

FOR IMMEDIATE RELEASE  
SEPTEMBER 7, 1989

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**DOLE ANNOUNCES SENATE APPROVAL TO FUND  
CLOSED-CAPTIONING OF SENATE TV PROCEEDINGS**

WASHINGTON -- Senator Bob Dole (R-Ks) announced today Senate approval of \$1 million to fund closed-captioning of televised Senate floor proceedings. The funding was included in the House-Senate conference committee report on the legislative branch appropriations bill which passed the Senate today. Senator Dole was the principal sponsor of earlier legislation requiring closed-captioning of televised broadcasts of Senate floor proceedings.

"All Americans should have the opportunity to share in the debates of their elected representatives," said Dole. "It's especially appropriate that the Senate is moving to make closed-captioning of its televised floor proceedings a reality on the same day that we begin consideration of the Americans With Disabilities Act."

"People with disabilities have a right to participate equally in our society. I am pleased that today we are taking steps towards achieving this goal," said Dole. "Closed-captioning of Senate televised floor proceedings will benefit the more than 20 million Americans who are deaf or hearing-impaired."

Closed-captioning technology allows the audio portion of a program to be displayed in printed form on a television screen. The captions are received if a person has a special decoding device attached to the television set.

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## TASK FORCE ON THE RIGHTS AND EMPOWERMENT OF AMERICANS WITH DISABILITIES

Justin W. Dart, Chairperson

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Appointed by Congressman Major R. Owens, Chairman, House Subcommittee on Select Education

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August 3, 1989

Dear Senator Dole

Congratulations on your sponsorship  
of ADA — and your leadership  
which I know contributed to  
the historic endorsement of  
the Act by the President.

Sincerely,

Justin Dart

EQUAL ACCESS TO THE AMERICAN DREAM

May 25, 1989

TO: Sheila Burke  
FROM: Mo West  
SUBJECT: House Minority Counsel Meeting

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Attached you will find the memos I have done for the Senator on the ADA thus far. I attended the House Minority Counsel meeting yesterday and wanted to share with you what was discussed.

It was agreed that the Republicans want to work in a bipartisan manner in resolving concerns that are in the bill. Yesterday morning the Chamber of Commerce held a briefing at their downtown offices which several people at the meeting yesterday attended. The Chamber and other representatives of the private sector stated that they want to work with the disability community in negotiating concerns they have. The private sector feels they are just now understanding the scope of this bill and will forward their concerns ASAP to all Hill offices.

The House strategy is to quickly analyze the bill and sit down with the Democrats next week to ask questions and further clarify language in the legislation. After next week's meeting they will then proceed to negotiate concerns after ambiguities have been addressed.

This legislation is under the jurisdiction of four Committees on the House side. Rep. Goodling and Rep. Michel would like to hold hearings in the each of the committees that deal with the varying issues within the bill.

They agreed that to introduce another bill would be too partisan and that perhaps negotiating known concerns at this point and looking at ways to strengthen the legislation (i.e. providing incentives for compliance) was a necessary way to proceed.

They will monitor Senate hearings in June when the Administration will comment on the bill -- but plan to proceed with or without the Administration's input.

I also met with four business groups today (see attached sheet) and heard their concerns with regard to the ADA. They would like to sit down with the disability community and further clarify ambiguities in the ADA. They do not want to be seen as in opposition to this bill and feel their concerns could be accommodated.

I have set up a meeting with you today at 11:00 to further discuss this bill. As you know, the pressure is continuous from the disability community who would still very much like to have Senator Dole on the bill and are willing to negotiate his concerns.

Thank you for keeping me abreast of nursing legislation -- I received the testimony and info regarding CRNA's.

May 25, 1989

TO: Senator Dole  
FROM: Mo West  
SUBJECT: ADA Update

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**Introduction:** The ADA was introduced in the Senate (S.933) and the House (H.R. 2273) on May 9, 1989. The Senate sponsor is Senator Harkin with 36 cosponsors. The House sponsor is Rep. Coehlo with 106 cosponsors.

**History:** In April, 1988, the ADA was originally introduced. It was developed by the National Council on Disability, an independent agency with 15 members appointed by President Reagan. The legislation had many cosponsors (including you). A hearing was held in September, 1988, but no action was taken in the 100th Congress.

**Justin Dart,** with the endorsement of Chairman Major Owens of the Subcommittee on Select Education, created the Task Force on the Rights and Empowerment of Individuals with Disabilities in May, 1988. Throughout the remaining months of 1988, he conducted forums in every State, some territories, and Puerto Rico, to collect testimony with examples of how individuals with disabilities have been discriminated against in the areas covered by the legislation. Testimony was received from 9,000 individuals and grassroots support for the legislation was mobilized.

**1988 Republican Platform --** This platform contains language that reflects and endorses the intent of the ADA.

**President Bush:** President Bush endorsed the concept of the ADA during the fall campaign. Currently, Executive Branch agencies are now analyzing the bill. The White House anticipates a final position by September, 1988.

**The Senate:** Senator Harkin anticipates speedy passage. Three hearings were held this month. Senator Hatch urged that the White House be given until June 19, 1989, to react to the ADA. If it does not, he indicated that the Committee on Labor and Human Resources would go forward without its formal input. Senators Harkin and Kennedy agreed to Senator Hatch's suggestion.

**The House:** The ADA has been referred to four Committees -- Education and Labor, Energy and Commerce, Judiciary and Transportation and Public Works. Mr. Michel asked Mr. Coehlo to work with him to develop a bipartisan bill. Mr. Coehlo has agreed. The first meeting between Republicans and Democrats is scheduled for May 31, 1989. Mr. Michel plans to meet with representatives of the disability community and to arrange meetings with the business community.

**The Business Community:** The Chamber of Commerce sponsored a briefing for business organizations on May 5, 1989. It is anticipated that small working groups on different issues will be established to work with Congressional staff. The Chamber and various other business groups are meeting with me today to discuss specific concerns with the ADA -- I will relay the concerns after our meeting.

**The Disability Community:** This community has become very organized since the Justin Dart forums. It is aggressively seeking rapid passage of the bill. It appears, however, that there is need for greater understanding, among the members of the groups both inside and outside of Washington, D.C. as to the specific provisions in the ADA and their implications for the private sector.

May 25, 1989

TO: Senator Dole  
FROM: Mo West  
SUBJECT: Overview of ADA Problems

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## OVERVIEW OF THE AMERICANS WITH DISABILITIES ACT

### PURPOSES:

The purpose of the Americans with Disabilities Act of 1989 (ADA) is to "establish a clear and comprehensive prohibition against discrimination on the basis of disability". Currently, such a prohibition applies to the Executive Branch. Federal contractors and recipients of Federal financial assistance through Title V of the Rehabilitation Act of 1973 and to matters related to the sale and rental of housing through the Fair Housing Amendments of 1988. The ADA (S. 933 and H.R. 2273) would extend the prohibition of discrimination on the basis of disability to the private sector and to State and local governments, public accommodations and services provided by private entities, and telecommunications relay systems. It is viewed as an extension of civil rights similar to those now available on the basis of race, national origin and religion through the Civil Rights Act of 1964.

### DEFINITIONS:

The definition for disability is the same as that contained in section 504 of the Rehabilitation Act and in the Fair Housing Act Amendments of 1988. With respect to an individual, the term disability means -- a physical or mental impairment that substantially limits one or more of the major life activities; a record of such impairment; or being regarded as having such an impairment.

The term "qualified individual with a disability" is defined further in title II pertaining to employment to mean "an individual with a disability who, without reasonable modifications can perform the essential functions of the employment position the individual holds or desires." A similar clarification for "qualified individual with a disability" is contained in title III pertaining to public services provided by State and local governments and is defined to mean -- an individual with or without reasonable modifications to rules, policies, and practices, the removal of architectural, communication and transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for services.

## **DISCRIMINATION:**

Discrimination is construed differently in titles I through V to accommodate the different foci in each. For example, in title I which addresses general prohibitions against discrimination, discrimination is viewed as denying opportunities, providing an opportunity that is not equal to or as effective as that provided to others, or helping others to perpetuate the same forms of discrimination.

Under title II which relates to employment, discrimination includes the failure to provide reasonable accommodation; to hire someone because he/she needs such accommodation; or the application of qualification standards, tests or eligibility criteria that identify or limit individuals on the basis of disability.

Title III, Public Services, addresses principally transportation systems and facilities associated with such systems, and thus contrues discrimination as the failure to make such systems and facilities accessible to individuals with disabilities, including those in wheelchairs.

Title IV, Public Accommodations and Services operated by Private Entities covers privately operated establishments -- auditoriums, convention centers, stadiums, theaters, restaurants, shopping centers, inns, hotels and motels. Discrimination is construed in terms similar to those found in title II and III.

Title V applies to telecommunication relay services offered by private companies, and includes services regulated by states. Discrimination is viewed as the failure to provide access to nonvoice terminal devices to those who cannot use the conventional telephone system.

## **STANDARDS OF COMPLIANCE:**

The ADA provides exemptions and conditions for compliance that vary across titles. For example title I allows for qualification standards that require the current use of alcohol or drugs, by an abuser of such substances, not pose a direct threat to the property and safety of others; or that an individual with a contagious disease or infection, not pose a direct threat to the health and safety of others.

Elected officials and their staff, nonprofit entities that employ less than 15 individuals are exempt from coverage under title II. In addition, an employer is not required to make a reasonable accommmodation for an individual on the basis of a disability, if such an employer can demonstrate that it would constitute an undue hardship on the operation of the business. Finally, special standards and criteria that discriminate against an individual on the basis of a disability may be used if an employer can demonstrate that they are necessary and substantially related to the ability of an individual to perform the essential functions of the position.

Under title III no retrofitting is required but all new vehicles and remanufactured vehicles with a life of more than five years must be accessible. In the purchase of used vehicles only a good faith effort must be demonstrated. All new facilities and those subject to alterations must be made accessible. Intercity, rapid, light, and commuter rail systems must be accessible within five years. Key stations must be made accessible within three years, but the Secretary of Transportation may give waivers for up to 20 years for extraordinarily expensive structural alterations.

Under title IV, private entities may be exempted if they can demonstrate that making reasonable accommodations would fundamentally alter the nature of privileges, advantages and accommodations; that providing auxiliary aids constitutes an undue burden; or that removing a barrier and providing an alternative method are not readily achievable. Facilities that are altered, to the maximum extent feasible, must be accessible and new facilities that would be occupied 30 months after enactment must be accessible. New vehicles that carry more than 12 individuals must be accessible.

Under title V dealing with telecommunications relay, compliance by covered entities is required within one year of enactment of the ADA.

#### **REMEDIES AND PROCEDURES:**

Remedies and procedures vary both within and across titles, encompassing the full range from injunctive relief and attorney's fees to compensatory and punitive damages. In addition, title V alone allows for administrative actions as well as individual suits. Finally, the ADA calls for the development of regulations by varying Federal agencies, including the EEOC, the Departments of Transportation and Justice, and the Federal Communications Commission. The variety in remedies and procedures throughout the ADA may cause multiple interpretations in the area of enforcement.

