statement: No incentives are included in the ADA to help a business owner with voluntary compliance. The current tax deduction of $35,000/year for structural changes is inadequate.

Response: The issue of providing financial assistance to businesses who make changes for physical access is, and should be, separate from establishing in the law the basic civil rights for people with disabilities. Section 504 of the Rehabilitation Act did not provide extra financial assistance when it established its requirements. The $35,000/year deduction currently in the tax code, which was sponsored by Senator Dole, is an excellent start for the separate issue of providing assistance to business owners, and the NFIB is encouraged to work with the sponsors of the ADA as we explore further alternatives.

9. NFIB statement: In new construction, "accommodation" must be made for all "potential places of employment." However, this term is "poorly defined" and may include places such as boiler rooms and stockrooms.

Response: The term "potential places of employment" is defined in the bill and further explained in the Committee Report. As a preliminary matter, there is no requirement of "accommodation" for potential places of employment. At the Administration's request, it was clarified in the bill that the term "potential places of employment" was relevant only for purposes of new construction. "Potential places of employment" are defined in the statute as places that are intended for nonresidential use (i.e., that are intended for commercial use) and whose operations affect commerce. The purpose of the provision is straightforward: there are many new buildings that, at the time of design and construction, do not yet have established tenants that would qualify as "public accommodations" under the ADA, but are simply designed for some commercial use. This provision makes clear that, for purposes of new construction, such places must be built accessible so that when

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business tenants ultimately occupy the building, it will already be accessible. The Committee Report further explains that regulations concerning "potential places of employment" will "cover the same areas in a building as existing design standards. Thus, unusual spaces that are not duty stations, such as catwalks and fan rooms, would continue to lie outside the scope of design standards." Because every state currently has in place design standards for construction, there will be guidance in this area for compliance. (See ADA, sec. 301(2), and 303(a), p. 67 and p. 79; Committee Report, p. 69.)

10. NFIB statement: The ADA provides that reasonable accommodation must be made unless it creates an undue hardship. However, the definition of undue hardship is "so subjective that no business owner will ever know when the requirements of the bill are met."

Response: This statement flies directly in the face of 15 years of experience under Section 504 of the Rehabilitation Act of 1973 and ignores major modifications made in the compromise ADA. Based on requests from the business community, the ADA introduced this year deleted a new standard that had been used in last year's ADA and returned to the terminology and standard of Section 504. That standard requires that accommodations that cause an "undue hardship" need not be undertaken. This change was made so that businesses could draw on the 15 years of experience and caselaw under Section 504 so that they would know "when the requirements of the bill were met." In response to requests from the Administration and the business community, the term "undue hardship" was further defined in the bill to include a specific standard (actions requiring "significant difficulty or expense") and to explicitly include the three factors set forth in the Section 504 regulations (size of business, type of operation and cost of accommodation). The standard and practice under the ADA will thus be the same as that already clearly set forth and applied under Section 504 for the past 15 years.

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NEED FOR COVERAGE OF THE PRIVATE TRANSPORTATION INDUSTRY BY THE AMERICANS WITH DISABILITIES ACT OF 1989.
PREPARED BY THE SENATE SUBCOMMITTEE ON THE HANDICAPPED
SEPTEMBER 6, 1989

Accessible intercity coach transportation has been termed the "Key to National Mobility" in the Community Transportation Reporter, November 1988 issue. Such transportation is provided primarily by private companies such as Greyhound, and is crucial for people with disabilities, particularly those in rural areas.

In its 1986 report Toward Independence, which first proposed the Americans with Disabilities Act, the National Council on Disability recommended that discrimination against people with disabilities be prohibited in regard to private intercity transportation providers. The Council noted that such carriers were not under any Federal requirements not to discriminate against people with disabilities and that as a result, "most intercity coach buses do not not have lifts or other access features to make them usable by disabled people who use wheelchairs."

Studies indicate that approximately 27% of Americans with disabilities live in rural areas (compared to 23% of other Americans). Rural and small town people usually do not have access to public transportation; for such people private transportation providers are their only link to the outside world.

People with disabilities also have drastically lower income than other Americans. People with lower incomes are more likely to use less expensive intercity buses and private train lines rather than higher cost airplanes for their travel.

For these reasons, the coverage of private transportation providers is essential if the ADA is to advance the goal stated by President Bush of bringing people with disabilities into the "mainstream of American Society."

Section 304 of the Committee substitute requires that all newly purchased over-the-road buses be "readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs," and delays the effective date of this requirement for 6 years after the date of enactment for small providers (as defined by the Secretary of Transportation), and for 5 years for other providers.

Section 305 directs the Architectural and Transportation Barriers Compliance Board to undertake a study to determine the access needs of persons with disabilities to over-the-road buses, and to determine the most cost effective methods for making over-the-road buses accessible. The results of the study are to be submitted to the President and to the Congress within 3 years after the date of enactment.

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It is important to understand what these provisions do -- and do not -- require.

First, these provisions do not require retrofitting of any buses in order to render them accessible. It is very clear that such retrofitting is by far the most expensive means of providing access. There also occur far more maintenance problems with equipment that has been retrofitted. For these reasons, with Committee chose not to require retrofitting of buses, but to require that new buses be accessible. In this manner, a fully accessible system can be phased in, gradually, as new vehicles are purchased.

Second, the requirement that new vehicles be accessible does not come into effect until 5 years after the date of enactment. Small providers are given an additional year, or a total of 6 years. This delay was not part of the bill that was introduced. Many in the disability community and many in this body are very much opposed to that long of a delay, under normal circumstances. It is only because of the unique circumstances presented by the over-the-road industry that the Committee agreed to such a lengthy delay. As a result of this delay, over-the-road providers may continue to purchase inaccessible buses for at least 5 years after the date of enactment.

Third, there is no requirement in the Senate substitute that lifts, or any particular method, be utilized in providing accessible over-the-road buses. The Senate substitute merely requires that vehicles, in time, be accessible. It does not mandate that any buses be equipped with lifts. Indeed, the major purpose of the study mandated by Section 305 is to assist the over-the-road industry to determine the most cost-effective methods of attaining accessibility. The study is to assess 'recent technological and cost saving developments in equipment and devices" and is to explore "possible design changes in over-the-road buses that could enhance such accessibility." Industry input into the study is assured by the fact that 50 percent of the members of the advisory committee overseeing the study must be selected from among private operators using over-the-road buses, bus manufacturers, and lift manufacturers,

We are confident that, with the cooperation of government, industry, and the disability community, a cost effective method for providing accessible over-the-road buses will be developed over the next five years. The development of the necessary technology is essential to the ability of persons with disabilities to travel to all cities in this great land of ours, and to travel by bus among the same cities and towns that those of us without disabilities travel to as a matter of course.

WHAT ABOUT A STUDY WITHOUT A MANDATE FOR THE PRIVATE TRANSPORTATION INDUSTRY?

An ADA without a clear mandate for accessibility of the over-the-road buses would be seriously weakened. If the mandate were removed, these interim years would expectably be used by the

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over-the-road bus providers to contest the need for or feasibility of accessible service rather than getting ready to deliver it. The aim of the legislation is to facilitate accessibility not to create incentives for resisting it.

It should be remembered that the famous Freedom Rides of the 1960s involved private intercity buses. The hard-won principle established by these rides was that all Americans should be free to travel without being discriminated against. People with disabilities should have the same right to travel without discrimination on these same buses.

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ILLEGAL DRUGS AND ALCOHOL PROVISIONS
AMERICANS WITH DISABILITIES ACT OF 1989
PREPARED BY THE SENATE SUBCOMMITTEE ON THE HANDICAPPED

Title I of the Americans with Disabilities Act (S. 933) addresses the problem of illegal drug and alcohol abuse. In response to the requests by the Administration and others, there has been extensive discussion and modification of the ADA's approach toward job applicants and employees who currently use or are addicted to illegal drugs or alcohol. This process has resulted in a bill that is wholly consistent with our national drug strategy, meets every legitimate concern of the business community, and promotes the national effort to maintain drug free workplaces. The ADA approach includes four points:

First, as part of the Agreement with the Administration, a technical amendment will be offered on the floor to provide that any job applicant or employee who is a current user of illegal drugs will be expressly excluded from Title I's definition of a "qualified individual with a disability." Therefore, no one who currently uses illegal drugs is entitled to any employment protections under the ADA, regardless of whether that person is a casual user of drugs or an addict and regardless of whether his or her illegal drug use has any adverse impact on job performance. Employers may thus refuse to hire and may discipline or fire any person who currently uses or is addicted to illegal drugs without violating the ADA.

Second, in addition to explicitly removing current illegal drugs users from the Act's employment protections, Title I also expressly allows employers to: prohibit the use of illegal drugs or alcohol by all employees; require that employees not be under the influence of illegal drugs or alcohol at the workplace; require that employees conform their behavior to requirements established pursuant to the Drug Free Workplace Act; and hold a drug user or alcoholic to the same qualifications, performance and behavioral standards to which all employees are held, even if unsatisfactory performance or behavior is related to the individual's drug use or alcoholism. This is explained in detail in the Committee Report at pages 40-42.

Third, Title I explicitly states that nothing in the Act prohibits or restricts employers from conducting drug testing or from making employment decisions based on such test results. Therefore, the Act allows drug testing before and during employment, and applicants who are tested and denied jobs and employees who are tested and disciplined or fired on the basis of test results showing illegal drug use have no protection under the ADA.

Fourth, the Act does not require employers to make any reasonable accommodations for current illegal drug users (including those addicted to illegal drugs), and does not require employers to offer such accommodations to any individual who

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violates any of the rules or requirements set out in the statute. This is because employers' obligations to make reasonable accommodations extend only to those who have a "disability" within the scope of the Title. Since current illegal drug use (including addiction) does not constitute such a disability, no duty of reasonable accommodation exists with respect to any applicant or employee who currently uses illegal drugs.

At the same time, the ADA retains employment protections for applicants and employees who have overcome drug or alcohol problems, including those who are participating successfully in treatment programs and are refraining from illegal drug use or alcohol abuse.

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No West

EDWARD M. KENNEDY, MASSACHUSETTS, CHAIRMAN

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KRISTINE A. IVERSON, MINORITY STAFF DIRECTOR

United States Senate

COMMITTEE ON LABOR AND
HUMAN RESOURCES

WASHINGTON, DC 20510-6300

August 4, 1989

Dear Colleague,

On August 2, 1989, with the endorsement of President Bush, the Committee on Labor and Human Resources unanimously approved a substitute amendment to S. 933, the Americans with Disabilities Act of 1989 (ADA). 57 Senators, from both sides of the aisle, have cosponsored this legislation. A copy of the list of cosponsors is attached.

This landmark legislation extends civil rights protections to people with disabilities in the areas of employment in the private sector, public accommodations, services provided by state and local governments, transportation and telecommunication relay services.

The Americans with Disabilities Act balances the rights of people with disabilities with the legitimate concerns of the business community. The ADA does not create undue burdens on small business.

The ADA is not only the right thing to do for people with disabilities, but it is also the right way to help strengthen our economy and enhance our international competitiveness. The ADA will save the government and society billions of dollars by getting people off the dependency/social welfare rolls and into jobs, into restaurants, into shopping centers and into community activities.

We urge you to join us in cosponsoring this historic legislation.