Further, the ADA would not preempt other disability laws that may be applicable to the same extent as the ADA. Thus, an employer could possibly be subject to different suits in different forums under different standards of compliance although the underlying facts giving rise to the disability discrimination claim were the same.

May 25, 1989

TO: Senator Dole  
FROM: Mo West  
SUBJECT: Major Problems with ADA

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To follow, are the concerns voiced thus far with regard to the Americans with Disabilities Act (ADA). I also believe there are ways to strengthen the Act that will benefit all parties impacted by this legislation.

**Definition of disability** -- The ADA includes a provision which would allow an individual, "regarded as having an impairment" to be considered an individual with a disability. Although such a provision is contained in other legislation that prohibits discrimination on the basis of disability, it would appear to allow very expansive coverage of individuals and classes of individuals, such as those suspected as having AIDS.

**Equal Treatment Standard** -- The ADA requires that equal and as effective means be offered to an individual with a disability so that such an individual may achieve the same result or outcome as other individuals. This appears to be a very rigorous standard that may not allow for a covered entity to offer a comparable treatment/service/opportunity for an individual to achieve a comparable, rather than the same, outcome. It is unclear how this standard would affect, and possibly restrict, efforts to provide reasonable accommodation.

**Coverage of individuals who are alcohol and drug abusers and those with contagious diseases or infections** -- The ADA would prohibit discrimination against such individuals unless they posed a direct threat to the property and safety or health and safety, respectively, of others in the workplace. (This provision is contained only in title I which addresses general prohibitions.) The alcohol and drug provision would seem to potentially conflict with legislation requiring a drug free workplace. The provision pertaining to contagious diseases or infection would extend coverage to individuals with AIDS or individuals regarded as having AIDS.

**Anticipated discrimination** -- The ADA would allow an individual to sue if he/she was discriminated against on the basis of disability or believes he/she is about to be discriminated against on such a basis. It is unclear how a case of anticipated discrimination would be proved or disproved.

**Clarification of language** in the bill has been a concern of the small business community. Such terms as "reasonable accommodation, undue hardship, readily achievable, and good faith effort" are in need of further clarification and definition.

**Access to varied and multiple penalties** -- The ADA would allow an individual who successfully sues because of discrimination on the basis of a disability, to obtain injunctive relief and attorney's fees and and/or compensatory and punitive damages in employment cases and those involving public accommodations and services operated by private entities. An individual could obtain injunctive relief and attorney's fees in cases involving public services (likely to be transportation cases). In cases involving telecommunications relay services an individual could seek a private cause of action (injunctive relief and attorney's fees, and/or compensatory and punitive damages) or administration action (which would cease and desist orders and fines). Clarification of remedies across titles is needed and perhaps a more uniform manner of enforcement mechanisms.

**Allowance of suits in cases of both intentional and unintentional discrimination** -- Because of the phrase "fail to" in the provisions which define discrimination (for example, fail to provide opportunity, access, reasonable accommodation etc.), it is likely that covered entities would be subject to suits involving either kind of discrimination. "fail to" does not require conscious intent, it just requires that an action or the failure to act has the effect of discrimination. Other language in the ADA appears to prohibit practices with an adverse impact, regardless of intent, on individuals with disabilities. It would seem appropriate to limit the right to sue in cases of unintentional discrimination to specific circumstances where covered entities have experience, knowledge, and resources that would allow them to avoid such discrimination.

**Inclusion of section 504 references in ADA** -- Section 504 of the Rehabilitation Act prohibits discrimination on the basis of disability by recipients of Federal financial assistance. The ADA includes references in section 504 in its provisions pertaining to transportation that now apply to recipients of Federal financial assistance covered by section 504.

**Burden of proof** -- The ADA appears unclear on where the burden of proof lies in most titles. Such lack of clarity needs to be resolved, especially in cases of unanticipated discrimination.

**Cost:** While it is obvious that there will be tremendous costs associated with the enactment of this landmark legislation -- the costs to society will only increase by not dealing with issues of inaccessibility and discrimination against individuals with disabilities. It has been researched that disabled people want to work but cannot get hired and that inaccessible transportation is an impediment to employability and full integration in society. Currently 67% of people with disabilities are unemployed. The private sector will play a fundamental role in hiring people with disabilities, however a major education mission must coincide with this legislation in understanding its intent and compliance.

**A technical assistance section is needed** to benefit all parties, (especially the employer or any entity) in understanding the intent of the ADA and effective implementation. Under section 504 and the Fair Housing Amendments of 1988 there is technical assistance available to carry out its mandate of non discrimination practices. **Incorporating a technical assistance section** to educate and assist parties impacted by this legislation would not only assist in its implementation but reduce costs and litigation by clarifying the intent and mandated requirements. Employers and entities required to carry out the mandates of this legislation will need to be educated on meeting reasonable accommodation and accessibility standards. Examples might include the following:

Currently, there exists a Job Accommodation Network (JAN) in Virginia which is an international information network and consulting resource to enable qualified workers with disabilities to be hired and retained. It brings together information from many sources about practical ways of making accommodations for employees and applicants and can supply information on required standards in meeting Federal mandates and assuring compliance.

Also available as a resource for counsel and education under a technical assistance section is the President's Committee on Employment of Persons with Disabilities, the Architectural Transportation Barrier Compliance Board and The National Council on Disability -- all of whom can offer assistance and education to anyone impacted by this legislation. Employers and entities will have concerns and questions which must be addressed after enactment.

You authored a \$35,000 tax exemption section in the tax code for the expenditure in making any facility or public transportation vehicle owned or leased by the taxpayer accessible. This section could be amended to include expenditures towards reasonable accommodation and/or technological adaptation & devices and communication aids. I am certain all impacted parties of this legislation would welcome such an exemption.

Small Businesses and the private sector has shared concerns that this legislation appears punitive with no incentives to assist them in fullfilling compliance. They have asked that a **tax credit** be considered given the expenses that may occur in making reasonable accommodations. If the goal is to prohibit discrimination against individuals with disabilities and provide opportunities for full integration for persons with disabilities -- it appears fair to provide incentives for those who will assist in assuring a barrier free society where opportunities provide greater employability and remove individuals from the dependency rolls and onto the taxpaying rolls.

May 25, 1989

TO: Senator Dole  
FROM: Mo West  
SUBJECT: AIDS and the ADA

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Under the ADA persons with AIDS will be covered. This as you know, will be a highly controversial component of the bill with the very conservative groups. Recent court cases and the President's Committee on AIDS support the incorporation of individuals with AIDS in the definition of disability under Section 504 of the Rehabilitation Act -- in addition to assured anti discrimination statutes to these individuals.

I have prepared the following facts pertaining to AIDS and its relation to the Americans with Disabilities Act.

AIDS is not explicitly mentioned in the bill. Persons are protected under the bill if they are subjected to discrimination because of a physical or mental impairment, perceived impairment, or record of impairment.

In defining these terms, the bill relies upon definitions currently in effect in regulations issued under Section 504 of the Rehabilitation Act of 1973.

The definition of "physical or mental impairment" under the Rehabilitation Act does not delineate AIDS specifically, but recent interpretations and court decisions have concluded that, in particular circumstances, AIDS, AIDS Related Complex, and seropositivity may constitute an impairment.

Coverage of people infected by the AIDS virus does not mean that such individuals can never be excluded under any circumstance.

The inclusion of someone having a condition that meets the definition of a physical or mental impairment is not the end of the inquiry under the ADA.

Inquiries regarding unequal treatment of persons with disabilities, including AIDS, can be viewed as a two step test.

First, is the individual being treated unequally because of a physical or mental impairment, perceived impairment or record of impairment? This determination is based upon the definition of physical or mental impairment drawn upon from Section 504 regulations and upon the facts of the case.

Second, is the unequal treatment permitted under the Act? This will depend upon whether there are legitimate standards or criteria justifying the unequal treatment, whether such standards are necessary and can be shown to be sufficiently connected to the essential components of the job or activity, and whether such criteria or standards have been properly applied to the particular individual with a disability.

With regard to AIDS specifically, if an employer or service provider could show, in particular circumstances, that a person with AIDS poses a substantial risk to the health or safety of co-workers or other participants, it would be permissible to establish qualification standards or selection criteria that screen out such individuals.

However, the employer or service provider would have to have adequate evidence to establish that such standards or criteria were necessary and that they were substantially related to the essential components of the job or activity.

They would also have to demonstrate that the individual in question failed to meet the standards or criteria, e.g., that the individual really did endanger the health and safety of others.

Mere irrational prejudice or unfounded fears could not justify such an exclusion or unequal treatment.

The Justice Department Office of Legal Counsel issued a ruling that Section 504 covers not only those who have AIDS -- but also those who test positive for the HIV virus.

Although the Supreme Court ruling in Arline said 504 covers people with contagious diseases, they left open the question of whether those who are simply infected are also covered. All lower courts considering the issue have held that it does.

The opinion gives strength to guidelines instituted by OPM last year that Federal agencies should not discriminate individuals with AIDS or those who test positive.

While not legally binding, the Justice Department opinion does give plaintiffs a new tool in private discrimination suits.

The President's Committee on AIDS in their findings recommended a strong anti discrimination statute to protect persons with AIDS.

May 25, 1989

TO: Senator Dole  
FROM: Mo West  
SUBJECT: Transportation Issues and the ADA

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**Issue:**

Accessible transportation is essential for people with disabilities to take part in community life and employment. The biggest issue for the disability community is lack of accessible mainline transportation and difficulty with the para-transit system.

Para-transit systems are a supplement to mass transit and provides door to door transportation to people who are unable to use public transportation. However, para-transit is not a substitute for accessible mass transportation, and both should be available. Unfortunately, problems with the existing para-transit systems include: (1) the service doesn't run the same hours as public transportation, and usually only between 9-5 or 8-4; (2) you must call 24 hours in advance, which makes unplanned virtually impossible; and (3) the para-transit systems cannot cross town lines, so that people may be left stranded if the system from another town doesn't arrive at the pick-up point.

Regulations issued by the Department of Transportation implementing the Urban Mass Transit Act have been challenged by numerous groups. Problems include (1) the regs exclude people with mental disabilities from eligibility for para-transit services; (2) the regs place an arbitrary 3% cap on the funds systems can use to make their systems accessible; and (3) there is no private rights action when discriminatory action occurs. A third circuit court decision, *Adapt v. Burnley* ruled in favor of people with disabilities which challenged the 3% limitation on funds and requires accessible mainline transportation and accommodable para-transit systems.

**Dole Transportation Record**

You have a strong record in making transportation fully accessible -- consistent with your view on full employability of persons with disabilities.

You authored the Air Carriers Access Act during the 99th Congress to prohibit discrimination against persons with disabilities in air travel. Because of this law air travel was not included in the ADA. Regulations for this Act have been recently released -- problems include safety concerns regarding blind persons requesting to sit near exit row seats -- you have remained supportive of this -- leaving this concern to the regulatory negotiations between blind groups and the DOT.

You wrote President Bush indicating your support for -- and asking that he not appeal -- the *Adapt v. Burnley* decision to the Supreme Court. The ruling required that buses newly purchased with federal assistance are to be accessible; that transit systems provide both accessible mainline transportation for those who can use buses and adequate para-transit to serve those who cannot; in addition, to challenging the 3% limitation on funds.

You cosponsored last year's ADA which included much broader transportation modifications and requirements. This year's ADA will do the following:

- \* requires all new buses and rail vehicles purchased after 30 days of enactment be accessible and usable to people with disabilities

- \* requires a demonstrated good faith effort to purchase or lease accessible used vehicles.

- \* purchase or lease of remanufactured vehicles must to the maximum extent feasible and within five years of life be made accessible.

operation of para-transit -- it shall be discriminatory for an entity which provides public transportation to fail to provide (refusal was eliminated) such a system as a supplement and comparable to that of the fixed route public transportation system.

operation of a community demand responsive system for the public must be comparable to that available to the public

intercity, rapid, light and commuter rail systems within five years must have at least one car per train accessible.

ket stations shall be accessible within three years, but the Secretary of Transportation may extend the period of compliance for up to 20 years for extraordinary expensive modifications.

May 25, 1989

TO: Senator Dole  
FROM: Mo West  
SUBJECT: Fair Housing Act Amendments Summary

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FAIR HOUSING ACT AMENDMENTS: DISABILITY PROVISIONS:

Last September, President Reagan signed the Fair Housing Act Amendments of 1988, which includes major new protections for persons with disabilities. You were a cosponsor.

**Background:**

The original 1968 Fair Housing Act prohibited discrimination on the basis of race, color, sex, or national origin and described what actions would be considered discriminatory in the sale, rental, or financing of a residence. Persons with disabilities were not a "protected class".

The 1988 Amendments add the disabled, and families with children, to the protected classes. The Amendments also set, for the first time, standards of accessibility for the new construction of multifamily housing.

Discrimination against disabled persons would include:

- \* a refusal to permit, at the expense of the disabled person, reasonable modification of existing premises occupied or to be occupied by such person "if such modification may be necessary to afford such person full enjoyment of the premises";
- \* a refusal to sell or rent a dwelling to a person because he or she is disabled; and
- \* a failure to design and construct a multifamily dwelling of four or more units in such a way that the public and common use portions of the dwellings are readily accessible and usable by disabled persons, all doors into and within the premises are wide enough for wheelchairs, and include general adaptive features (light fixtures, etc., in accessible locations, reinforcements in walls that allow installation of grab bars, among others).

These new requirements for multifamily housing will be effective 30 months after enactment, and HUD is authorized to provide state and local governments with technical assistance to ensure that design and construction of new multifamily housing will be consistent with these standards.

While there is no statutory language regarding group homes for the mentally retarded and mentally ill, the House Committee report states its intent that the prohibition against discrimination based on disability apply to zoning decisions and practices. Specifically, it is intended to prohibit application of special requirements through land-use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of disabled individuals to choose where to live,

Disabled persons who believe that they have been discriminated against can file a complaint with HUD who will investigate. If the complaint has merit, HUD will attempt to mediate. Investigations must be completed within 100 days. The individual can also go to Federal court.

#### **Current Status:**

HUD has recently proposed regulations, which are open for public comment. These regs include further specificity as to what constitutes discriminatory actions. I will monitor the regs and report back to you.

May 23, 1989

TO: Senator Dole  
FROM: Maureen West  
SUBJECT: ADA Bill

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The Americans with Disabilities Act (S.933) was introduced with 35 cosponsors -- the 10 Republican cosponsors are (Durenberger, Jeffords, McCain, Chaffee, Stevens, Cohen, Packwood, Boschwitz, Graham & Heinz).

The Americans With Disabilities Act is an omnibus civil rights statute that prohibits discrimination against individuals with disabilities in private sector employment; all public services; public accommodations; transportation; telecommunications; and State and Local governments.

The ADA extends civil rights protections to people with disabilities beyond section 504 of the Rehabilitation Act of 1973 (the anti-discrimination statute for disabled persons) by requiring the private sector and state and local governments to comply with current civil rights statutes afforded women and minorities.

The Act covers employers engaged in commerce who have 15 or more employees; transportation companies; those engaged in communications and state and local governments.

The Act specifically defines what does constitute discrimination, including various types of intentional and unintentional exclusion; segregation; benefits and services; architectural, transportation, and communication barriers; failure to make reasonable accommodations; and discriminatory qualifications and performance standards.

The Act specifies those actions that do not constitute discrimination. They include unequal treatment wholly unrelated to a disability or that which is the result of legitimate application of qualification standards necessary and substantially related to the ability to perform or participate in the essential components of a job or activity.

The ADA incorporates by reference the enforcement provisions under title VII of the Civil Rights Act of 1964 and section 1981 of the Civil Rights Act of 1866 for employment -- and other applicable enforcement provisions in Title VIII of the Civil Rights Act of 1964 and Section 505 of the Rehabilitation Act of 1973.

May 23, 1989

TO: Senator Dole  
FROM: Mo West  
SUBJECT: Narrative Summary of ADA

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OVERVIEW OF THE CURRENT PROPOSAL:

You were given two drafts of the bill and a final version prior to introduction of the Americans with Disabilities Act (ADA). As you know, the ADA introduced this year by Senator Harkin has been substantively changed from Senator Weicker's bill which was broader in scope.

To follow is a narrative description of the bill incorporating what changes were made. I am preparing a memo delineating concerns and proposed recommendations which I will have for you tomorrow.

THE PURPOSE OF THE ACT IS TO PROVIDE:

- a clear and comprehensive mandate to end discrimination against people with disabilities.
- protection comparable to that afforded to other minorities with enforceable standards addressing discrimination against individuals with disabilities.

KEY DEFINITION:

The term disability is defined to mean, with respect to an individual -- a physical or mental impairment that substantially limits one or more of the major life activities; a record of such impairment; or being regarded as having such an impairment.

This is the same definition contained in section 504 of the Rehabilitation Act and the Fair Housing Amendments of 1988. The inclusion of "substantially limits" in the bill circulated this year eliminates concerns about frivolous claims by tightening up a broad definition.

The definition section also includes definitions for "reasonable accommodation" and "auxiliary aids and services."

Reasonable accommodations include - making facilities accessible and usable, job-restructuring, modified work schedules, reassignments, modification of equipment or devices, appropriate adjustments or modifications of examinations and training materials, adoption or modification of procedures or protocols, the provision of qualified readers or interpreters, and other similar modifications.

Auxiliary aids and services shall include qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments; qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments; acquisition or modification of equipment or devices, and other similar services and actions.

#### TITLE I GENERAL PROHIBITION AGAINST DISCRIMINATION:

This title identifies broad forms of discrimination on the basis of disability with regard to services, programs, activities, jobs, or other opportunities -- subject to the standards and procedures established in other titles -- it would be discriminatory to:

- deny an opportunity to participate;
- afford a person with a disability an opportunity to participate that is not equal to that afforded to others;
- afford an opportunity that is less effective,
- afford an opportunity to an individual or class of individuals with disabilities that is different or separate than that afforded to others, -- unless it is as effective,
- aiding an entity to perpetuate discrimination;
- denying participation on a board or commission,
- otherwise limiting an individual in the enjoyment of any right, privilege, advantage or opportunity enjoyed by others.

This title further clarifies these conditions by addressing the concepts of "equal opportunity" as an equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement in the most integrated setting appropriate to the individual's needs. This title also clarifies prohibitions in the use of administrative methods that have the effect of discrimination; that substantially impair the intended objectives of the opportunity for the person with the disability; or that perpetuate discrimination by others. The title addresses discrimination pertaining to relationships and associations of individuals with persons who are disabled.

The title outlines the conditions which do not constitute discrimination. First, it would not be considered discrimination to exclude an individual with a disability, if the exclusion is unrelated to the disability.

Second, in the area of standards and criteria, exclusion of an individual with a disability would be allowed if such standards or criteria were shown to be both necessary and substantially related to an individual's ability to perform or participate.

Third, qualification standards may include requiring that the current use of alcohol or drugs by an alcoholic or drug abuser not pose a direct threat to property or the safety of others in the workplace or program.

Fourth, qualification standards may include requiring that an individual with a currently contagious disease or infection not pose a direct threat to the health or safety of others in the workplace or program.

## TITLE II EMPLOYMENT:

This title defines a "qualified individual with a disability" as an individual who, with or without reasonable accommodation, can perform the essential functions of a job -- either held or desired by that individual.

Discrimination under this title includes situations when a covered entity fails to make reasonable accommodations to the known limitations of an individual unless the entity can demonstrate that such an accommodation would constitute an undue hardship (This addresses/alleviates the concern about the bankruptcy standard in the original bill introduced last Congress).

As in title I the entity would have to show that standards and criteria for a job be necessary and substantially related to perform the essential functions of the job.

Exempted entities include those who are -- covered by section 501(c) of the Internal Revenue Code (This includes corporations organized and operated for religious or charitable purposes.), elected officials, Indian tribes, or entities who have less than 15 employees.

This title incorporates by reference the remedies and procedures set out in sections 706, 709, and 710 of title VII of the Civil Right Act of 1964 and section 1981 of the Civil Rights Act of 1866. Such remedies and procedures would be available to any individual who believes that he or she is being or about to be subjected to discrimination on the basis of disability. Note that under section 1981, an individual has a private cause of action and may recover for compensatory damages such as pain and suffering. The individual may also pursue a cause of action through EEOC.

The authors of the current draft indicate that all remedies and procedures under these laws may only be used in cases of intentional discrimination (which is more difficult to prove) as distinguished from practices which are unintentional but have a disparate adverse impact on individuals with disabilities. This intended limitation is not directly apparent in the current draft of the ADA.

### TITLE III PUBLIC SERVICES:

In this title, a "qualified individual with a disability" means one who, with or without reasonable modifications to rules, policies, and practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for services from or participation in a program of a public agency.

Although broadly construed as the above suggests, most of this title addresses public transportation. Such language does not limit coverage to public entities.

This title covers a wide range of actions related to public transportation and reasonable accommodation/accessibility, including:

purchasing or lease of **new** buses and rail vehicles (those purchased after 30 days of enactment must be accessible to and usable by individuals with disabilities );

purchase or lease of **used** vehicles (language includes the standard of -- "demonstrated good faith to acquire accessible vehicles")

purchase or lease of remanufactured vehicles (new provision standard includes -- "to the maximum extent feasible vehicles with five-years of life should be made accessible");

operation of paratransit systems (standard includes -- "it shall be considered discrimination for an entity which provides public transportation to fail to provide ("refusal" was eliminated) such a system as a supplement and comparable to that of the fixed route public transportation system");

operation of a community demand responsive system for the public (standard -- comparable to that available to the general public");

This title also deals with new facilities, alterations to existing facilities, rail systems, and key stations. The standards include

for new facilities -- readily accessible and useable by individuals with disabilities;

for alterations -- after one year of enactment, to the maximum extent feasible, the path to the altered area, bathrooms, telephones, and drinking fountains serving the remodeled area must be accessible;

existing facilities -- when viewed in their entirety are readily accessible and usable;

intercity, rapid, light, and commuter rail systems -- within five years at least one car per train must be accessible;

key stations -- any system shall be accessible within three years, but the Secretary of Transportation may extend the period of compliance for up to 20 years for extraordinary expensive modifications.