Sincerely,

Tom Harkin
United States Senator

Edward M. Kennedy
United States Senator

Dave Durenberger
United States Senator

George Mitchell
United States Senator

Bob Dole
United States Senator

Jim Jeffords
United States Senator

Paul Simon
United States Senator

John McCain
United States Senator

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COSPONSORS OF THE AMERICANS WITH DISABILITIES ACT OF 1989

Mr. HARKIN (IA)
Mr. KENNEDY (MA)
Mr. DURENBERGER (MN)
Mr. SIMON (IL)
Mr. JEFFORDS (VT)
Mr. CRANSTON (CA)
Mr. MCCAIN (AZ)
Mr. MITCHELL (ME)
Mr. CHAFEE (RI)
Mr. LEAHY (VT)
Mr. STEVENS (AK)
Mr. INOUYE (HI)
Mr. COHEN (ME)
Mr. GORE (TN)
Mr. PACKWOOD (OR)
Mr. RIEGLE (MI)
Mr. BOSCHWITZ (MN)
Mr. GRAHAM (FL)
Mr. PELL (RI)
Mr. DODD (CT)
Mr. ADAMS (WA)
Ms. MIKULSKI (MD)
Mr. METZENBAUM (OH)
Mr. MATSUNAGA (HI)
Mr. WIRTH (CO)
Mr. BINGAMAN (NM)
Mr. CONRAD (ND)
Mr. BURDICK (ND)
Mr. LEVIN (MI)
Mr. LIEBERMAN (CT)
Mr. MOYNIHAN (NY)
Mr. KERRY (MA)
Mr. SARBANES (MD)
Mr. HEINZ (PA)
Mr. GLENN (OH)
Mr. SHELBY (AL)
Mr. PRESSLER (SD)
Mr. HOLLINGS (SC)
Mr. SANFORD (NC)
Mr. WILSON (CA)
Mr. SASSER (TN)
Mr. DIXON (IL)
Mr. KERREY (NE)
Mr. ROBB (VA)
Mr. FOWLER (GA)
Mr. ROCKEFELLER (WVa)
Mr. BIDEN (DE)
Mr. BENTSEN (TX)
Mr. SPECTER (PA)
Mr. DeCONCINI (AZ)
Mr. KOHL (WI)
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Mr. D'AMATO (NY)
Mr. DOLE (KS)
Mr. HATCH (UT)
Mr. WARNER (VA)
Mr. PRYOR (AR)

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August 1, 1989

TO: Senator Dole

FROM: Mo West

SUBJECT: ADA Cosponsorship

Today the Administration and Senators Kennedy and Harkin came to a compromise on the Americans with Disabilities Act. As you will note from Dennis Shea's memo the changes have been agreed upon and address the conflictual problems in the legislation.

Tomorrow's mark up is scheduled for 9:00 a.m.-- I spoke with the White House this evening and President Bush has fully endorsed the ADA package -- and will issue a press release of his support tomorrow.

With the exception of further refinement of language in the bill the negotiations have been successful. Your cosponsorship along with the Administration's support tomorrow will signify your strong commitment to passage of a comprehensive civil rights bill for people with disabilities this Congress.

Will you cosponsor the Americans with Disabilities Act?

Yes____ No_____

If so, shall I will work with Walt & Jake to issue a statement and press release indicating your support.

Yes_____ No_____

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Office of the Attorney General
Washington, D. C. 20530

July 26, 1989

Honorable Edward M. Kennedy
Chairman, Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

During my testimony before your Committee on June 22, 1989, I presented this Administration's endorsement of comprehensive civil rights legislation for persons with disabilities. The Administration continues to believe that the Americans with Disabilities Act, S. 933, is an appropriate vehicle for landmark legislation in the disability rights area. Our agreement in concept for new legislation, however, cannot mask the problems that we have with several of the bill's provisions. I certainly hope, however, that further discussions will allow us to reach common ground on the issues over which we have differed.

For the past month representatives of the Department of Justice, the Department of Transportation, and the White House have met with you and staff from your Committee and from Senator Dole's office in an attempt to resolve our differences. The discussions have proceeded positively and amicably through numerous sessions, with both sides acting in good faith. The goal has been to reach agreement on a revision of S. 933 that both the Administration and the sponsors of the bill could endorse. Although we have reached agreement on a number of specific issues and provisions, our discussions thus far have not yet reached that goal.

This letter is the "bill of particulars" that I discussed at our meeting Monday night. It constitutes a statement of the Administration's views on the major items in the bill as it is currently drafted and is a summation of the major provisions upon which we agree. More importantly, it posits several options for further discussion over two of the thorny issues over which we have differed: remedies and the scope of public accommodations.

Employment

Perhaps we have reached the most agreement on the employment provisions of the bill. Indeed, the changes that we have agreed upon remove many of the egregious problems that the ADA as

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introduced would have caused, particularly for small businesses that are the backbone of our economy.

The Administration continues to endorse the concept of paralleling in the disability area Title VII of the Civil Rights Act of 1964. We believe that, like Title VII, coverage should be phased-in over time. We propose that S. 933 apply to all employers with 25 or more employees two years from enactment of the legislation and that, two years later, coverage be phased-down to include all employers with 15 or more employees. This two-year implementation period will give the Administration time to craft implementing regulations and to engage in wide-reaching technical assistance efforts to explain the bill's requirements to covered entities.

The Administration endorses using the existing standard from the Federal Government's regulations implementing section 504 of the Rehabilitation Act of 1973. Thus, employers would be obligated to make reasonable accommodations to the known disabilities of applicants for employment or employees unless such accommodations would result in an undue hardship on the operation of the employer's business. We recommend that, whenever possible, language in the statute should be taken verbatim from the existing Federal section 504 regulations. This approach is particularly important for the "reasonable accommodation/undue hardship" requirement. (In fact, whenever possible, for all titles of S.933, standards imposed on recipients of Federal funds who would also be subject to the requirements of the Fair Housing Act and Section 504 should be consistent.)

The Senate staff agreed with our suggestion of deleting title I of S. 933 and moving certain of its provisions to the other substantive titles of the bill. For the employment provisions, we agreed to include language from the general prohibitions on discrimination found in Subpart B of the regulations of the Departments of Health and Human Services and Labor implementing section 504. We have included the concept of reemployment inquiries about applicants' disabilities, as well as placing severe restrictions on reemployment physicals and language on selection criteria and testing. We were pleased that there is now agreement with our suggestion that any notion of "anticipatory discrimination" be deleted from S. 933. The Senate staff have also agreed that the bill would include language clarifying that employer-provided health insurance is not required to cover preexisting conditions or alter employer choice of the mix of medical services eligible for reimbursement under a plan.

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Remedies

The Administration's position on remedies is based on the belief that S. 933 should use existing civil rights laws for minorities and women as its model. S.933 as introduced would inevitably lead to a massive burden of litigation, benefitting lawyers more than those we all seek to assist.

We would use existing enforcement procedures under Title VII of the Civil Rights Act of 1964 for employment and existing enforcement procedures under Title II of the Civil Rights Act of 1964 for public accommodations. The Administration has opposed going beyond such a model for remedies in this area to include compensatory and punitive damages and jury trials for two reasons: our earnest belief that existing Title II and Title VII remedies will be effective in enforcing the new statute and our fear that the lure of large settlements in compensatory and punitive damages will unnecessarily promote litigation.

However, because of your concern that additional remedies should be available in S. 933, particularly to combat wilful and egregious acts against persons with disabilities, we have given consideration to other options. There are a range of alternatives in the remedies area that, while different from S. 933's current requirements, would nonetheless provide additional remedies for persons with disabilities. Using the pattern and practice authority given to the Attorney General in the Fair Housing Act Amendments of 1988 as a model, the Attorney General could be given authority to seek civil penalties in cases involving egregious and wilful violations. Such an approach could provide substantial penalties in set amounts, with increasing penalties for subsequent violations. This type of approach would not likely foster needless litigation and would still provide a strong fiscal incentive for covered entities to avoid discriminatory practices.

Public Accommodations

The Administration believes that any new civil rights law for persons with disabilities should cover public accommodations if that law is to guarantee access to the mainstream of American life. S. 933 as currently drafted would extend the reach of Federal regulation inappropriately to encompass practically every structure in America for human use -- even homes and churches. This intrusion, we fear, is overly broad and surely would have unknown and unintended consequences.

To this end, we have proposed paralleling the coverage of Title II of the Civil Rights Act of 1964. This would provide coverage of inns, hotels, motels, restaurants, cafeterias, lunchrooms, gasoline stations, motion picture houses, theaters, concert halls, sports arenas, and other places of entertainment.

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We have also entertained the concept of adding other categories of public accommodations to this list, particularly the professional offices of health care providers.

The Administration continues to link the scope of coverage of public accommodations with the extent of the nondiscrimination obligation. We have recently given consideration to alternatives suggested by a two-tiered or bifurcated approach to accessible public accommodations. Perhaps we can explore the ramifications of a bifurcated or two-tiered approach that would duplicate the broad coverage of S. 933 but which would provide reduced obligations for some public accommodations.

Under one version of such an approach, the first tier would include all public accommodations covered by title II of the Civil Rights Act of 1964 plus the professional offices of health care providers. These public accommodations would be subjected to nondiscrimination rules, new construction requirements, existing building requirements, including minimal retrofitting requirements (those that are "readily achievable"), and the requirement to provide auxiliary aids to persons who have hearing or vision impairments.

The second tier would include the categories in S. 933 that may truly be described as public accommodations (not all new private buildings as now covered by S. 933). These additional categories of accommodations would be subjected to a significantly less far-reaching set of requirements. Under this compromise approach, the obligation would cover new construction only; there would be no retrofitting or auxiliary aids obligation. Instead, entities covered by this second tier would be required to have any new facilities constructed for first occupancy 30 months after enactment of the bill be accessible. Similarly, when such entities make significant renovations or alterations of their existing facilities, they would have to make such alterations in an accessible manner.

The second tier could contain an exemption for small businesses, perhaps based on the size of the enterprise. In addition, the second tier public accommodations would not be required to install an elevator in buildings up to 3 stories in height.

This approach has the advantage of providing broader coverage, thus promising a fuller implementation of the goal of opening up all aspects of American life to persons with disabilities. It is still cost conscious, however, avoiding costly retrofitting requirements for the second tier and restricting second tier requirements to the more cost effective approach of making new buildings accessible. This approach would not, as does S. 933, subject virtually all new non-residential construction to Federal jurisdiction, in a sense establishing a

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Federal building code for all private commercial construction. The Administration would be interested in having the views of S. 933's sponsors on this type of approach to making public accommodations accessible.

During discussions, we have come to understand S. 933's use of the term "readily achievable," the concept that will apply to making alterations in existing facilities. The Senate staff's proposal that facilities will only need to be retrofitted if the alteration is easily accomplishable, or is able to be carried out without much difficulty or expense is an approach that, if fully supported in the legislative history with specific examples, can be viewed favorably by the Administration. Finally, your Committee staff agreed that neither the phrase "potential places of employment" nor anything in the public accommodation provisions is intended as a separate basis for coverage of employers.

Treatment of Religious Entities

The Administration believes that any legislative initiative in this area should be carefully crafted to avoid any potential confrontation with the First Amendment to the Constitution. For example, we believe that churches and synagogues should not be forced to expend monies which have been contributed for religious and charitable purposes in order to meet the expenses of litigation.

We are pleased with your Committee's offer to exempt employment practices from Federal jurisdiction if they are based on the religious tenets of a religious organization or if the employment decision is based on the religion of the employee. The Administration continues to believe, however, that religious entities must be fully exempted, particularly in the public accommodations area, but also in the area of employment.

Public Transportation

Our goal remains that persons with disabilities have access to adequate transportation in this country. For this reason, we continue to recommend that new public buses purchased after enactment of the bill be accessible. Similarly, the bill should also require paratransit services that supplement, rather than duplicate, fixed-route bus service. This paratransit service should be open to those persons with physical or mental disabilities who are unable to use the mainline accessible system by virtue of their disabilities.