Enforcement, include remedies and procedures (limited to injunctive relief and attorney's fees) of section 505 of the Rehabilitation Act. An individual who believes he or she is being or about to be subjected to discrimination on the basis of disability, may access the protections in section 505.

Three key points --

These requirements apply to newly covered entities under ADA and those covered under section 504 of the Rehabilitation Act;

Elimination of "refusal" with "fail to " would appear to make it easier to prove discrimination since this would appear to eliminate the requirement for proving intent.

The "or about to be subjected to discrimination" language under this title of the act could be proved by way of blueprints and other methods in justifying intentional discrimination. This language was appropriately taken from the Fair Housing Act of 1988.

#### TITLE IV PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES:

This title defines several terms broadly --

Commerce -- means travel, trade, traffic, commerce, or communication among the States...

Public accommodation -- means privately operated establishments that are used by the general public... and are potential places of employment, including auditoriums, convention centers, stadiums, theaters, restaurants, shopping centers, inns hotels, motels -- (except for those covered by section 201(b)(1) of the Civil Rights Act of 1964; e.g., those with less than five rooms), terminals, gas stations, sales establishments, professional offices of health care providers, office buildings, personal and public service buildings, private schools, parks and recreational facilities.

Public transportation -- defined as in title III --The title states that no individual shall be discriminated against in the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation, on the basis of disability.

Discrimination includes --

the imposition of eligibility criteria that identify or limit or tend to identify or limit, an individual with a disability or a class of such individuals from full and equal enjoyment.

the failure to make reasonable accommodations unless it would fundamentally alter the nature of privileges, advantages...

the failure to ensure no exclusion, segregation, or different treatment, unless such would result in an undue burden,

the failure to remove architectural, communication, and transportation barriers, where such removal is readily achievable (if such a standard cannot be achieved, an alternative must be offered to avoid discrimination);

with respect to a facility -- to the maximum extent feasible, the failure to make it or its altered part accessible and useable within one year of enactment (New facilities built 30 months after enactment shall be accessible, unless the covered entity can demonstrate that it is structurally impracticable to do so.);

with respect to transportation -- the failure to provide transportation equivalent to the general public; -- and in the case of vehicles that carry 12 or more individuals -- purchased after 30 months of enactment, that are accessible and usable by individuals with disabilities.

This title also includes a separate section on prohibition of discrimination in public transportation provided by private entities.

This title, like title III, replaces "refuse to" in the first draft with "fail to," in the second draft, and would appear to allow discrimination charges on effects of, as well as intent to, discriminate. Selected enforcement provisions in the Fair Housing Act would apply to this title. They represent a very broad and permissive basis for discrimination charges.

#### TITLE V TELECOMMUNICATION RELAY SERVICES:

This title defines -- Telecommunications Relay Services -- as services that enable simultaneous communication to take place between individuals who use nonvoice terminal devices (like a telecommunication device for the deaf --TDD) and individuals who do not use such devices.

The title states that it shall be considered discrimination for any common carrier (as defined in section 3(h) of the Communications Act of 1934), that offers telephone service to the general public, to refuse to provide, not later than one year after enactment, interstate and intrastate telecommunication relay services.

Enforcement provisions reference provisions in the Fair Housing Act (in the case of charges brought by an individual), and for purposes of administrative enforcement, various provisions in the Communications Act of 1934, access to cease and desist orders, and the requirement that each violation of this title shall be construed as a separate offense.

#### TITLE VI MISC. PROVISIONS:

Title VI includes miscellaneous provisions, such as a construction clause explaining the relationship between the provisions in the ADA and the provisions of other Federal and State laws; a prohibition against retaliation; a statement that States are not immune from actions in Federal court for a violation of the ADA; a directive to the Architectural Transportation Barriers Compliance Board to issue guidelines; and authority to award attorney's fees.

May 23, 1989

TO: Senator Dole  
FROM: Mo West  
SUBJECT: Differences in Harkin and Weicker bill

---

Substantial changes were made to the Harkin/Kennedy bill from Senator Weicker version of ADA introduced last Congress. Senator Weicker's bill was much broader in its interpretation.

For purposes of clarifying the changes between the American with Disabilities Act (ADA) from last year and the bill Senators Harkin and Kennedy have just introduced, I have termed last years ADA as the original ADA and the Harkin/Kennedy bill as the revised ADA. I have delineated changes according to the titles within the Act.

DEFINITION OF PROTECTED CLASS AND PROVING DISCRIMINATION:

Under sections 504 and 504 of the Rehabilitation Act of 1973 there is a two step process for proving discrimination. First, an individual must prove that he or she is disabled -- having a physical or mental impairment that substantially limits a major life activity. Second there must be evidence that he or she is otherwise qualified.

Section 503 and 504 also include provisions which states that if someone with a contagious disease or someone who is a alcoholic or drug addict poses a direct threat to the health and safety of others, then he or she is not a "qualified disabled person".

The original ADA had a much broader definition of disability than sections 503 and 504 -- whereby there had to be no proof that one had a disability that substantially limits a major life activity. The original ADA did not incorporate provisions regarding persons with contagious diseases and alcoholics and drug abusers. The definition did not include the term "otherwise qualified".

The revised ADA incorporates the section 503 and 504 definition which requires an individual must prove that his/her disability substantially limits a major life activity.

#### EMPLOYMENT:

Sections 503 and 504 generally require covered entities to make reasonable accommodations for disabled applicants and employees unless it would pose an "undue hardship."

The original ADA had a "bankruptcy" provision under which a recipient would have to provide the accommodations unless it would "threaten the existence of the company."

The revised ADA incorporates section 503 and 504 standards of undue hardship.

Both versions have a small provider of 15 employees or less consistent with title VII of the Civil Rights Act of 1964.

#### PUBLIC ACCOMMODATIONS:

The original ADA used the definition of "public accommodation" set out in title II of the Civil Rights Act of 1964 (e.g. restaurants, hotels, theaters, etc.) and required that all existing facilities be retrofitted within 2 to 5 years to assure full accessibility unless the retrofitting would "threaten the existence of" the business (the so called bankruptcy provisions).

The original ADA also required that all new facilities be fully accessible and required public entities provide reasonable accommodations -- unless it would "threaten the existence of" the entity.

The revised ADA reaches beyond the title II provision to include all entities that are open to the public as customers, clients, visitors, or which are potentially places of employment.

With respect to existing facilities, the revised ADA only requires structural changes that are "readily achievable." and providing alternative methods for those which are not.

The revised ADA requires reasonable accommodations (termed "auxiliary aids and services) be made unless it would result in "undue burden" which is the current standard in section 504.

Both versions require that new facilities be made accessible.

#### PUBLIC SERVICES:

The original bill requires that all new facilities be accessible within 2 to 5 years, regardless whether an entity receives federal aid.

The revised ADA extends section 504 to cover all state and local governments their programs and activities.

#### COMMUNICATIONS:

The original ADA required all those engaged in the business of broadcasting to progressively close caption shows. It also establishes an interstate and intrastate relay system for deaf persons. (a deaf person using a TDD can speak to an operator who can relay a message to an individual who has no TDD).

The revised ADA requires only a TDD relay system and deletes the captioning provisions.

#### TRANSPORTATION:

The original ADA required 50% of all a public authority's fleet be accessible within 7 years (which includes retrofitting) in addition to all making all new buses accessible

The revised ADA requires that all buses on a fixed route be accessible with no retrofitting required. It also permits a transit authority to purchase used buses that are not accessible if the transit authority has demonstrated a good faith effort to purchase a used bus that is accessible.

Both versions require a paratransit system be made available for those disabled individuals who cannot use the mainline system and that all new facilities be accessible.

The revised ADA has a separate standard for communities that have a demand responsive system ( advanced reservation transportation) for the general public. Under this standard, all new buses need not be accessible if the transit authority can demonstrate that it can meet the needs of disabled people with current accessible buses.

The original ADA required that 50% of existing rail cars be made accessible within 7 years (requiring extensive retrofitting).

The revised ADA requires that at least one rail car be made accessible within 5 years and that only key stations be made accessible within 20 years.

The original ADA required all stations be made accessible within 10 years.

The original ADA covered air travel and required accessible taxis.

The revised ADA does not cover air travel and does not require accessible taxicabs but prohibits a driver from refusing to pick up a disabled person.

#### ENFORCEMENT:

The original ADA included an enforcement provision (injunctive and monetary damages) that applied to the entire Act.

The revised ADA has a separate enforcement section for each title. Under employment, the revised ADA incorporates by reference the enforcement provisions in title VII of the Civil Rights Act of 1964. For acts of intentional discrimination, it applies section 1981 of the Civil Rights Act of 1968.

The revised ADA incorporates by reference the provisions of section 505 of the Rehabilitation Act (attorney's fees) to public entities. Under public accommodations and communications, the revised ADA incorporates the enforcement provisions in the Fair Housing Act of 1988.

Both versions incorporate attorneys' fees provisions.

May 23, 1989

TO: Senator Dole  
FROM: Mo West  
SUBJECT: ADA Update

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Senator Hatch announced at the last day of hearings on the Americans with Disabilities Act last week that he would like to work in a bipartisan effort to assure a compromise prior to marking up this legislation -- scheduled for early July. He has invited the Administration to testify on the bill the week of June 19. They have not to date commented on the ADA bill

Because of the strong grass roots support for this bill and the Administration's previous statements in support of the Americans with Disabilities Act, Senator Hatch will refrain from introducing his bill and work towards further compromise.

I have attached a copy of his statement and will keep you informed of the proposed June hearing.

May 23, 1989

TO: Senator Dole  
FROM: Mo West  
SUBJECT: Sen. Hatch's ADA bill

---

I have examined Senator Hatch's alternative bill to the Americans with Disabilities Act and consulted with legal staff of the American Law Division at Congressional Research.

Senator Hatch's bill differs from the ADA in five areas:

First, the small business provider exemption has been raised to 25 in his bill from 15 in the ADA bill. It is likely that this exemption will be an issue given the accommodations that small businesses must make to comply with mandated standards of non discrimination. -- A probable negotiation tactic might be a phase in of this exemption number given the accommodations that must be made in assuring compliance under this Act.

Second, his bill will tighten the remedies available under each title to parallel current civil rights statutes by deleting section 1981 remedies currently in Title II of the ADA. Under Title II (the Employment Section) of the ADA remedies would extend section 1981 of the Civil Rights Act of 1866 to include punitive damages and attorney's fees.

Third, he tightens up the public accommodation definition consistent with title II of the Civil Rights Act to include entities covered under this title which include restaurants, entertainment and lodging entities. The ADA will go beyond title II entities to those aforementioned. However, if we are going to assure a barrier free society -- entities must go beyond restaurants, theaters and hotels -- this is another area for negotiation.