We continue to believe, however, that the Secretary of the Department of Transportation should have leeway, in the form of a waiver authority, to make determinations in limited circumstances that not all new buses need be lift-equipped. It is axiomatic

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that no rule is reasonable without an exception. For example, if the supply of lift-equipped buses is disrupted, the purchase of new buses should not come to a halt. Similarly, we believe that the obligation to provide paratransit services should be subject to a cost limitation, for example, at 2% of the transit provider's operating budget.

The cost of making older rail stations fully accessible is extremely high. With systems required to purchase lift-equipped buses, there will be fewer funds available for other transit expenditures. Also, increased service will be available with more accessible buses. Therefore, we believe that the provision to require retrofitting key stations in rail systems should be deleted from the bill. Consideration of any requirements in this area would depend on the establishment of a cap on paratransit expenditures. However, this in no way affects the current requirements that a newly constructed station or renovated station be made accessible.

Private Transportation

During the discussions, your staff presented a proposal that would reduce the requirements of S. 933 for private transportation. The Administration continues to believe, however, that, with the exception of employer-sponsored van pools, it would be premature to apply requirements to private establishments using vehicles for transporting individuals or to private entities primarily engaged in the transportation business. Little is known of the exact nature of the demand for accessible private transportation service by persons with disabilities. Furthermore, there is substantial evidence of the financial fragility of private providers, particularly intercity bus owners and operators, and our concern is that the additional costs of providing accessible transportation could drive private providers out of business and would result in decreased services for everyone, particularly vulnerable groups such as the elderly, the young and the poor, especially in rural areas. For these reasons, the Administration believes that S.933 should commission an in-depth study of this area which could determine if there is a need for future legislation.

Telecommunications

The Administration once again endorses the concept of making our Nation's telecommunications system accessible to persons who are deaf or who have hearing or speech impairments. We believe that functionally equivalent phone service for persons with hearing or speech impairments should be provided. We note that negotiations over amendments to the requirements in title V of S. 933 are continuing, and we remain hopeful that an agreement on the exact nature of the legislative vehicle that will ensure such equivalent service will soon be reached.

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I am certain that you will find this "bill of particulars" a useful spur to continued discussions. I request that you consider and respond to these points. Then, the principals can meet this Thursday for further discussions. We believe the Administration has made significant offers that, with similar offers on your part, could lead to agreement in key areas. We hope that you will respond in kind. The Administration looks forward to your views in response to this document.

Sincerely,

Dick Thornburgh
Attorney General

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THE WHITE HOUSE
Office of the Press Secretary

For Immediate Release August 2, 1989

STATEMENT BY THE PRESS SECRETARY

The Administration has reached a consensus with key Senators from both parties on legislation that would expand the reach of this country's civil rights laws to include disabled Americans. This will be landmark legislation, not only for the 37 million Americans with some form of disability, but for all Americans, demonstrating, as the President said in his Inaugural Address, that "this is the age of the offered hand."

The President endorses this legislation as the vehicle to fulfill the challenge he offered in his February 9 address to the Nation: "Disabled Americans must become full partners in America's opportunity society."

The President has pursued a commonsense approach, seeking a practical bill that will help the disabled reach their full potential. He is committed to producing a bill that can be signed this year.

The discussions have resulted in an agreement we expect to be reflected in today's mark up in the Senate Labor and Human Resources Committee of the "Americans with Disabilities Act." The agreement provides for:

- Federal protection for the disabled against discrimination in the workplace, paralleling existing protections that apply to entities that receive federal funds. The requirement would initially apply to employers of 25 or more and phase down to employers of 15 or more. Covered employers would have to make reasonable accommodation to disabled persons.

- Prohibition of discrimination against the disabled in public accommodations. The agreement adopts a broad definition of public accommodations, including restaurants, stores, and health care providers. A core group of public accommodations would be required to make readily achievable alterations to existing facilities to accommodate the disabled. This legislation is designed to achieve access for the disabled in the most efficient manner, with emphasis on making new buildings accessible.

- Enforcement of the new protections through the Equal Employment Opportunity Commission, and suits seeking injunctive relief.

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The President is committed to bringing persons with disabilities into the mainstream, including full participation and access to all aspects of society. He wants to do this through a framework that allows for maximum flexibility to implement effective solutions, builds on existing law to avoid unnecessary confusion and litigation, and attains these goals without imposing undue burdens. The President believes this can be accomplished by using reasonable measures, phased over time, as this legislation does.

We are pleased that substantial progress has been made. We will continue to analyze the full ramifications of the legislation and look forward to working with the Senate and the House to complete the legislative process this year.

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United States Senate

COMMITTEE ON LABOR AND
HUMAN RESOURCES

WASHINGTON, DC 20510-6300

cc: SB, DW, MO WEST ATT → WEST

September 5, 1989

Dear Colleague:

The Americans with Disabilities Act, S. 933, is expected to be on the Floor during Labor Day week. I was pleased to become a cosponsor of the committee-approved version of the bill. I did so with the understanding that I still had important concerns about the bill.

My principal concerns are:

1. The bill provides no small business exemption from the bill's public accommodations provisions. Thus, mom-and-pop businesses will have to incur more than de minimus costs when necessary to provide accessibility. For small businesses, any new costs can be very detrimental to their competitive position.

2. The relief available in an Attorney General action to enforce the public accommodations provisions is excessive. This includes a civil penalty of up to $50,000 for a first offense and up to $100,000 for a second offense.

3. The bill's requirement that private bus transportation companies purchase or lease their new buses with lifts is premature, even with a delayed effective date. For large companies, this requirement is effective five years after enactment; for small companies, it is effective one year later. This "new bus" requirement is based on inadequate data. It creates the serious risk that, when it goes into effect, private over-the-road regular route service, that is, scheduled service between communities, will be significantly curtailed, if not virtually eliminated, at some point thereafter. Ironically, the bill calls for a three-year study to determine, in effect, whether this requirement is feasible. Yet, the lift requirement remains in place regardless of the results of the study. A study of this issue should be undertaken first, and then the Congress should act based on the study.

Further information about each concern is attached. My concerns are more fully detailed in my additional views in the Committee Report, which I will also place in the Wednesday, September 6, Congressional Record.

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Please feel free to call Mark Disler (224-7703) or Steve Settle (224-6770) of my staff if there are any questions.

Sincerely,

Orrin G. Hatch

Orrin G. Hatch
United States Senator

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF ADMINISTRATION
Washington, D.C. 20503

TO: ~~[illegible]~~ Chris Bolten

LOCATION: Robert Dole's Office

FAX NUMBER: 224-8952

FROM: Roger Porter

ROOM NUMBER: WW-2nd

PHONE EXT: 456-~~[illegible]~~ 2705

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DISABILITY

Issues Needing Answers

1. Costs and Benefits

What are the costs and benefits associated with the Americans with Disabilities Act (ADA)? Many provisions have costs. There does not now exist an analytic base for understanding the size of those costs and how the costs could be most efficiently allocated.

AT&T has estimated that its costs for complying with the telecommunications provisions of ADA would be $200 million per year. Operating both lift-equipped buses and paratransit could cost public transit authorities $270 million per year. How could these costs be mitigated consistent with ADA's goals? Who will ultimately pay these costs? Also, what are the gains to society that offset these costs? Where do these gains occur in relationship to the costs? What can be done to mitigate the most extreme costs?

2. Scope of Provisions

How widely should ADA's net be thrown? The public accommodations section seems to suggest that every office building in America would have to be accessible. Another reading suggests every doctor's and dentist's office would have to be accessible.

What provision should be made for small entities? Large employers and large firms can spread costs over a large base. Small firms and small organizations would find themselves with costs that threaten viability or ability to fulfill a principal mission. What provision should be made for these entities? Total exemption? Case by case good faith effort? What size entities should be exempted? ADA does not allow cost as a defense, and so an organization would have to comply no matter what the cost.

Remember the example that bedeviled Joe Califano when implementing Section 504 of the Rehabilitation Act. A library in a farming town in Iowa, population under a thousand, thought the federal government (actually it was the State librarian) was requiring it to install a ramp allowing for wheelchair access of the library. The ramp would have cost about $7,000, close to the library's operating budget. And the town had no residents who used a wheelchair, making the proposed ramp a monument to useless regulation.

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3. Implementation and the Courts

ADA contains many ambiguities that should be resolved in the statutory language. Because ADA is silent on many points, definitive elaboration would be left to the courts. For example, are transvestites protected? In effect, the real meaning of ADA would not be known for years until a number of cases move through the courts applying "undue hardship" and other vague concepts to specific fact patterns.

How can implementation be handled most smoothly? A law that took effect on enactment or shortly thereafter would expose many entities to litigation risks of which they are not aware.

Also, the uniform requirement for promulgating regulations in 180 days does not consider the comparative difficulty of regulating new areas as compared to altering existing regulatory schemes. For example, the Department of Transportation is asked to undertake a new area in the regulation of private transit.

What flexibility can offered to encourage non-confrontational dispute resolution and prevention as opposed to litigation and administrative processes?

4. Persons Covered and Implications

What is to be done where ADA overlaps the current structure of civil rights law? The Rehabilitation Act of 1973 and the Fair Housing Act of 1988 cover some of the same populations as ADA, have different compliance standards and different remedies. Absent specific instruction from the statute, resolution will be turned over to the courts and will entail significant litigation costs.

The potential for covering drug and alcohol abusers within the protection offered those with disabilities deserves long and hard consideration. On its face, such a move would appear to end the "drug free workplace" concept.

With respect to accessibility, does an emphasis on removing barriers exclude assistance to those for whom affirmative action is required, e.g., the sight and hearing impaired?

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LEGISLATIVE NOTICE

Editor, Judy Myers

Notice #37
September 6, 1989

U.S. SENATE REPUBLICAN POLICY COMMITTEE
William L. Armstrong, *Chairman*

S. 933: THE AMERICANS WITH DISABILITIES ACT OF 1989

Calendar 216

Reported: Labor and Human Resources Committee, August 2, 1989, S. Rept. 101-116

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HIGHLIGHTS

- Prohibits discrimination on the basis of disability in employment, public services, public accommodations and telecommunications relay services.

- Defines "disability" as:

  -- a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

  -- a record of such an impairment; or

  -- being regarded as having such an impairment.

Employment

- Bars covered employers from discriminating against people with disabilities in regard to job application procedures, hiring and firing, compensation, job training and other terms, conditions and privileges of employment. This prohibition would apply to all employers who:

  -- Beginning two years after enactment, employ 25 or more employees;

  -- Beginning four years after enactment, employ 15 or more employees.

- Permits employers to ban the use of alcohol and illegal drugs in the workplace and to prohibit employees from being under the influence of such substances while at work.

- Permits religious entities to give preference in employment to members of their own faith.

Public Services

- Requires public entities that purchase new buses and rail vehicles to assure that they are accessible to people with disabilities, including people who use wheelchairs.

- Requires public entities that operate fixed route bus systems to provide comparable services to people with disabilities through paratransit or

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other special transportation services, unless they demonstrate to the Secretary of Transportation that the provision of such additional services would impose an undue financial burden.

- Requires that all public transportation facilities built more than 18 months after enactment be accessible to people with disabilities.

- Requires public entities to assure that any existing public transportation program or activity is "when viewed in its entirety . . . readily accessible to and usable by individuals with disabilities, including indviduals who use wheelchairs." This provision would take effect 18 months after enactment.

- Requires that intercity, rapid, light and commuter rail systems have at least one car per train that is accessible to people with disabilities "as soon as practicable, but in any event in no less than 5 years."

- Requires that railway stations be made accessible within 3 years after enactment, but authorizes the Secretary of Transportation to extend this deadline to up to 20 years after enactment "for extraordinarily expensive structural changes to, or replacement of, existing facilities."