Fourth, the Hatch bill does not include language for a telecommunications relay system for the deaf and instead requires that networks progressively close caption their broadcasts. The relay services are key to full integration of deaf people -- the deaf community would prefer a relay system given networks are currently working at close captioning programs.

Fifth, the Hatch bill does not cover private transportation and the ADA stipulates that private transportation (which is a necessity given that all mainline transportation is not accessible) must comply with anti-discrimination statutes in making accessible transportation. This would include making buses such as Greyhound accessible and local transportation services accessible which are not federally funded.

I believe Senator Hatch has some valid concerns, however, his bill is limiting in the areas of public accommodations and transportation. Your past accomplishments and views on accessible transportation to assure employability for people with disabilities is inconsistent with the language of Senator Hatch's bill.

You are suited well for a compromise between the two bills. I would not recommend cosponsoring Senator Hatch's bill at this time. Senator Hatch would like to work at a compromise instead of introducing his own version.

Do you want to cosponsor Senator Hatch's bill?

Yes \_\_\_\_\_ No \_\_\_\_\_

May 15, 1989

TO: Senator Dole  
FROM: Mo West  
SUBJECT: Meeting with Disability Groups

---

Several key disability advocates have asked to meet with you to talk about the ADA. It would be wise to meet with a select few to hear their concerns and interest in eliciting your support for the ADA. Because of your statements to work in a bipartisan manner and to continue to learn more about this legislation -- a brief meeting with key disability advocates in the next week would tone down your viewed opposition on the bill.

The advocates that would like to meet with your are:

Pat Wright -Disability Rights Education Defense Fund

Dave Kaposi- Paralyzed Veterans Association

A meeting with these individuals (representative of the disability community) to hear out concerns will support your position to hear from all parties impacted by this legislation in addition to weighing in White House recommendations on the ADA.

Will you meet with them next week?

Yes\_\_\_ No\_\_\_



May 15, 1989

TO: Senator Dole  
FROM: Mo West  
SUBJECT: ADA Update

---

The National Council on Independent Living (NCIL) is a grass roots organization (with members who are predominantly physically disabled) which represents the independent living movement and disability issues in general. Approximately 1500 disabled individuals attending the conference will make their way to the Hill today and tomorrow in mass to generate support for the ADA bill and attend the last day of scheduled hearings on the ADA.

After the NCIL congressional reception this evening, participants of the conference will march to the White House for a candle light vigil to elicit support from the Administration, which has yet to comment on the legislation.

The groups that have stopped by have not been militant but rather have stated their support for the bill. There were approximately 15 delegates from Kansas that stopped by to convey their support for the ADA. I continue to reiterate your intent to hear out all parties impacted by this legislation and your consideration of White House recommendations on this issue.

I believe it would be wise to talk with key players in the disability community to hear out their concerns and to convey your intent to work in a bipartisan manner.

Marca Bristow, President of NCIL, will be in town until Tuesday evening and would like to talk to you about the bill. Marca was rehabilitated at the National Rehabilitation Institute in Chicago and has spearheaded the independent living movement. She is well respected and not militant however representative of the NCIL population. A meeting to hear out her concerns would be helpful given the intensity of the ADA this week.

Will you meet with Marca to hear her concerns?

Yes ☐ No ☒

May 12, 1989

TO: Senator Dole  
FROM: Mo West  
SUBJECT: Appointment re ADA

Sandy Parrino, Chairperson of the National Council on Disabilities would like to see you this afternoon to briefly discuss the Americans with Disabilities Act. She has met with White House officials of the Economic Advisory Council this morning and would like a follow up meeting with you.

The National Council on Disability is an independent Federal agency comprised of members appointed by the President. The Council is charged with making disability policy recommendations to the President and Congress. The original ADA bill emanated from the National Council on Disabilities under her tenure. I believe it would be wise to hear her concerns and your intent to work with the White House on this legislation.

Will you meet with her this afternoon?

Yes \_\_\_\_\_ No ☒ \_\_\_\_\_

*Handwritten signature/initials*

*called Maureen 3:00 pm  
Jaye*

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05/12/89 14:45

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F-02

*Murder list*

Dear Senator Harkin,

On behalf of the National Council on Disability, I want to convey and reemphasize our long-standing and profound support for your efforts and those of other distinguished Members of Congress, who have sincerely committed themselves, as you have, to insuring, through forthright legislative action, that people with disabilities in the United States will be protected from discrimination on the basis of disability by the full force and measure of the law.

As the Council stated in Toward Independence, its February 1986 report to the Congress and the President, "Congress should enact a comprehensive law requiring equal opportunity for individuals with disabilities, with broad coverage and setting clear, consistent, and enforceable standards prohibiting discrimination on the basis of handicap." The Council continues to believe that this is absolutely and without question the highest priority for action by Congress and the President which exists in the area of disability policy today.

The Council understands that introduction of this important legislation is only the first step in the process of achieving our goal of insuring equal opportunity and protection against discrimination for 43 million people with disabilities in the United States.

Ultimate passage and successful implementation of this legislation depend on broad-based agreement and support from many sectors. Disability policy is not, nor should it be, a partisan issue or concern. It must be a principal concern of public officials at all levels and of all ideologies.

While we are most anxious to see early passage of legislation like that recommended by the Council and introduced by you and Senator Weicker last year, our own experience in developing complex policy recommendations indicates that process plays an important and necessary role in educating interested parties and in building consensus-oriented support.

We know that consensus-building and educating can be a relatively painstaking process. However, we believe that the likelihood of adoption and successful implementation of this measure will be enhanced by such a process. Thus, we urge you to take whatever steps are necessary to insure consideration of the legitimate concerns of all parties as you move toward passage of this vital legislation.

As you know, the President has expressed his support in principle for comprehensive protection against discrimination of people with disabilities. We join the President in pledging our support for this principle. We look forward to working with the Congress and the Administration to establish, unequivocally, comprehensive equal rights for persons with disabilities in our great nation.

Sincerely,

Samuel M. Parrino

May 10, 1989

TO: Senator Dole  
FROM: Mo West  
SUBJECT: ADA Hearing

---

AT 10:00 you are scheduled to testify at the second day of hearings on the Americans with Disabilities Act. The hearings are being held at the Subcommittee level and Senator Harkin will chair.

The Americans with Disabilities Act was introduced yesterday by Senators Harkin, Kennedy and Durenberger. Seven additional Republicans have joined as original cosponsors (McCain, Jeffords, Chaffee, Stevens, Cohen, Packwood, & Boschwitz). An identical bill was introduced by Rep. Coehlo in the House yesterday.

Testimony at todays hearing will focus on employment and communications. Witnesses include self-advocates, the disability agencies, NFIB, private schools and AT&T. (see attached witness list).

I have also asked that Nancy Jones, chief counsel with the American Law Division join us for counsel should any technical question be asked and there need to be clarification on an issue.

SUBCOMMITTEE ON THE HANDICAPPED  
HEARING ON THE AMERICANS WITH DISABILITIES ACT OF 1989  
MAY 10, 1989

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Hofstra University  
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Lisa Carl  
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INDUSTRY

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Robert Yaeger  
Direct Connect  
MN Relay Service  
419 N. Robert St  
Suite 300  
St. Paul, MN 55101

May 10, 1989

TO: Senator Dole

FROM: Mo West

SUBJECT: The Americans with Disabilities Act

---

DATE OF INTRODUCTION:

The Americans with Disabilities Act (ADA) was introduced Tuesday, May 9, 1989 in conjunction with the first day of ADA hearings.

PURPOSE OF THE ADA:

The purpose of the legislation is to prohibit discrimination on the "basis of disability", in the areas of -- employment, public accommodation, transportation, communication, State and local governments.

Title V of the Rehabilitation Act of 1973 contains section 504 which prohibits discrimination on the basis of a disability to any entity that is a recipient of Federal aid. It also covers Federal contractors specifically in the area of employment provided directly by Federal agencies (section 501). These sections provide that a covered entity may not discriminate against an individual with a disability unless the disability renders the individual unqualified for the position or program in question.

In the evaluation of the individual's qualifications, the entity must evaluate whether the disability can be reasonably accommodated without undue hardship.

The ADA would not amend Title V of the Rehabilitation Act, but extend prohibitions against discrimination on the basis of disability to the private sector. The rights and remedies in the ADA would exist independently of Title V of the Rehabilitation Act and there would be no preemption.

ACTION AND ACTIVITIES IN THE LAST CONGRESS:

In May, 1987, Chairman Major Owens of the Subcommittee on Select Education, appointed Justin Dart to chair a Task Force on the Rights and Empowerment of People with Disabilities. This task force had as its central purpose, the identification of the full range and magnitude of discrimination faced by people with disabilities and to develop grassroots support for legislation to overcome such discrimination.

Mr. Dart, a longtime disability rights advocatet held hearings in every state, most territories, and in Puerto Rico. Over 9,000 persons gave oral and written testimony on examples of discrimination and the need for comprehensive anti discrimination legislation for people with disabilities. As a result, broad-based grassroots support for this legislation has been established.

The concept of the ADA eminated by the National Council on Disability, an independent federal agency charged with providing recommendations to the President and Congress on disability policy. In addition, President Reagan's Commission on AIDS recommended that such protections, as those offered in section 504 be made available to persons with AIDS.

#### CONCERNS WITH LAST YEAR'S BILL:

Reactions to the ADA in the last Congress from the private sector and the Executive Branch were few and limited, though substantive. The principle reason for this reaction was that everyone was aware that passage was not the intent of the sponsors during the 100th Congress.

Concerns about cost were aimed at architectural and transportation accessibility but most specifically at employment accommodation.

First, there was concern that a covered entity (employer) would have to be on the verge on bankruptcy before it would be relieved from the duty to accommodate.

Second, employers are familiar with section 503 of the Rehabilitation Act and Title VII of the Civil Rights Act of 1964, both of which address employment, yet they were concerned that the ADA would create a third set of independent standards.

Third, disability defined in the bill, was so broadly construed that even minor limitations (e.g. acne or left handness) might force accommodation or result in a charge of discrimination.

Fourth, the bill would have allowed an individual who was discriminated against on the basis of handicap or thought he/she was about to be discriminated against, to pursue private cause of action.

A fifth major area of concern was that persons with AIDS would also be covered by the ADA. The Supreme Court, the Department of Justice, and President Reagan's Commission on AIDS have concurred that such persons are covered under section 504, if they can be reasonably accommodated without posing a direct threat to the health and safety of others.

May 10, 1989

TO: Senator Dole  
FROM: Maureen West  
SUBJECT: Harkin ADA Bill

---

The Americans with Disabilities Act was introduced yesterday with 8 Republican cosponsors (Durenberger, Jeffords, McCain, Chaffee, Stevens, Cohen, Packwood, Boschwitz).

The Americans With Disabilities Act is an omnibus civil rights statute that prohibits discrimination against individuals with disabilities in private sector employment; all public services; public accommodations; transportation; telecommunications; and State and Local governments.

The ADA extends civil rights protections to people with disabilities beyond section 504 of the Rehabilitation Act of 1973 (the anti-discrimination statute for disabled persons) by requiring the private sector and state and local governments to comply with current civil rights statutes afforded women and minorities.

The Act covers employers engaged in commerce who have 15 or more employees; transportation companies; those engaged in communications and state and local governments.

The Act specifically defines what does constitute discrimination, including various types of intentional and unintentional exclusion; segregation; benefits and services; architectural, transportation, and communication barriers; failure to make reasonable accommodations; and discriminatory qualifications and performance standards.

The Act specifies those actions that do not constitute discrimination. They include unequal treatment wholly unrelated to a disability or that which is the result of legitimate application of qualification standards necessary and substantially related to the ability to perform or participate in the essential components of a job or activity.

The ADA incorporates by reference the enforcement provisions under title VII of the Civil Rights Act of 1964 and section 1981 of the Civil Rights Act of 1981 for employment -- and other applicable enforcement provisions in Title VIII of the Civil Rights Act of 1964 and Section 505 of the Rehabilitation Act of 1973.

May 7, 1989

NOTE TO: SHEILA BURKE  
SUBJECT: AMERICANS WITH DISABILITIES ACT (ADA)  
HARKIN  
FROM: JOE FAHA *Joe*

As you know Maureen West has kept me informed on the content and politics surrounding the ADA. As to the content, there are still problems with the legislation which I have discussed with Moe. But it seems to me that the politics of the situation is driving the discussion and not the content.

Harkin wants the bill as a trophy that he can display in his upcoming campaign against Mr. Tauke. I am not sure that it is a trophy that will make a difference in the election but I understand that Mr. Tauke does and so it is an issue.

On the other side it seems that the disability groups have mounted a campaign for this bill that exceeds what they did for the Civil Rights Restoration Act. The number of phone calls and letters/telegrams that the Senator has received far exceed what he received on the Restoration Act. I also understand that the Kansas Office has been taken over and that there is a possibility of that happening again. That did not happen with the Restoration Act.

I also understand from Moe that the White House has significantly been involved in the bill spending time communicating with Harkin's staff and Pat Wright who is a major player in the lobbying efforts to pass the bill. As I understand it, Pat knows about the Iowa race issue from Gray. I also understand that the White House has yet to indicate to Pat or to Harkin's staff that they have some problems with the bill and that they are pulling back on a promise to testify on the bill.

I have not been immediately involved but I am concerned for the Senator. The push for the legislation among the disabled is such that if the Senator is perceived as objecting to the measure purely for the Iowa race that Harkin will get his trophy anyway and will be able to pin on Senator Dole that he is willing to compromise principle for politics.

I am also concerned that the White House may be leaving the Senator out there to work this on his own and they will come in later to mediate or compromise the situation.

Needless to say the potential loss of a previously supportive strong constituency who saw the Senator waiver on the Civil

Rights Restoration Act and now being perceived as an abstacle to the ADA is very real. The last piece of legislation that the Senator marshalled through the Senate of importance to disability groups was several years ago.

If the Senator cannot support the legislation because of some of the provisions which he has problems with and can show through substantive testimony which demonstrates a strong committment to disability issues then I think he can make it through this experience with respect to the disability groups. If, however, the sole perceived reason is the Iowa race, his credibility will not be worth very much among a group that has traditionally been very important to him.

May 5, 1989

DRAFT WITNESS LIST  
HEARING ON THE AMERICANS WITH DISABILITIES ACT OF 1989  
May 9, 1989

PANEL 1

Dr. I. King Jordan  
President, Gallaudet College  
Washington, D.C.

Justin Dart  
Chairman  
Congressional Task Force on the Rights and Empowerment  
of Americans with Disabilities  
Washington, D.C.

PANEL 2

Administration

PANEL 3

Mary Disapio  
Wall Street Financial Analyst  
New York, New York

Joe Danowsky  
Attorney  
New York, New York

Two other witnesses

PANEL 4

Jay Rochlin  
Executive Director  
President's Council on Employment  
of People with Disabilities  
Washington, D.C.

Edward Berkowitz  
Professor of History and Public Policy,  
George Washington University  
Washington, D.C.

Zack Fasman  
Attorney  
Paul, Hastings, Janofsky and Walker  
(representing Chamber of Commerce)  
Washington, D.C.

Lawrence Lorber  
Attorney  
Kelley, Drye, and Warren  
(representing American Society of Personnel Administrators)  
Washington, D.C.

Arlene Mayerson  
Disability Rights Education and Defense Fund  
Berkeley, California

May 5, 1989

TO: Senator Dole  
FROM: Mo West  
SUBJECT: Disability Community Support

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The Americans with Disabilities Act is comprehensive landmark civil rights legislation that establishes a national mandate to end discrimination against people with disabilities. The Act will parallel in scope the civil rights statutes provided racial and ethnic minorities, women and older persons -- extending anti-discrimination statutes and creating enforceable standards to deal with discrimination against people with disabilities in employment, transportation, public accommodations, communications, and State and local governments.

Federal legislation barring discrimination against individuals with handicaps exists under Section 504 of the Rehabilitation Act of 1973 but is limited to those entities receiving federal financial assistance. The ADA would provide broader coverage since it would apply to the private sector. It is also more specific in its statutory requirements.

Senator Harkin plans to introduce the Americans with Disabilities Act next Monday prior to next week's hearings. Approximately, 70 disability groups and the Leadership Conference on Civil Rights support the Americans with Disabilities Act.

The ADA extends civil rights protections to people with disabilities by requiring the private sector to come into compliance with current civil rights statutes afforded women and minorities. The problems are that in some instances, the required compliance would exceed those afforded other minorities.

The Act covers employers engaged in commerce who have 15 or more employees.

The Act specifically defines what constitutes discrimination, including various types of intentional and unintentional exclusion; segregation; benefits and services; architectural, transportation, and communication barriers; failure to make reasonable accommodations; and discriminatory qualifications and performance standards.

The Act also specifies those actions that do not constitute discrimination. These include unequal treatment wholly unrelated to a disability or that which is the result of legitimate application or qualification standards necessary and substantially related to the ability to perform or participate in the essential components of a job or activity.

The ADA incorporates by reference the enforcement provisions under Title VII of the Civil Rights Act of 1964 and section 1981 of the Civil Rights Act for employment -- and other applicable enforcement provisions in Title VIII of the Civil Rights Act of 1968 and Section 505 of the Rehabilitation Act of 1973.



JUSTIN DART, JR.

907 6TH STREET, S.W., APT. 516C  
WASHINGTON, D.C. 20024  
202-488-7684 (H)

April 14, 1989

Honorable George Bush  
President  
The White House  
Washington, DC 20500

Dear President Bush:

I congratulate you on your endorsement of the Americans with Disabilities Act. You are the first President of the United States to take a public stand for our civil rights. But we still face opposition which, although often well meaning, is based on traditional assumptions and misinformation. We need your continued leadership for justice now.

As an example of problem attitudes, the Justice Department has just filed an appeal brief in which they seem to oppose a keystone provision of ADA that requires all new components of federally supported public transportation systems to be accessible to people with disabilities. Their brief seems to assert that special transit systems for people with disabilities will be more efficient to accomplish mainstreaming.

Although there was a time when I have made similar arguments, I have come to see that approach as reminiscent of assertions that separate schools could result in equality.

Special transit for people with very severe disabilities is a necessary supplement to accessible public transit. However, sole reliance on special, segregated transit to provide door-to-door service for millions of people, will be more "efficient" than accessible public transit only if most of those people remain unemployed recipients of social welfare who don't go anywhere except to hospitals.

It is estimated that the proportion of our population with disabilities, presently about 15%, will double within the next 20-30 years. To perpetuate status quo attitudes and practices of segregation will guarantee ever increasing millions of unproductive, dependent, second class citizens, and lead us inevitably toward the economic and moral disasters of massive, paternalistic, welfare bureaucracies.

America must begin now to create communities in which all systems of productivity and social intercourse are equally accessible to all people. But this can never be accomplished until we overcome the insidious assumption that people with disabilities are less than fully human. This nation must make a firm, enforceable statement of law that our 43 million citizens with disabilities will have equal opportunities to fulfill their potential, everywhere, every day, in every way. The Americans with Disabilities Act is that historic statement of equality.

Mr. President, we need your vigorous public support for ADA as reintroduced in the current session of Congress. It has been revised to accommodate the legitimate concerns of public and private sector leaders. It has virtually unanimous support by every major segment of the disability community. It is a landmark statement of human rights, which will, at long last, keep the promise of "liberty and justice for all" to the nation's last large oppressed minority.

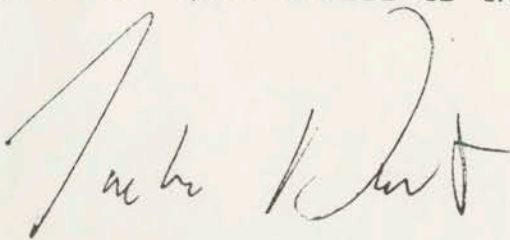
I enclose a picture taken on June 22, 1987, the evening before my father was awarded the Freedom Medal by President Reagan. Standing beside you is my younger brother, Peter, a graduate engineer, a top Air Force jet pilot, an outstanding family man, respected in his community. He contracted the most serious form of polio many years ago while in the Air Force, and some years later suffered a severe head injury. He fought back from these disabilities to walk, as you see him, with canes. He struggled valiantly to overcome traditional attitudes and barriers and to become active in his profession. Shortly after this picture was taken he began to experience normal post-polio and head injury effects for his age - modest deterioration of strength, breathing, vision and memory. It became apparent that he needed to use a wheel chair - as I have done for 40 years - and perhaps give up driving. His family pushed him to do these things, and to have necessary medical advice, but he resisted. On January 24th last year, faced with the presence of the wheel chair and the imminence of a medical consultation that might lead to other lifestyle adjustments, he told his son, "I would rather be dead than dependent." On the morning of January 29, he was found dead in his bed. The coroner found no evidence of dramatic illness that would cause death - "He simply stopped breathing." It is my impression that certain obvious hypotheses were discretely unmentioned.