Public Accommodations

- Prohibits discrimination on the basis of disability "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation."

- Defines public accommodations to include such entities as motels, restaurants and bars, theaters, lecture halls, bakeries, hardware stores, laundromats, funeral parlors, shoe repair shops, professional offices, museums and libraries, parks and zoos, schools, day care centers, homeless shelters, food banks, health spas, bowling alleys and golf courses.

  [NOTE: Unlike the employment title of this bill, all public accommodations, irrespective of the number of people they employ, are covered under this title.]

- Exempts private clubs, establishments and religious organizations from the public accommodations requirement.

- Requires that facilities constructed for first occupancy later than 30 months after enactment be accessible to people with disabilities except where an entity can prove that it is "structurally impracticable" to meet this requirement.

- Prohibits discrimination in access to public transportation services, except for air transportation services.

- Requires that new "over-the-road" buses, purchased or leased for public transportation services, be accessible to people with disabilities. This provision is effective 6 years after enactment for small providers (as defined by the Secretary of Transportation) and 5 years after enactment for other providers.

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- Subjects firms that have been found out of compliance to monetary damages and, under certain circumstances, to additional civil penalties of up to $100,000.

Telecommunications Relay Services

- Requires phone companies to make telecommunications relay services, which enable people with speech and hearing impairments to use telephones, universally available not later than 2 years after enactment. [NOTE: This requirement does not pertain to Telecommunications Devices for the Deaf (TDD), which are attached to the phones of certain individuals. Rather, it directs phone companies to provide services that enable people using TDDs to communicate with people who use telephones without TDDs.]

- Prohibits phone companies from financing these enhanced interstate services through the imposition of fixed monthly charges on consumers.

BACKGROUND

S. 933 was introduced by Senator Harkin (D-IA) on May 9. The Senate Labor and Human Resources Committee held hearings on the legislation on May 9, 10, 16 and on June 22.

During the hearings, representatives of disability rights and civil rights organizations hailed the bill as extending basic legal protections to people with disabilities, while groups representing businesses complained that the costs of complying with the legislation could be ruinous to small proprietors. Zachary Fasman, an attorney representing the U.S. Chamber of Commerce, told the Committee that the cost of compliance "would be enormous and obviously could have a disastrous impact upon many small businesses struggling to survive."

Attorney General Richard Thornburgh, testifying for the Administration, voiced support for legislation to bar discrimination on the basis of handicap, but expressed concerns about specific provisions in S. 933. Thornburgh called for discussions between representatives of the Administration and the Labor Committee in order to achieve consensus legislation. During the ensuing negotiations, the bill was changed in a number of ways. In general, these modifications brought the bill's requirements and enforcement mechanisms more into line with existing civil rights statutes, although some significant differences remain.

Despite the continuing opposition of business groups and reservations on the part of some Committee Republicans, the full Committee on August 2 approved the bill by a 16-0 vote.

SUMMARY OF PROVISIONS

Definitions

S. 933 contains a rather broad definition of disability, encompassing not only people with physical and mental impairments but also those who are "regarded as having such . . . impairment[s]." This is the same definition used in the Rehabilitation Act of 1973 (29 USC 706), which prohibits the

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federal government and recipients of federal funds from discriminating on the basis of handicap.

The Committee report states that people with contagious diseases, including people who test positive for the AIDS virus but who manifest no symptoms of the disease, are covered under this definition. The report also establishes that this definition applies to alcoholics and drug addicts.

Employment

S. 933 would prohibit employers from discriminating on the basis of handicap. Beginning two years after enactment, this prohibition would apply to those with 25 or more workers; beginning four years after enactment, it would apply to firms with at least 15 employees. S. 933 would prohibit employers from:

- Limiting, segregating or classifying a job applicant or employee in a way that adversely affects the disabled person's employment opportunities or status;

- Participating in any contractual or other arrangement (e.g., with an employment agency, labor union, or health insurer) that has the "effect" of discriminating against an employee;

- Using standards, criteria or methods of administration that have "the effect of discrimination on the basis of disability;"

- Denying equal jobs and benefits to an individual "because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;"

  [NOTE: The meaning and intent of this provision is not entirely clear. Report language cites examples of people who have been adversely treated because they are related to a person with disabilities, but it is not evident what "have a relationship or association with" denotes.]

- Not making reasonable accommodations for a person with disabilities, unless the employer can prove that such accommodation would "impose an undue hardship on the operation of [his or her] business;"

- Using employment tests or other selective criteria that "screen out or tend to screen out" a person -- or a class of people -- with disabilities; and

- Selecting and administering tests which reflect "the impaired sensory, manual, or speaking skills" of a disabled employee or job applicant, rather than the applicant's relevant skills and aptitude.

S. 933 would also apply strict limits on the use of medical examinations and inquiries by employers. An employer may not, for example, require a job applicant to undergo a medical examination either to determine whether the applicant has a disability or to ascertain the nature or severity of the

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applicant's disability. Employers are permitted to "make preemployment inquiries into the ability of an applicant to perform job-related functions."

An applicant who has been offered a job may be required to undergo a medical examination if all entering employees are required to submit to such examinations and if information obtained from the tests is kept confidential, with certain limited exceptions.

Although S. 933 would define alcoholism and drug abuse as disabilities, it does permit employers to ban the use of alcohol and illegal drugs in the workplace and to prohibit employees from being under the influence of such substances on the job. The bill also states that employers "may hold a drug user or alcoholic to the same qualification standards for employment or job performance and behavior to which it holds other individuals."

The mechanisms for enforcing the ban on employment discrimination are the same as those used in Title VII of the Civil Rights Act of 1964, which empowers the Equal Employment Opportunity Commission and any "individual who believes that he or she is being discriminated against" to seek administrative and judicial remedies.

Public Services

Title II of S. 933 generally prohibits discrimination by a department, agency, special purpose district or other instrumentality of a state or local government and imposes the following requirements relating to vehicles used in public transportation operated by these entities:

New Fixed Route Vehicles	Any new vehicle, for which solicitation is made later than 30 days after enactment, must be accessible to people with disabilities. The Secretary of Transportation may provide temporary waivers of this requirement if lifts are unavailable.
Used Vehicles	Public entities must make "demonstrated good faith efforts" to purchase or lease accessible used vehicles.
Remanufactured Vehicles	Such vehicles, if they are intended to be used for 5 years or more, must, "to the maximum extent feasible," be accessible to people with disabilities.
Paratransit	If a public entity operates a fixed route public transportation system, it must also provide paratransit or other special transportation services for people with disabilities sufficient to provide them with a level of services that is comparable to that provided by the fixed route transportation system.

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	Exception: Entities which demonstrate to the Secretary of Transportation that this requirement would impose an "undue financial burden," need only provide paratransit services "to the extent that providing such services would not impose an undue financial burden."
Demand Responsive Systems	Vehicles purchased more than 30 days after enactment for demand responsive systems must be accessible, unless the entity can demonstrate that its system "when viewed in its entirety, provides a level of service to individuals with disabilities equivalent to that provided to the general public."

The following rules pertain to facilities used in public transportation systems operated by public entities:

New Facilities	New facilities built 18 months or more after enactment must be accessible to people with disabilities.
Alterations of Existing Facilities	Alterations must be carried out in such a way that "to the maximum extent feasible, the altered portions of the facility are readily accessible." If major structural renovations are made, "the path of travel to the altered area, and the bathrooms, telephones and drinking fountains" must, to the maximum extent feasible, be made accessible.
Intercity, Rapid, Light and Commuter Rail Systems	At least one car per train must be accessible, "as soon as practicable but in any event in no less than 5 years."
Key Stations	Key stations on rapid rail, commuter rail and light rail systems must be made accessible "as soon as practicable but in no event later than 3 years." The Secretary of Transportation may, however, extend the deadline to 20 years "for extraordinarily expensive structural changes to, or replacement of, existing facilities."
	Key stations on intercity rail systems must be made accessible "as soon as practicable, but in no event later than 20 years."

Public Accommodations

S. 933 provides that people with disabilities must be afforded "full and equal enjoyment of the goods, services, facilities, privileges, advantages and

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accommodations of any place of public accommodation." The bill includes a lengthy list of establishments that are regarded as "public accommodations," a list that includes many more entities than are covered under Title II of the Civil Rights Act of 1964. Such entities must accommodate people with disabilities "in the most integrated setting as appropriate to the needs of the individual."

As mentioned above, all entities providing public accommodations, regardless of size, are covered by this title. Only private clubs and religious organizations are exempted from coverage. Covered entities are also prohibited from discriminating against anyone with whom a disabled person "is known to have a relationship or association."

The bill defines "discrimination" to include:

- The application of eligibility criteria that "screen out or tend to screen out" people with disabilities from public accommodations.

- Failure to modify policies, practices and procedures to accommodate people with disabilities.

- Failure to supply those auxiliary aids and services necessary to enable people with disabilities to use public accommodations.

- Failure to remove architectural barriers, communication barriers "that are structural in nature," and transportation barriers where the removal of such barriers is "readily achievable." [NOTE: The bill defines "readily achievable" as "easily accomplishable and able to be carried out without much difficulty or expense."]

- Failure to make alterations in such a manner as to make the altered area accessible to people with disabilities; if "major structural alterations" are undertaken, the "path of travel to the altered area, and the bathrooms, telephones and drinking fountains" must also be made accessible. [NOTE: This provision does not require the installation of elevators in facilities that are less than three stories tall or that are smaller than 3000 square feet per story, unless the building is a shopping center, the professional office of a health care provider, or a category of facilities that, in the judgment of the Attorney General, require elevators.]

S. 933 also requires that buildings designed and constructed for first occupancy later than 30 months after enactment be "readily accessible" to people with disabilities, except where accessibility can be shown to be "structurally impracticable."

Like the Civil Rights Act of 1964, S. 933 directs the Attorney General to investigate alleged violations of the public accommodations title and to undertake periodic compliance reviews of covered entities. It also authorizes the Attorney General to institute a civil action in a federal district court, where he or she believes such action is warranted.

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But while the Civil Rights Act of 1964 authorizes only injunctive relief, S. 933 goes further, allowing the award of unlimited monetary damages and civil penalties of up to $100,000.

S. 933 also authorizes any individual "who is being or is about to be subjected to discrimination" to seek injunctive relief, including a court order to alter facilities. The procedures for obtaining such relief would be the same as those used in section 204 of the Civil Rights Act of 1964.

The bill also institutes a number of requirements relating to private entities engaged in public transportation. In addition to requiring "reasonable modifications" and the provision of auxiliary aids and services, S. 933 requires that new vehicles for which solicitation is made later than 30 days after enactment be accessible. It also requires that new "over-the-road" buses be accessible to people with disabilities. This provision is effective 6 years after enactment for small providers (as defined by the Secretary of Transportation) and 5 years after enactment for all other providers.

S. 933 also directs the Architectural and Transportation Barriers Compliance Board to establish an advisory committee on issues affecting the accessibility to disabled people of over-the-road buses. The resulting report would be due to the President and the Congress 3 years after enactment.

Telecommunications Relay Services

Title IV of the Act requires phone companies to make telecommunications relay services, which enable people with hearing impairments to use telephones, universally available no later than 2 years after enactment. The FCC may extend this deadline by up to 1 year for any common carrier that is "unduly burden[ed]" by the Act.

These telecommunications services must be available 24 hours per day, and phone companies could not charge more for calls using these services than for ordinary telephone calls. Telecommunications relay operators would also be barred from limiting the length of calls.

Phone companies would be prohibited from financing these enhanced interstate services through the imposition of fixed monthly charges on consumers.

Miscellaneous Provisions

Title V of the Act contains provisions to:

- Establish that the Act shall not be construed to bar insurers and health care providers from underwriting, classifying or administering insurance risks consistently with state laws, so long as they do not use this provision "as a subterfuge to evade the purposes" of the ADA.
- Prohibit retaliation and coercion against individuals who bring action under the ADA.
- Deny states their eleventh amendment immunity against lawsuits with respect to alleged violations of the ADA.

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- Require the Architectural and Transportation Barriers Compliance Board to issue new guidelines pertaining to accessibility.
- Allow the recovery of attorney's fees by the prevailing party in any administrative or judicial action brought pursuant to the Act.

ADDITIONAL VIEWS

Senator Hatch

The substitute version is not a perfect compromise, but it incorporated enough important changes to enable him to cosponsor it at the mark-up, while reserving the right to pursue further changes on the floor. Concerns include:

- Need for small business exemption for public accommodations. A "mom-and-pop" grocery store is subject to all of the bill's requirements in its treatment of customers, as well as to an extremely onerous penalty scheme. There is a crucial difference between a disability civil rights statute and a civil rights statute in the race area. In order to provide equal treatment to racial minorities, a business need only disregard race and judge a person on his or her own merits. To provide equal opportunity for a person with a disability will sometimes require additional actions and costs. Favor an exemption of small businesses from the prohibitions and obligations in the public accommodations provisions of the bill. Would not, however, exempt any public accommodation from the requirement that its new facilities be accessible.
- Excessive penalties against public accommodations. Under Title II of the Civil Rights Act of 1964, the Attorney General can obtain injunctive relief, but monetary damages and civil penalties are not available. In an Attorney General action under S. 933, the court can award monetary damages and civil penalties. This relief is excessive and unjustifiable. Our purpose should not be punitive. To the extent we are trying to provide access by enacting the bill, we should keep the money available for use in providing access to the injunctive relief.
- The bill's threat to the private bus industry. The requirement that all new buses have wheelchair lifts would quickly accelerate the loss of private, intercity bus service to our nation's communities, if not entirely end such service. The prudent course is to study the issue first and then to impose appropriate requirements on the study -- not the reverse as currently provided for in the bill.

Senator Coats

He is pleased that amendments relating to drug and alcohol abuse and religious institutions were substantially incorporated into S. 933. Agrees with the additional views of Senator Hatch, particularly with regard to the need for a small business exemption and the problems facing the bus industry.

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POSSIBLE AMENDMENTS

A number of amendments to the bill are possible. Many would soften the bill's impact on small businesses and on the private bus transportation industry, whose representatives argue that the Committee bill would impose onerous and destructive burdens. In his additional views, Senator Hatch discussed several concerns with the bill, perhaps signalling his intention to offer amendments on the floor. These potential amendments include:

Exempting from the public accommodations requirements all businesses which are exempt from the bill's employment requirements (i.e., firms with fewer than 25 employees, beginning two years after enactment, and firms with fewer than 15 employees, beginning four years after enactment). Small firms would still, however, be required to make any new facilities accessible.

Eliminating monetary and civil penalties against businesses that violate the public accommodations requirements.

Requiring a study of the feasibility of making new over-the-road buses accessible. If the study shows that such changes are feasible, then Congress, by separate enactment, can require that all new over-the-road buses be accessible.

Offering a tax credit to small businesses for expenses incurred in accommodating people with disabilities.

Some representatives of businesses have also advocated an amendment to the definition of discrimination in public accommodations. The bill currently defines such discrimination as the "failure" to provide equal access. Critics of this provision say that the Committee bill would make businesses that are not intentionally barring access to people with disabilities liable for substantial monetary and civil penalties. An amendment may be offered that would penalize only those proprietors who have been made aware of an accessibility problem and who refuse to correct it.

Despite provisions in the Committee bill that allow employers to prevent drug use and intoxication in the workplace, some business organizations and other groups are concerned about the bill's extension of civil rights protections on the basis of addiction to illegal drugs. There may be amendments in this area, and perhaps a proposal to exclude drug addiction from the bill's definition of disability.

During Committee mark-up, Senator Hatch was prepared to offer an amendment to apply the provisions of S. 933 to Congress. He withdrew the amendment at the urging of the Chairman, who observed that the addition of such a provision in Committee could create jurisdictional problems. Senator Hatch may offer the amendment on the floor.

ADMINISTRATION POSITION: Not available at press time.

Staff Contact: Doug Badger

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Constitutional Notes on the ADA

1. Section 503 and the 11th Amendment

Section 503 of ADA provides in part, "A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal court for a violation of this Act. . . ." Without this section, the states could not be subject to Federal suit for violating the act.

The 11th Amendment reads, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Long ago, however, the Supreme Court held that, because the Amendment had been adopted in response to the Court's holding in Chisholm v. Georgia, 2 U.S. 419 (1793), the meaning of the amendment could not be confined by its express terms. While the amendment's express terms limit Federal judicial power when suit is commenced against a state by a citizen of another state or a foreigner, the Court has held that the principles behind the 11th Amendment bar suits against states even when the suits are commenced by their own citizens. In Hans v. Louisiana, 134 U.S. 1, 18-19 (1890), the High Court said, "[T]he manner in which [Chisholm] was received by the country, the adoption of the 11th Amendment, the light of history and the reason of the thing" all indicate that states cannot be sued even by their own citizens in Federal courts.

In Atascadero State Hospital v. Scanlon, 473 U.S. 234, (1985) (5-to-4 decision), the Supreme Court held that the State of California was immune from suit (brought by one of its own citizens) under Section 504 of the Rehabilitation Act. Immunity from suit is a privilege which a state may (expressly) waive by constitutional provision, statute, or otherwise (e.g., participation in litigation), but California was immune in Atascadero because it had not waived its immunity. However, a state can also have its immunity taken away by Congress. A state's immunity can be withdrawn when Congress exercises certain constitutionally express powers. Congressional power appears especially compelling when Congress legislates under section 5 of the 14th Amendment. "Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). Section 5 of the 14th Amendment is cited in section 2(b)(4) of ADA as a source of constitutional power for the act.

Congress's withdrawal of immunity must be "unmistakably clear in the language of the statute" itself. Atascadero, 473 U.S. at 242. General language is not sufficient to overcome the 11th Amendment's presumption of state immunity. Accordingly, section 503 of the bill specifically and unmistakably withdraws 11th Amendment state immunity with respect to violations of ADA.

2. Section 2 and the 14th Amendment

Section 2(a)(7) of the bill provides,

> "Congress finds that . . . individuals with disabilities are a discrete and insular minority who have been faced with restrictions and

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limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society[.]"

Section 2(b)(4) of the bill provides,

"It is the purpose of this Act . . . to invoke the sweep of congressional authority, including its power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities."

These provisions (and others that are less illustrative) raise this question, is ADA intended to change equal protection jurisprudence?

The 14th Amendment provides in relevant part, no State shall "deny to any person within its jurisdiction the equal protection of the laws." The 5th Amendment's due process clause has been interpreted to impose a similar requirement on the Federal government. Bolling v. Sharpe, 347 U.S. 497 (1954). As an analytical tool in equal protection cases, the Supreme Court has developed what is often referred to as a three-tier analysis. Certain classifications, e.g. those based on race, are subjected to heightened analysis or strict scrutiny and will be sustained only if narrowly tailored to serve a compelling state interest. Other classifications, e.g. gender classifications, are subjected to immediate scrutiny and must be substantially related to important governmental objectives. Finally, commercial and social welfare classifications are presumed constitutional and sustained if rationally related to a legitimate state interest. In City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985), the Supreme Court held that the 14th Amendment does not require heightened scrutiny for classifications based on mental retardation but requires only that such classification be analyzed under the rational basis standard that is normally applied to economic and social legislation. Is ADA designed to change the Cleburne result?

Section 5 of the 14th Amendment grants "Congress [the] power to enforce, by appropriate legislation, the provisions of" the Amendment, and ADA is an exercise of those powers. Can Congress use its section 5 powers to "reverse" the Court's interpretation of the 14th Amendment in Cleburne? This same question was answered in the affirmative (in a voting rights case) in Katzenbach v. Morgan, 384 U.S. 641 (1966).

In 1959, the Court held that an English literacy requirement for voting did not violate the Equal Protection Clause. With the Voting Rights Act of 1965, Congress sought to "reverse" the 1959 case by using its power under the 14th Amendment to forbid "conditioning the right to vote . . . on ability to read, write, understand, or interpret any matter in the English language." Congress's action was held constitutional in Morgan although the Court took pains to say that Congress had no power to narrow constitutional guarantees. ("We emphasize that Congress' power under section 5 is limited to adopting measures to enforce the guarantees of the Amendment; section 5 grants Congress no power to restrict, abrogate, or dilute these guarantees." 384 U.S. at 651 n. 10.) Although Morgan's rationale and viability were questioned in Oregon v. Mitchell, 400 U.S. 112 (1970), Morgan appears to provide a basis for Congress

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to expand the meaning of "equal protection of the laws" with respect to persons with disabilities.

If Congress has the power, section 2(a)(7) of the bill may provide the necessary language. Paragraph (7) begins by using the magic words ("discrete and insular minority") from Justice Stone's famous footnote 4 in United States v. Carolene Products Co., 304 U.S. 144, 153 n. 4 (1938). According to Stone, "prejudice against discrete and insular minorities may be a special condition[] which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities[] and . . . may call for a correspondingly more searching judicial inquiry." If a "more searching judicial inquiry" is required for the "discrete and insular minority" of persons with disabilities who are (in the words of ADA) "relegated to a position of political powerlessness," then Cleburne's "rational basis test" is constitutionally inadequate. Paragraph 7 goes on to use the kind of language ("characteristics that are beyond the control of such individuals") that is used by jurists who seek to define groups that are entitled to heightened constitutional protection by their immutable traits. E.g., Cleburne, supra at 472 n. 24 (Marshall, J., concurring in the judgment in part and dissenting in part).

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WEST

SENATE RECORD VOTE ANALYSIS—TEMPORARY

101st Congress
1st Session

Vote No. 170

September 7, 1989, 4:22 p.m.
Page S–10747 (Temp. Record)

DISABILITIES ACT/Small-Business Tax Credit

SUBJECT: The Americans with Disabilities Act of 1989 . . . S. 933. Hatch motion to waive the Budget Act for the Hatch et al. amendment No. 709.

ACTION: MOTION REJECTED, 48-44

SYNOPSIS: Pertinent votes on this legislation include Nos. 170-171 and 173.

As reported by the Labor and Human Resources Committee, S. 933, the Americans with Disabilities Act of 1989, prohibits discrimination on the basis of disability in employment, public services, public accommodations and provides for the installation of telecommunications relay services for the hearing impaired. It defines disability as a physical or mental impairment that substantially limits one or more of the major life activities of an individual, a record of such an impairment, or being regarded as having such an impairment.

The Hatch et al. amendment would provide a maximum $5,000 per year refundable tax credit to eligible small businesses (those with less than 15 employees and less than $1 million yearly gross income) which incur costs in complying with the public accommodation provisions of S. 933.

During debate, Senator Hatch moved to waive section 311(a) of the Budget Act with respect to his amendment and asked for the yeas and nays.

NOTE: A motion to waive section 311(a) of the Budget Act requires a three-fifths (60) majority of the Senate to succeed. Following the vote, the Chair ruled the Hatch amendment violated section 311(a) of the Budget Act and the amendment fell.

Those favoring the motion to waive contended:

The Americans with Disabilities Act of 1989 is an historic step forward in the extension of civil rights to all citizens of our country. Not since the Civil War, and the 13th, 14th, and 15th Amendments, have we embarked on such dramatic step forward in our treatment of our fellow citizens. But the broad sweep of this bill has gathered-in some unintended victims. This amendment will serve to correct that problem.