I know in my heart that my brother is dead years before his time because of his unwillingness to face the massive discrimination that society visits on persons, like wheel chair users, who call to mind certain stereotyped perceptions of disability. He is the

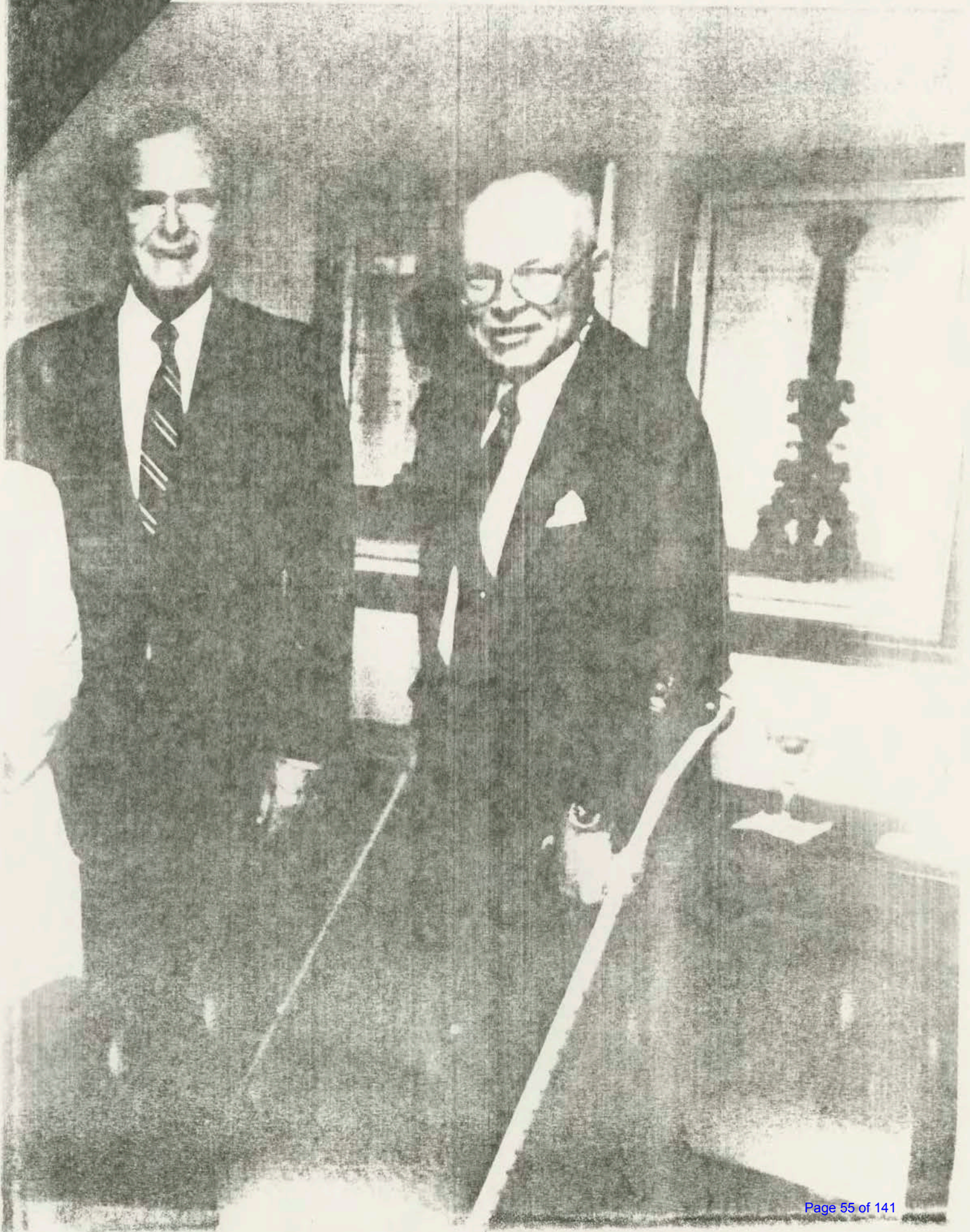
third member of my family to meet this fate in recent years, and thousands of other families have experienced similar tragedies. My beloved daughter Betsy, who has three lovely children, was deserted late in 1987 by her husband, a few days after she was diagnosed as having MS. I have met personally hundreds of individuals with impairments who are forced to live in situations of segregation, poverty and physical and psychological deprivation to which we would not knowingly subject animals.

Mr. President, these things must not happen to our grandchildren. We must not allow this great nation to become terminally stricken with the cancer of welfare dependency. All of us who are associated with the Americans with Disabilities Act have a profound responsibility to millions in future generations. I pray every day that I, and that each one of us, can reach into the depths of our souls, and somehow find the courage to act with such responsibility for the sacred values of democracy and of human life that our grandchildren, and their children after them, will be proud to speak our names.

Yours for equal access to the American dream,

A handwritten signature in dark ink, appearing to read "Justin Dart". The signature is fluid and cursive, with a large initial "J" and "D".

Justin Dart



## Consortium for Citizens with Disabilities

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For further information contact:

Liz Savage, EFA 459-3700  
Dave Capozzi, PVA 872-1300  
Tom Sheridan, AAC 293-2886

May 1, 1989

The Honorable Robert Dole  
U.S. Senate  
Washington, D.C. 20510

Dear Senator Dole:

Discrimination is a daily experience for individuals who have disabilities. Last year you recognized the importance of this problem by co-sponsoring the Americans with Disabilities Act. The Consortium for Citizens with Disabilities and other national organizations that advocate for the rights of America's 43 million citizens with disabilities would like you to become an original co-sponsor of the Americans with Disabilities Act of 1989.

This bill will afford civil rights protections to all individuals in this country who have disabilities. It is intended to provide people with disabilities, America's largest minority, the same federal civil rights protections that are enjoyed by other minorities.

As President Bush has stated, "Disabled people do not have the same civil rights protections as women and minorities . . . I am going to do whatever it takes to make sure the disabled are included in the mainstream. For too long they've been left out. But they're not going to be left out anymore." The Americans with Disabilities Act is a significant step toward achieving this goal.

We appreciated your leadership in the 100th Congress. We urge you to once again affirm your commitment to our nation's citizens with disabilities by co-sponsoring the Americans with Disabilities Act of 1989. Please contact Bob Silverstein at the Subcommittee on the Handicapped (4-6265) if you wish to co-sponsor this legislation. Thank you.

Sincerely,

May 1, 1989

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ACLD, An Association for Children and Adults with  
Learning Disabilities  
AIDS Action Council  
Alexander Graham Bell Association for the Deaf  
American Academy of Child and Adolescent Psychiatry  
American Academy of Otolaryngology Head and Neck Surgery  
American Association for Counseling and Development  
American Association of the Deaf-Blind  
American Association on Mental Retardation  
American Association of University Affiliated Programs  
American Civil Liberties Union  
American Deafness and Rehabilitation Association  
American Diabetes Association  
American Foundation for the Blind  
American Psychological Association  
American Speech-Language-Hearing Association  
Association for Education and Rehabilitation of the Blind  
and Visually Impaired  
Association for the Education of Rehabilitation  
Facility Personnel  
Association for Retarded Citizens of the United States  
Autism Society of America  
Child Welfare League of America  
Conference of Educational Administrators Serving the Deaf  
Convention of American Instructors of the Deaf  
Council for Exceptional Children  
Deafness Research Foundation  
Disabled But Able to Vote  
Disability Rights Education and Defense Fund  
Epilepsy Foundation of America  
Episcopal Awareness Center on Handicapped  
Gallaudet University Alumni Association  
Gazette International Networking Institute  
International Association of Parents of the Deaf  
International Polio Network  
International Ventilator Users Network  
Lambda Legal Defense and Education Fund  
Leadership Conference on Civil Rights  
Mental Health Law Project  
National Alliance for the Mentally Ill  
National Association for Music Therapy  
National Association of the Deaf  
National Association of Developmental Disabilities Councils  
National Association of Private Residential Resources  
National Association of Protection and Advocacy Systems  
National Association of Rehabilitation Facilities  
National Association of Rehabilitation Professionals in the  
Private Sector  
National Association of State Mental Retardation  
Program Directors  
National Coalition for Cancer Survivorship  
National Council of Community Mental Health Centers

May 1, 1989  
Page 3

National Council on Independent Living  
National Council on Rehabilitation Education  
National Down Syndrome Congress  
National Easter Seal Society  
National Fraternal Society of the Deaf  
National Handicapped Sports and Recreation Association  
National Head Injury Foundation  
National Mental Health Association  
National Multiple Sclerosis Society  
National Organization for Rare Disorders  
National Organization on Disability  
National Recreation and Park Association  
National Rehabilitation Association  
National Spinal Cord Injury Association  
Paralyzed Veterans of America  
People First International  
Self Help for Hard of Hearing People, Inc.  
Spina Bifida Association of America  
Telecommunications for the Deaf, Inc.  
The Association for Persons with Severe Handicaps  
Tourette Syndrome Association  
United Cerebral Palsy Associations, Inc.  
World Institute on Disability

May 5, 1989

TO: Senator Dole

FROM: Mo West

SUBJECT: Major Statutory Language Problems with ADA

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There are many unknown concerns yet to be voiced and potential land mines yet to be uncovered regarding this legislation. However, there are a few areas which we can identify already that need to be addressed. The disability community, as you are aware, is extremely emotional about this legislation. They have worked to refine this bill from last year's version. Too much is still unclear as to what impact this legislation will have on the regulatory process and the economy in general. Cost estimates are still to be determined.

Concerns raised thus far with the Harkin bill include the ramifications this legislation will have on the private sector, specifically the small business community who must come into compliance with mandated civil rights statutes to assure full accessibility and accommodations for people with disabilities.

The major concern is the exemption clause of 15 or less employers. The fact that reasonable accommodations will need to be made to assure a discrimination free-workplace or public accommodation has many small businesses very apprehensive, because it will cost to make the environment barrier free. While there is language in the bill that would eliminate a business or entity from going bankrupt in meeting mandated standards -- the 15 or less clause will need to be phased in to assure adequate time to comply and prepare for the restructuring this legislation will force on businesses.

Some of the language throughout the bill is too broad and must be further defined and clarified. For example: -

(1) Anticipated discrimination -- Under Title II pertaining to employment, an individual, based on disability, could pursue a private cause of action if he/she believed that he/she is "about to be discriminated against" on the basis of a disability. This is a hard point to prove; how does one know that he/she is about to be discriminated against in employment? The business community fears that forced litigation and frivolous lawsuits will result from this language, which includes compensatory damages for pain and suffering, always difficult to measure.

(2) Use of failure standard in employment -- An individual with a disability, can pursue a private cause of action in several titles (II and III primarily which are employment and transportation related) if a covered entity fails to provide or accommodate a discrimination-free environment. Language in the bill incorporates "failure" and thus, would encourage increased litigation for those who unintentionally discriminated. Inserting language such as "refusal" will give a party the option of correcting unintentional discrimination.

(3) Transit Authorities will have problems with the timelines and costs in bringing into compliance accessible transportation, however, no retrofitting will be required and accessible transportation is necessary for people with disabilities who want to live and work in their community.

(4) Use of different remedies in different titles -- Each title uses differing combinations of remedies and procedures in cases of private causes of action. Consistency among remedies may be necessary because of the accommodations that are to be made.

(5) Burden of proof -- Under this bill burden of proof is placed on the defendant, while most laws place burden of proof on the plaintiff. The approach should be consistent.

May 5, 1989

TO: Senator Dole  
FROM: Mo West  
SUBJECT: Summary of Harkin ADA

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The Americans with Disabilities Act of 1989 (ADA) is an omnibus civil rights statute that prohibits discrimination against individuals with disabilities in private sector employment; all public services; public accommodations; transportation; and telecommunications.

Several key terms such as "disability", "auxiliary aids and services", and "reasonable accommodations" are specifically defined. These definitions are comparable to the definitions used for the purposes of section 503 of the Rehabilitation Act of 1973 (which requires government contractors to take affirmative action to hire individuals with disabilities) and section 504 of the Rehabilitation Act of 1973 (which prohibits discrimination against persons with disabilities by recipients of Federal financial assistance).