(See other side)

YEAS (48)

Republicans (30 or 71%)	Democrats (18 or 36%)
Armstrong	Biden
Bond	Bingaman
Boschwitz	Boren
Coats	Breaux
Cochran	Bumpers
Cohen	Conrad
Garn	DeConcini
Gorton	Dixon
Grassley	Exon
Hatch	Fowler
Helms	Heflin
Humphrey	Johnston
Jeffords	Kerrey
Kassebaum	Kerry
Kasten	Nunn
Lott	Reid
Lugar	Rockefeller
Mack	Shelby
McCain	
McClure	
McConnell	
Nickles	
Pressler	
Simpson	
Specter	
Symms	
Thurmond	
Wallop	
Warner	
Wilson	

NAYS (44)

Republicans (12 or 29%)	Democrats (32 or 64%)		
Chafee	Bentsen	Lautenberg	
D'Amato	Bradley	Leahy	
Danforth	Bryan	Levin	
Dole	Burdick	Lieberman	
Domenici	Byrd	Matsunaga	
Durenberger	Cranston	Metzenbaum	
Gramm	Daschle	Mikulski	
Hatfield	Dodd	Mitchell	
Heinz	Ford	Moynihan	
Packwood	Gore	Pell	
Rudman	Graham	Pryor	
Stevens	Harkin	Riegle	
	Hollings	Robb	
	Inouye	Sarbanes	
	Kennedy	Simon	
	Kohl	Wirth	

NOT VOTING (8)

Republicans (3)	Democrats (5)
Burns—2	Adams—2
Murkowski—2	Baucus—2
Roth—2	Glenn—2
	Sanford—2
	Sasser—2

EXPLANATION OF ABSENCE:
1—Official Business
2—Necessarily Absent
3—Illness
4—Other

SYMBOLS:
AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

Compiled and written by the staff of the Senate Republican Policy Committee
William L. Armstrong, *Chairman*

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The 1964 Civil Rights Act issued the classic definition of public accommodations including: places of eating, lodging, entertainment, and gasoline stations. S. 933 expands the definition of public accommodations to include all retail and service businesses regardless of their size. S. 933 instructs that all places of public accommodation be made accessible to people with disabilities. But in so doing, we overlook the cost of compliance, not for large businesses and corporations, but for small businesses, the mom-and-pop enterprises in every town across America. Small businesses will find the costs of complying with the provisions of S. 933 prohibitive. For example, a concrete wheelchair ramp can cost $500. A disabled-accessible restroom's modifications can easily cost $3,000. Widening doors, automatic door-opening systems, wheelchair-accessible aisles and corridors-- these and more all cost money to design and install. If businesses fail to comply with the regulations of S. 933, they face huge fine schedules: $50,000 for the first infraction, up to $100,000 for the second.

We must think of the many small businesses across America. Faced with the prospect of huge fines if they do not comply with S. 933, they may have to lay off workers or, even more drastically, cease operation altogether. Small businesses should not have to face that type of scenario as a result of S. 933. We must take responsibility for imposing these obligations on small business, and we can do that through a $5,000 refundable tax credit granted to eligible small businesses which strive to comply with S. 933 over the next four years.

Those who argue against this amendment have made several points: first, that it violates the Budget Act by reducing revenue levels in the Budget Resolution. This is true, but it is a cost which will be borne by the American people, regardless of whether it is paid by consumers, by small businesses, or by taxpayers via the tax credit. Should we adhere to the Budget Act and then turn around and tell small businessmen to comply or be fined? Or should we be responsible to the businessmen upon whom we impose these costs and find some offsetting revenues to pay for this tax credit? We say we should attempt the latter.

Second, opponents will argue that the House will interpret this introduction of a tax credit as meddling with their prerogatives, and therefore the House will kill the bill. However, according to the Constitution, Article I, section 7, "All bills for raising revenue shall originate in the House." This amendment does not raise revenue. Constitutionally, it does not meddle with their prerogatives one bit.

Finally, they will argue that this amendment should have been evaluated by the Finance Committee, position or offered before the Labor and Human Resources Committee. This is nonsense. If this is their position, then perhaps they believe the entire amending process should be eliminated.

S. 933 will make history, a history with which we are proud to be associated. But in the rush to pass this landmark legislation, we must not overlook the consequences of our acts. We can remedy such consequences in the case of small business by waiving the dictates of the Budget Act and passing this amendment.

Those opposing the motion to waive contended:

We understand the concerns of this amendment's proponents and we hope that our opposition to it is not interpreted in any way as being "anti-business." While our proponents' intentions are admirable, their execution is less than responsible.

This is a killer amendment. The House is quite jealous about its prerogatives, one of which is fashioning tax legislation. Any time we have added anything remotely dealing with taxation to a bill and sent it to the House, they have killed it. This amendment will lead to the demise of the entire Disabled Americans Act, a grave consequence for a bill we have labored on for nearly two years. To have a bill held up over a genuine difference of opinion between the two Houses is one thing; to see a bill die because we intentionally pick a fight we can never win is ridiculous.

In addition, this tax credit would violate the provisions of the Budget Act. According to the dictates of the Budget Resolution, we must discover $5.3 billion in revenue by the time the new fiscal year begins on October 1, 1989. This amendment would reduce Federal revenues, but no one knows by how much. Not even its proponents can estimate how much it will cost the government in lost revenue. Tax credits are a matter for the Finance Committee, yet this amendment was never brought before the Committee. In the Finance Committee, we have the tools, experience, background and jurisdiction to evaluate the effects of a tax credit and we should be allowed to do so.

Finally, section 190 of the Internal Revenue Code already allows a tax deduction of up to $35,000 for the removal of architectural barriers for the handicapped. It is available to all businessmen and has been working well since its introduction in the 1970's. We are presently working to revise section 190 to comply with S. 933 and we plan to introduce those revisions as an amendment during our conference with the House. We hope these changes will address the concerns of this amendment's proponents and provide relief and incentive for small businessmen to meet the provisions of S. 933.

The concerns addressed by this amendment are real. However, an amendment whose consequences cannot be evaluated, which violates the Budget Act, and which may be superfluous in light of the existing tax code is poor legislation. For these reasons, we oppose the motion to waive the Budget Act.

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WEST

SENATE RECORD VOTE ANALYSIS—TEMPORARY

101st Congress
1st Session

Vote No. 171

September 7, 1989, 5:44 p.m.
Page S-10752 (Temp. Record)

DISABILITIES ACT/Civil Penalties, good faith provision

SUBJECT: The Americans with Disabilities Act of 1989 . . . S. 933. Boschwitz amendment No. 713.

ACTION: AMENDMENT AGREED TO, 90-0

SYNOPSIS: Pertinent votes on this legislation include Nos. 170-171 and 173.

As reported by the Labor and Human Resources Committee, S. 933 prohibits discrimination on the basis of disability in employment, public services, public accommodations, and telecommunications services.

The Boschwitz amendment would require that a judge, when deciding what amount of civil penalty is appropriate, consider if a defendent who is accused of discrimination on the basis of disability has acted in good faith to comply with this Act.

Those favoring the amendment contended:

We support the Americans with Disabilities Act and we feel that all businesses should comply with it. Providing adequate access to the disabled, however, will sometimes require businesses to spend large sums of money. This may put an incredible financial burden on small businesses for which excess capital is not readily available.

This amendment would ease possible legal penalties that may be incurred by small businesses that have unintentionally barred access to the disabled because they have been unable to complete needed changes. Under this amendment, during the interim period between the time a business begins to comply with S. 933 and the time it is able to complete any necessary adjustments, if civil action is brought against a business by a disabled person, the courts could grant that business credit for making a reasonable and good faith effort to comply with this Act.

It may appear as though this amendment is meant to deter efforts to prevent discrimination based on a handicap. This assumption, however, is not accurate. Instead, this amendment attempts to shield small businesses that have acted in good faith from financial penalties they might otherwise incur. If a business is caught in a civil suit before adequate facilities for the disabled have been completed, this amendment would provide a cushion to soften the financial blow of the suit.

(See other side)

YEAS (90)

Republicans (40 or 100%)		Democrats (50 or 100%)	
Armstrong	Jeffords	Bentsen	Johnston
Bond	Kassebaum	Biden	Kennedy
Boschwitz	Kasten	Bingaman	Kerrey
Chafee	Lugar	Boren	Kerry
Coats	Mack	Bradley	Kohl
Cochran	McCain	Breaux	Lautenberg
Cohen	McClure	Bryan	Leahy
D'Amato	McConnell	Bumpers	Levin
Danforth	Nickles	Burdick	Lieberman
Dole	Packwood	Byrd	Matsunaga
Domenici	Pressler	Conrad	Metzenbaum
Durenberger	Rudman	Cranston	Mikulski
Garn	Simpson	Daschle	Mitchell
Gorton	Specter	DeConcini	Moynihan
Gramm	Stevens	Dixon	Nunn
Grassley	Symms	Dodd	Pell
Hatch	Thurmond	Exon	Pryor
Hatfield	Wallop	Ford	Reid
Heinz	Warner	Fowler	Riegle
Helms	Wilson	Gore	Robb
		Graham	Rockefeller
		Harkin	Sarbanes
		Heflin	Shelby
		Hollings	Simon
		Inouye	Wirth

NAYS (0)

Republicans (0 or 0%)	Democrats (0 or 0%)

NOT VOTING (10)

Republicans (5)	Democrats (5)
Burns—2	Adams—2
Humphrey—2	Baucus—2
Lott—2	Glenn—2
Murkowski—2	Sanford—2
Roth—2	Sasser—2

EXPLANATION OF ABSENCE:
1—Official Business
2—Necessarily Absent
3—Illness
4—Other

SYMBOLS:
AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

Compiled and written by the staff of the Senate Republican Policy Committee
William L. Armstrong, *Chairman*

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S. 933 is designed to help integrate the disabled into mainstream society and the modifications it requires businesses to make to their facilities will play a large part in achieving that goal. We should not, however, place an unreasonable burden on businesses that are making good faith efforts to comply with this legislation. We want to help the disabled, but we do not want to thrust unnecessary legal burdens on small businesses in the process. If we make it easier for businesses to comply with S. 933, we help the disabled gain access to all that society has to offer. For these reasons, we support adoption of this amendment.

No arguments were expressed in opposition to the amendment.

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SENATE RECORD VOTE ANALYSIS—TEMPORARY

101st Congress
1st Session

Vote No. 173

September 7, 1989, 8:35 p.m.
Page S-10803 (Temp. Record)

DISABILITY ACT/Passage

SUBJECT: The Americans with Disabilities Act of 1989 . . . S. 933. Passage.

ACTION: BILL PASSED, 76-8

SYNOPSIS: Pertinent votes on this legislation include Nos. 170-171 and 173.

As amended by the Senate, S. 933 prohibits discrimination on the basis of disability in employment, public services, public accomodations, and telecommunications services. The bill:

- Defines "disability" as a physical or mental impairment that substantially limits one or more of the major life activities of an individual;
- Bars employers from discriminating against people with disabilities in job application procedures, hiring and firing, compensation, job training, and other terms, conditions, and privileges of employment;
- Requires that new buses and rail vehicles be accessible to disabled people and fixed bus routes provide comparable services to people with disabilities;
- Prohibits discrimination on the basis of disability "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accomodations of any place of public accommodation;"
- Requires the phone companies to make telecommunications relay services, which enable people with speech and hearing impairments to use telephones, universally available not later than two years after enactment;

As amended the bill:

- Requires a judge to consider if a defendant who is accused of discrimination on the basis of disability has acted in good faith;
- Clarifies the definition of handicapped under the Rehabilitation Act of 1973 relating to the use of illegal drugs;
- Excludes an employee or applicant who is currently using illegal drugs from the definition of "qualified individual with a disability;" and
- Provides that the term "disabled" or "disability" shall not apply to an individual solely because that individual is a transvestite, pedophilia, transsexualism, exhibitionism, and other forms of sexual behavior disorders.

(See other side)

YEAS (76)

Republicans (32 or 80%)		Democrats (44 or 100%)	
Boschwitz	Jeffords	Biden	Johnston
Chafee	Kassebaum	Bingaman	Kennedy
Coats	Kasten	Boren	Kerrey
Cochran	Lugar	Bradley	Kerry
Cohen	Mack	Bryan	Kohl
D'Amato	McCain	Bumpers	Lautenberg
Danforth	McConnell	Burdick	Leahy
Dole	Nickles	Byrd	Levin
Domenici	Packwood	Conrad	Lieberman
Durenberger	Pressler	Cranston	Matsunaga
Gorton	Simpson	Daschle	Mitchell
Gramm	Specter	DeConcini	Moynihan
Grassley	Stevens	Dixon	Nunn
Hatch	Thurmond	Dodd	Pell
Hatfield	Warner	Exon	Reid
Heinz	Wilson	Ford	Riegle
		Fowler	Robb
		Gore	Rockefeller
		Graham	Sarbanes
		Harkin	Shelby
		Heflin	Simon
		Hollings	Wirth

NAYS (8)

Republicans (8 or 20%)	Democrats (0 or 0%)
Armstrong	
Bond	
Garn	
Helms	
Humphrey	
McClure	
Symms	
Wallop	

NOT VOTING (16)

Republicans (5)	Democrats (11)
Burns—2	Adams—2
Lott—2	Baucus—2
Murkowski—2	Bentsen—2
Roth—2	Breaux—2
Rudman—2	Glenn—2
	Inouye—2
	Metzenbaum—2
	Mikulski—2AY
	Pryor—2
	Sanford—2
	Sasser—2

EXPLANATION OF ABSENCE:

1—Official Business
2—Necessarily Absent
3—Illness
4—Other

SYMBOLS:

AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

Compiled and written by the staff of the Senate Republican Policy Committee
William L. Armstrong, *Chairman*

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Those favoring the legislation contended:

When the Senate passes S. 933, the Americans with Disabilities Act (ADA), 43 million Americans with disabilities will say with one voice, "Our time has come." For too long, individuals with disabilities have been excluded, segregated, and otherwise denied equal, effective, and meaningful opportunity to participate in the economic and social mainstream of American life. Disabled Americans are one segment of our society that does not enjoy the basic rights afforded to other groups. In S. 933, we address this injustice and correct two-hundred years of discrimination and segregation.

S. 933 prohibits discrimination on the basis of disability in four major areas; employment, public accommodations, public transportation, and telecommunications. It requires that employers, businesses, transportation companies, and the phone companies make reasonable accommodations to provide access to disabled people. At the same time, it takes precautions to avoid placing an undue hardship on these public and private entities while they comply with the new regulations.

For example, this bill takes into account the very real concerns of the business community. Cost was a factor when we decided not to mandate that existing buses be fitted with special lifts for disabled people; only new buses must be fully accessible. Also, the bill requires only modest changes to existing facilities. If the proposed changes would be too burdensome to a business or facility, then the bill does not mandate them. Busing companies, for instance, are allowed to provide paratransit services, in lieu of refitting all their existing buses, if they can demonstrate a financial need.

The bill also makes allowances for the fragile financial situation of most small businesses. The bill delays for 2 years the effective date of its provisions and it provides a step-down coverage of small businesses where companies employing 25 or fewer people are exempt for 2 years after enactment and companies with 15 or fewer employers are exempt thereafter. The bill will also allow judges to take good-faith efforts into account when considering a disability discrimination case. In other areas of concern, the bill clearly states that its protections do not apply to drug abusers or alcoholics.

We hope that these exemptions will help to soften the financial strain of complying with the ADA. Bankrupting businesses and unemploying workers is not this bill's objective. While we recognize that businesses will incur costs to comply with the ADA, we believe the positive aspects of fully including the millions of disabled Americans in our economic and social structures more than makes up for the added expense. With this bill, people who were formerly condemned to relying on welfare for financial support will now be able to earn their own way and contribute positively to society.

The ADA is not about disabilities, it is about abilities. It is about unleashing the talents, skills, and commitment of 43 million Americans who want to contribute. With the passage of this emancipation proclamation for disabled persons, we will no longer deny these people the basic access that enables them to participate fully in our society. We will open to disabled people the opportunities of work and mobility that the rest of us take for granted.

The ADA is, without exaggeration, the most critical legislation affecting people with disabilities ever considered by Congress. We believe it is long overdue and we urge the entire Senate to support it.

While supporting the bill, some Senators expressed the following reservations:

Despite our desire to pass this important legislation, we feel strongly that further improvements could be made to the bill.

First, we are concerned that this legislation fails to cover the Congress. We believe it is about time Congress recognized the hypocrisy of subjecting the entire country to regulations from which it exempts itself. We are withholding an amendment to include Congress within the jurisdiction of this bill only at the insistence of our leadership.

Second, this legislation fails to address adequately the problem of cost. Businesses that deal with the handicapped are going to incur high expenses when they begin complying with the new rules. We believe that, if we are going to impose these obligations upon small businesses, we should help them pay for them. Many small businesses will not be able to correct their access problems inexpensively. This bill will place an unmanageable burden on these companies and cause some of them to either close their doors or hire fewer people. Earlier we had an opportunity to provide relief to these businesses through tax credits (see vote No. 170). While that effort was defeated, we hope the Senate will act in the future to provide some sort of compensation to these businesses.

No arguments were expressed in opposition to the bill.

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Administration Remarks for Dole Statement

- o ADA could not happened so quickly without the backing George Bush has given to the concept
  - His willingness to take this kind of step, which he expressed during last year's campaign, demonstrated to all who sought this legislation that his Administration would support expanding civil rights protections to include the disabled.
  - That we are in so short a time moving forward with legislation demonstrates the resolve George Bush presented in his Inaugural Address: that this "is the age of the offered hand
- o Our being here today on this legislation demonstrates as well that these are not dark days for civil rights in this country. The scope of our civil rights laws can be expanded.
  - This is something we should keep in mind as the year progresses and the momentum builds to overturn a number of decisions from the last term of the Supreme Court.
  - Our civil rights laws should stand for opportunity. That is the long term tradition of civil rights laws, it is the tradition in which ADA falls, and the tradition in which future civil rights laws should also be.
  - Finally, ADA shows that civil rights laws should proceed from consensus if they are to have effect and respect.

- Unfortunately, because of the pace at which we have been moving forward, not all the news that is getting out about this legislation is accurate
  - One point I want to dispell is the suggestion that there is a lot of litigation that will be unleashed on unsuspecting parties by the ADA.
  - That is patently false The remedies allowed under this legislation are, in the case of employment, the familiar remedies of Title VII of the Civil Rights Act of 1964 -- enforcement through the Equal Emplyment Opportunity Commission with the opportunity for recourse to the courts Punitive damages or immediate access to jury trials are not part of ADA's remedies.

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The remedies allowed under the public accommodations title are still narrower. The only person who can bring suit under this title is the Attorney General. There is no opportunity for members of the legal profession to build careers on bringing suits against public accommodations on a contingency fee basis. There was such an opportunity under S. 933 as introduced, and I am pleased to see that it is no longer there.

The idea that the unsuspecting are subject to suit is inconsistent with the words of the legislation. Sec. 308 grants the Attorney General the authority to bring suit where there is "a pattern or practice of resistance to the full enjoyment of any of the rights" of the disabled. That is not language that puts the Attorney General in the business of bringing suit to terrorize the innocent.

- Another area where there has been unfounded concern is ADA and illegal drugs

Some are even trying to read ADA as conferring rights on every drug user to stay in the workplace. You can only reach this conclusion through some mighty strange reasoning. This legislation is about Americans with disabilities. Why doesn't it deal with the situation of drug users who are not disabled? The question answers itself: because they are not disabled, and this legislation concerns itself only with the disabled.

* * *

o I know there has been some discomfort about this legislation within the bus industry.

I'm not willing to wager on whether the provisions in this legislation requiring lifts on buses will be implemented in five years because I'm not sure they will. But I am also sure that if we don't we have a requirement in this legislation, this issue won't get the attention it will if there is a requirement.

The report required by the statute, the research effort to develop better lifts, the Secretary of Transportation's rulemaking and our responsibility to provide relief through the tax code will only get the attention they deserve if we all have the feeling that a sword is about to fall. And that is what the lift requirement here provides.

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SENATOR DOLE'S TECHNICAL ASSISTANCE AMENDMENT TO ADA

A) PLAN FOR TECHNICAL ASSISTANCE -- THE ATTORNEY GENERAL, IN CONSULTATION WITH THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, THE DEPARTMENT OF TRANSPORTATION, THE ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD AND THE FEDERAL COMMUNICATIONS COMMISSION SHALL WITHIN 180 DAYS AFTER ENACTMENT, DEVELOP A PLAN TO ASSIST ENTITIES COVERED UNDER THE ACT TO UNDERSTAND THEIR RESPONSIBILITIES ~~IN CARRYING OUT COMPLIANCE~~ UNDER THIS ACT.

B) AGENCY ASSISTANCE -- THE ATTORNEY GENERAL IS AUTHORIZED TO OBTAIN THE ASSISTANCE OF ~~THE~~ OTHER FEDERAL AGENCIES IN CARRYING OUT THE RESPONSIBILITIES AS DIRECTED IN SUBSECTION A, INCLUDING THE NATIONAL COUNCIL ON DISABILITY, THE PRESIDENT'S COMMITTEE ON EMPLOYMENT OF PEOPLE WITH DISABILITIES, THE SMALL BUSINESS ADMINISTRATION AND THE DEPARTMENT OF COMMERCE.

C) IMPLEMENTATION -- THE ATTORNEY GENERAL, THE EEOC, THE DEPARTMENT OF TRANSPORTATION, AND THE FEDERAL COMMUNICATIONS COMMISSION ARE AUTHORIZED TO MAKE OR ENTER INTO CONTRACTS WITH OTHER INDIVIDUALS, ORGANIZATIONS OR ENTITIES WITH KNOWLEDGE AND EXPERTISE IN CARRYING OUT DISABILITY POLICY AND PROGRAMS AND BUSINESS AND OTHER ENTITIES AFFECTED BY THIS ACT.

TITLE I -- ~~WITH RESPECT TO TITLE I,~~ THE EEOC, IN COORDINATION WITH THE ATTORNEY GENERAL, SHALL IMPLEMENT THE PLAN FOR TECHNICAL ASSISTANCE UNDER TITLE I.

TITLE II -- THE ATTORNEY GENERAL SHALL IMPLEMENT THE PLAN FOR TECHNICAL ASSISTANCE UNDER TITLE II, WITH THE EXCEPTION OF 203 WHICH SHALL BE IMPLEMENTED BY DOT.

TITLE III -- THE ATTORNEY GENERAL, IN COORDINATION WITH THE DEPARTMENT OF TRANSPORTATION AND THE ARCHITECTURAL TRANSPORTATION BARRIERS COMPLIANCE BOARD, SHALL IMPLEMENT THE PLAN FOR TECHNICAL ASSISTANCE UNDER TITLE III.

TITLE IV -- THE FEDERAL COMMUNICATIONS COMMISSION, IN COORDINATION WITH THE ATTORNEY GENERAL, SHALL IMPLEMENT THE PLAN FOR TECHNICAL ASSISTANCE UNDER TITLE IV.

D) AUTHORIZATION -- THE CONGRESS SHALL APPROPRIATE SUCH SUMS AS NECESSARY TO CARRY OUT THE PROVISIONS OF SEC. 506 OF THIS ACT.

to John Wodatch
hi - thanks for your
comments, additions, whatever!
Mo
Phone # 224-8952

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Maureen — have you talked to Sally Lovejoy in Bartlett's office lately? Last year Bartlett didn't support ADA, so she's had experience coming up with the sort of language you're working on.

Stacy

(I don't know what Bartlett is doing this year)

- cost
- can see it your anticipate discrimination
- education

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TALKING POINTS

AMENDMENT RE: INTERSTATE BUSES

Nature of Amendment

The proposed amendment would probably eliminate the requirement that accessibility standards for over-the-road buses be issued by the Department of Transportation within one year of the Act's effective date and that buses newly leased or purchased six years after the effective date (five years for small companies) be accessible. Proponents of the amendment would argue that it is unreasonable to require accessible buses in 5 or 6 years when the feasibility, cost, and other impacts are unknown, and when the costs (particularly for providing lifts and accessible bathrooms) are claimed to be so high as to have the potential to put bus companies out of business. They would also argue that it is unreasonable to issue rules two years before the required study is completed.

Talking Points Against the Amendment

1. The overall approach to over-the-road bus accessibility is the result of a long-negotiated compromise and is based on the overriding principle that individuals with disabilities are entitled to access to transportation even in rural areas, to the extent that access is technologically feasible and cost-effective.

2. The committee report accompanying the bill makes very clear that the rules to be issued by DOT are to be based on what is now feasible. The rules will not require costly and infeasible accessibility features.

3. It is clearly contemplated that DOT rules would be modified if the results of the study so dictate. The rules, although issued before completion of the study, would take effect two or three years after the study is completed and forwarded to Congress. This provides DOT and the Congress at least two years to consider whether the rules should be modified before they take effect and whether the legislation itself should be amended at that point.

4. The report specifically states that the Act does not necessarily require bathrooms to be accessible because feasible technology may not currently exist. It would require lifts, ramps, and fold-up seats to the extent these are feasible.

5. The claims that bus companies would suffer economically or go out of business are based largely on speculation and inadequate information. These claims in fact support the need for a study. Only through a study can we determine the true costs and other impact of possible accessibility

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requirements, particularly with respect to rural service, and assess the feasibility of requirements that would become effective five years down the road.

6. We cannot say to persons with disabilities who need bus service: Just keep waiting until we figure out how to provide access. We can't continue to say that access costs too much, or at least we think it might cost too much. We can't say that we can't provide access for people because then we can't carry as many packages. We can't keep waiting until technology makes itself available and costs decrease. We must make accessibility happen by examining current technology, encouraging new technology, examining our options, and mandating what is now feasible.

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THE AMERICANS WITH DISABILITIES ACT

(S.933)

SEPTEMBER 6, 1989

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Mr. President: I rise today to urge Senate passage of S. 933, the Americans with Disabilities Act. It was a long time in coming and many -- on both sides of the aisle -- have worked long and hard to get us here today.

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You know, many have called people with disabilities the last minority. Enactment of the Americans with Disabilities Act will bring this last, and largest, minority group into a position of achieving equal opportunity, access and full participation in the American Dream. Mr. President, that's what the ADA is all about.

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BI-PARTISANSHIP IN ACTION

The ADA is also a good example of bipartisanship in action. The bill originated with an initiative of the National Council on Disability, an independent federal body comprised of 15 members appointed by President Reagan and charged with reviewing all laws, programs, and policies of the Federal Government affecting individuals with disabilities.

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And the fact that we have moved forward with the ADA demonstrates that the President wasn't kidding in his Inaugural Address when he said that this "is the age of the offered hand."

I would also like to take this time to commend the efforts of other members of the Administration, notably Governor John Sununu, Attorney General Dick Thornburgh, Secretary Sam Skinner of Transportation, National Council on Disability Chairwoman Sandra Swift Parrino, and Justin Dart, Chairman of the President's Committee on Employment of People with Disabilities.

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The ADA has also benefitted from the input of numerous White House staff, including Bill Roper, John Wodasch, Hans Kuttner, David Sloane, Boyd Hollingsworth, Bob Funk, Bob Damus, Ken Yale and Mary Ann McGettigan. All these individuals have made significant contributions to the legislation that is before us today.

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AN IMPROVED BILL

Like President Bush, I believe that the ADA will help to create a more inclusive America, an America that does not place needless and harmful barriers in the way of her citizens with disabilities. I also believe that the bill before us today addresses many of my previous concerns -- concerns that I raised during my testimony before the Labor Committee last May.

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I am particularly pleased with the bill's tough -- but fair -- remedies provisions. The remedies available in the event of employment discrimination, for example, are the familiar and well tested remedies of Title VII of the Civil Rights Act of 1964 -- enforcement through the Equal Employment Opportunities Commission with recourse to the courts. Punitive damages and immediate access to jury trials are simply not available under the ADA in it's revised form.

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Furthermore, the only person who can bring suit for civil penalties and monetary damages under the bill's public accommodation's section is the Attorney General. So -- as you can see -- lawyers will not be able to build careers out of law suits against public accommodations brought on a contingency fee basis. That was the case under S. 933 as originally introduced, but not now.

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So those who would suggest that the ADA will unleash a mountain of litigation, I believe, are simply missing the point.

COSTS

But let there be no mistake about it. The vision of a barrier free society for all Americans can be expensive. It is not cost-free -- particularly for our nation's small businessmen and businesswomen.

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One of my primary concerns is the financial affect of the ADA on our nation's private bus industry. The private bus industry is the most affordable form of mass transportation for the poor, the elderly, and rural Americans. It is not a subsidized mass transit system. Greyhound, for example, has estimated that the annual cost of ADA to the company will range from $40 to $100 million dollars.

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Advocates in the disability community believe this estimate is too high, but in any event it will be costly. Obviously, we cannot allow the important protections of this legislation to bankrupt an industry that provides critical service.

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The bill contains a provision directing the Architectural and Transportation Barriers Compliance Board to undertake a study to determine the feasibility of equipping private intercity buses with lifts. The bill also imposes a lift requirement five to six years after the bill's enactment.

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Now, some have suggested that the ADA should not impose any lift requirements until after the results of the Board study becomes known. In other words, they claim that the ADA should not put the cart before the horse.

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Others argue that without statutory requirements, the issue of making private intercity buses accessible will not get the attention it deserves.

I believe both positions have merit. Individuals with disabilities are entitled to access to transportation even in the rural areas, to the extent that access is technologically feasible and cost effective. This is an area I intend to follow closely. My support for ADA is based upon my commitment to seeing that its provisions can work to the benefit of all and the detriment of none.

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INCENTIVES AND TECHNICAL ASSISTANCE FOR SMALL BUSINESSES

While costs alone should not be reason enough to deny the disabled their civil rights, there should be accompanying incentives for small businesses to meet the requirements of the bill. To this end, I will soon introduce an amendment to the tax code for the express purpose of ameliorating the financial burden to small businesses complying with the ADA.

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This amendment will allow small businesses to deduct their expenditures on such items as "auxiliary aids and services" and "reasonable accommodations" -- all, to some extent required by the ADA.

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Employers, persons with disabilities, and other affected parties must have access to accurate information. As a result I intend to offer an amendment which will enable the responsible federal agencies to establish a strong government-wide technical assistance program. Such a program will help to educate the public about the requirements of the bill.

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There are many knowledgeable and qualified experts -- such as the Dole Foundation, to assist in this endeavor. Other experts include the President's Committee on Employment of People with Disabilities and the Job Accommodation Network, the National Association of Rehabilitation Facilities, the National Council on Disability and the Disability Rights and Education Defense Fund, to name a few.

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Given the comprehensive nature of the ADA, I believe it is our obligation to see that people with disabilities understand their new rights under the bill and that employers and businesses understand the nature of their new obligations.

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CONCLUSION

Mr. President, being here today demonstrates that these are not dark days for civil rights in this country. It proves our commitment to expand our civil rights so that they embrace every American. The tradition of civil rights law is one of opportunity. And the ADA is squarely in that tradition.

I would also like to make one final point here. The eradication of discrimination in employment against persons with disabilities will result in a stronger workforce and lessen dependency on the welfare system. It will ensure that we fully utilize the potential talents of every individual within our society. A 66% unemployment rate for persons with disabilities is simply unacceptable -- and it is simply too expensive for America to afford.

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In closing, I ask consent to insert into the record the "Op-Ed" piece written by my friend James Brady, President Reagan's Press Secretary. His poignant remarks are certainly worth noting as we consider this legislation.

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So those who would suggest that the ADA will unleash a mountain of litigation, I believe, are simply missing the point.

COSTS

But let there be no mistake about it. The vision of a barrier free society for all Americans can be expensive. It is not cost-free -- particularly for our nation's small businessmen and businesswomen.

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Advocates in the disability community believe this estimate is too high, but in any event it will be costly. Obviously, we cannot allow the important protections of this legislation to bankrupt an industry that provides critical service.

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The bill contains a provision directing the Architectural and Transportation Barriers Compliance Board to undertake a study to determine the feasibility of equipping private intercity buses with lifts. The bill also imposes a lift requirement five to six years after the bill's enactment.

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Now, some have suggested that the ADA should not impose any lift requirements until after the results of the Board study becomes known. In other words, they claim that the ADA should not put the cart before the horse.

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Others argue that without statutory requirements, the issue of making private intercity buses accessible will not get the attention it deserves.

I believe both positions have merit. Nevertheless, it is easier to amend the lift requirement once the results of the study become known than it is to add these requirements at some point down the road. For this reason, I support the legislation as written.

Senator - I do not think it makes sense to take a position on the Greyhound amendment until after the amendment is offered.

Dennis

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I am fully aware inexpensive and accessible transportation is the key to employment for many disabled persons -- and one cannot distinguish between a ride to work and a ride for recreation. This is an area I intend to follow closely. My support for ADA is based upon my commitment to seeing that its provisions can work to the benefit of all and the detriment of none.

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This amendment will allow small businesses to deduct ~~to some extent~~ their expenditures on such items as "auxiliary aids and services" and "reasonable accommodations" -- all, to some extent, required by the ADA.

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Employers, persons with disabilities, and other affected parties must have access to accurate information. As a result I intend to offer an amendment which will enable the responsible federal agencies to establish a strong government-wide technical assistance program. Such a program will help to educate the public about the requirements of the bill.

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There are many such knowledgeable and qualified experts -- such as the Dole Foundation, to assist in this endeavor. Other experts include the President's Committee on Employment of People with Disabilities and the Job Accommodation Network, the National Association of Rehabilitation Facilities, the National Council on Disability and the Disability Rights and Education Defense Fund, to name a few.

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Given the comprehensive nature of the ADA, I believe it is our obligation to see that people with disabilities understand their new rights under the bill and that employers and businessmen and businesswomen understand the nature of their new obligation.

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CONCLUSION

Mr. President, being here today demonstrates that these are not dark days for civil rights in this country. It proves our commitment to expand our civil rights so that they embrace every American. The tradition of civil rights law is one of opportunity. And the ADA is squarely in that tradition.

I would also like to make one final point here. The enactment of this huge bill will substantially benefit our Nation. The eradication of discrimination in employment against persons with disabilities will result in a stronger workforce and lessen dependency on the welfare system. It will ensure that we fully utilize the potential talents of every individual within our society. A 66% unemployment rate for persons with disabilities is simply unacceptable -- and it is simply too expensive for America to afford.

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In closing, I ask consent to insert into the record the "Op-Ed" piece written by my friend James Brady, President Reagan's Press Secretary. His poignant remarks are certainly worth noting as we consider this legislation.