Title I sets out the general forms of discrimination prohibited by the Act. These general prohibitions are comparable to the prohibitions included in section 504.

Title II specifies that an employer, employer agency, labor organization, or joint labor-management committee may not discriminate against any qualified individual with a disability in regard to any item, condition or privilege of employment. The ADA incorporates by reference the enforcement provisions under title VII of the Civil Rights Act of 1964. The ADA also incorporates by reference section 1981 of the Civil Rights Act for acts of intentional discrimination.

Title III specifies that no individual shall be discriminated against by a State agency or political subdivision of a State or board, commission, or other instrumentality of a State and political subdivision. Title III also includes specific actions applicable to public transportation provided by public transit authorities considered discriminatory. The enforcement provisions in section 505 of the Rehabilitation Act of 1973 are also incorporated under this title.

Title IV specifies that no individual shall be discriminated against in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation operated by a private entity on the basis of a disability. Also included are specific prohibitions of discrimination in public transportation services provided by private entities. Finally title IV incorporates the applicable enforcement provisions in title VIII of the Civil Rights Act of 1968.

Title V specifies that telephone services offered to the general public must include interstate and intrastate telecommunications relay services so that such services provide individuals who use nonvoice terminal devices because of disabilities with opportunities for communications that are equal to those provided to individuals able to use voice telephone services. Title V incorporates by reference applicable enforcement provisions in title VIII of the Civil Rights Act of 1968 and the Communications Act of 1934.

Title VI includes miscellaneous provisions, such as a construction clause explaining the relationship between the provisions in the ADA and the provisions on other Federal and State laws; a prohibition against retaliation; a statement that States are not immune from actions in Federal court for a violation of the ADA; a directive to the Architectural and Transportation Barriers Compliance Board to issue guidelines; and authority to award attorney's fees.

May 4, 1989

TO: Senator Dole  
FROM: Mo West  
SUBJECT: Statutory Language with ADA

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The following legal questions need to be raised:

1. How have the Court's interpreted the phrase "... regarded as having an impairment" in the definition of an individual with disability in section 504 of the Rehabilitation Act?

If the Court's are split on this, we may have a basis for excluding or limiting this phrase in the ADA.

2. How have the Court's interpreted the the phrase "... believe one is about to be discriminated against?"

Legal staff at CRS has indicated it is a new concept; therefore, if that is the case, it should be deleted, because can one measure or ascertain "about to be" it is just plain too vague.

3. How many civil rights statutes allow for a private cause of action in cases of both intentional and unintentional discrimination, and how many limit cases to those involving only intentional discrimination?

If most laws allow for a cause of action only in cases of intentional discrimination, the argument can be made for limiting the private cause of action to similar cases in the ADA or at least selected titles in ADA.

4. Most civil rights statutes place the burden of proof on the plaintiff, why should ADA place this burden on the defendant?

If most laws place the burden of proof on the plaintiff, the argument for similar provision in the ADA could be made. This is not the case.

More research will need to be done on the remedies and procedures under each title of the ADA and the implications of such remedies.

March 10, 1989

TO: Senator Dole  
FROM: Mo West  
SUBJECT: Americans with Disabilities Act

Senator Harkin will soon introduce a revised version of the Americans with Disabilities Act (ADA). You were an original cosponsor of last year's bill introduced by Senators Weicker and Harkin, which emanated from the National Council on Disability after several years of constructing the legislation. The disability community will look for your support again this year.

Senator Harkin shared a copy of the draft bill with Senator Hatch and it is my understanding that Senator Harkin approached Senator Hatch last November to ascertain whether he would like to be the chief Republican sponsor. To date, their staff are discussing the draft version. A final draft of the bill is not yet available, however, I have been in contact with many of the disability groups and was assured a copy of the draft legislation from staff of the Subcommittee on the Handicapped next week.

President Bush and Vice-President Quayle on numerous occasions expressed support for "Federal legislation that gives people with disabilities the same protections that is now enjoyed by women and minorities." President Bush has pledged a commitment that his Administration will oppose discrimination of the past that has kept too many people with disabilities out of the American mainstream. He has been on record in support of accessibility of new facilities and vehicles for people with disabilities. Statements to this effect were included in the President's first debate, his acceptance speech, as well as his address to the joint Members of Congress.

Justin Dart, a longtime disability rights advocate and a favored of this Administration to serve as the President's liaison with the disability community, is currently Chairperson of the Task Force on Rights and Empowerment of Americans with Disabilities. He is strongly opposed to the proliferation of bills similar to ADA and has to date, generated nationwide support for a bipartisan ADA bill.

You should be very wary of committing yourself to introducing your own version, as no one knows what Senators Harkin and Hatch will agree upon at this point. Should Senator Hatch refrain from joining Senator Harkin, because of differences which prevent him from sponsoring the bill at this time, you may want to consider joining Senator Harkin as an original sponsor?

It is my experience, that Senator Hatch hasn't always wanted to join in on disability legislation from its inception but rather will render his support at a later time. For example, Senator Hatch may not believe that retrofitting a number of new buses is legally required for mainstreaming to be a reality, whereas, Justin Dart and the disability community often think accessible buses are bottom line standards. Key disability advocates have approached me as to whether you would join Senator Harkin as an original cosponsor, given the principles the disability community has agreed to in this bill, as well as President Bush's vocal support of an ADA bill.

The momentum from the perspective of the disability community will be behind the Harkin bill and President Bush has made a point of embracing the concerns of the disabled and barring discrimination against persons with disabilities as previously explained.

My initial reaction at this point is to hold off on introducing your own bill and wait out the reaction to the draft bill. I would like to discuss perceptions of the draft legislation with the disability groups not yet privy to the bill as well as the National Council on Disability. In addition, the Administration will by then officially have commented on the bill.

I have reiterated your support for a civil rights bill for people with disabilities and shared with concerned groups your interest in seeing a draft bill before making a decision on supporting the ADA. I suggest you wait to see what compromise Senators Harkin and Hatch can agree upon and remain committed to a comprehensive civil rights bill for persons with disabilities.

I have attached a summary of the Americans with Disabilities Act and delineated draft revisions made to the original ADA bill from last Congress. I was informed today by key disability groups of the revisions made.

April 28, 1989

TO: Senator Dole  
FROM: Mo West  
SUBJECT: Speaking Engagements

You have been asked by the National Council on Independent Living (NCIL) to speak at their annual conference (which is in conjunction with the ADA hearings) on May 13. It will take place at the Hyatt in Bethesda with approximately 500 people with disabilities in attendance. This organization represents the national voice of the independent living movement and people with disabilities generally. They are a strong and sometimes militant advocacy organization with grassroots backing for the Americans with Disabilities Act. The audience would like to hear more about ADA and its progression through Congress. I believe this would be a prime opportunity to validate your interest and intention to be a key player with this legislation.

Will you speak at their conference?

Yes \_\_\_\_\_ No ☒ \_\_\_\_\_

*yes so it*

Jo Ann Molnar, from the Foundry United Methodist Church phoned to invite you to speak at the Sunday morning "Christian's Connection Class" on May 14. You have been asked to speak (for approx. 15 minutes) on "Faith and Coping with a Disability." Members of the Church who have a disability will be in attendance and take part in the class as well.

Will you speak to the class?

Yes \_\_\_\_\_ No ☒ \_\_\_\_\_

*not here.*

**National Council on Independent Living**  
Peoria St., Suite 201  
Chicago, Illinois 60607  
26-1006 (Voice/TTY/TDD)

NOT JUST RESPONDING TO CHANGE,  
BUT LEADING IT

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April 25, 1989

*Maureen*

The Honorable Robert Dole  
Hart Building, Room 141  
Washington, D.C. 20510

Dear Senator Dole:

The National Council on Independent Living in conjunction with the Research and Training Center on Independent Living at the University of Kansas and the ILRU Research and Training Center on Independent Living are holding their Annual Conference on Independent Living from May 13 through the 16th at the Hyatt Bethesda Hotel in Bethesda, Maryland. We respectfully request your presence as a Keynote Speaker on Saturday morning, May 13, from 9:15 a.m. to 10:00 a.m. We would appreciate your comments on any disability topic, but we are most interested in your perspective on the Americans With Disabilities Act and how to effectively advocate for its passage.

Please contact Bonnie O'Day at the Endependence Center, Inc., Janaf Office Building, Suite 601, Norfolk, Virginia 23502, (804) 461-8007 if you have any questions or need additional information.

Sincerely,

*Bonnie O'Day*  
Bonnie O'Day, Chair  
Legislative Civil Rights Subcommittee

BLO:cjc

cc: Sue Elkins  
Maggie Shreve

April 28, 1989

TO: Senator Dole  
FROM: Mo West  
SUBJECT: ADA Hearings

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Senators Hatch and Kennedy have scheduled the mornings of May 9, 10, and the 16th for hearings on the Americans with Disabilities Act. The hearings are to be balanced with representation from the disability community, small business and the Administration. I will share with you a copy of the witness list when it becomes available.

The Administration will not have an official stance on a bill (for approx. 3 months) until affected Agencies concerned with the legislation have time to study its impact and OMB has done a cost analysis. I was informed that there is to be a Rose Garden Ceremony in a few weeks with the President and interested Congressional leaders, encouraging bi-partisan efforts on civil rights for the disabled. President Bush will also recommend that an appropriate analysis be completed in developing sound policy recommendations for this legislation.

I recommend that you stop by the hearings and make a statement indicating your intent to be a major player with this legislation and your support for the basic concept of enhanced civil rights; you may also use this opportunity to clarify your own position.

Do you want to stop by the ADA hearings?

Yes ☒ No ☐

April 19, 1989

TO: Senator Dole  
FROM: Maureen West  
SUBJECT: ADA Strategy

As you requested I spoke with Senator Grassley regarding the Americans with Disabilities Act (ADA). He seemed to indicate that he would consider cosponsoring a Hatch bill but preferred a Dole bill as he informed Iowans of his interest in your legislation.

#### OVERVIEW OF THE LEGISLATION:

The Americans with Disabilities Act is comprehensive landmark civil rights legislation that establishes a national mandate to end discrimination against people with disabilities. The Act will parallel in scope the civil rights statutes provided racial and ethnic minorities, women and older persons -- extending anti-discrimination statutes and creating enforceable standards to deal with discrimination against people with disabilities in employment, transportation, public accommodations, communications, and State and local governments.

Federal legislation barring discrimination against individuals with handicaps exists under Section 504 of the Rehabilitation Act of 1973 but is limited to those entities receiving federal financial assistance. The ADA would provide broader coverage since it would apply to the private sector. It is also more specific in its statutory requirements.

#### POLITICAL PROBLEMS:

President Bush repeatedly expressed his support for the ADA during the campaign. However, now the White House wants more time to study the bill, because affected agencies (Department of Labor, Department of Transportation, Federal Communications Commission and the Department of Commerce) are very concerned about its cost, regulatory impact, and the effect on the economy and small business. Extension of anti-discrimination statutes with enforceable remedies may result in increased litigation against those not in compliance with mandated standards.

The disability community is prepared to stage protests and react militantly should the Administration not support this legislation. If you introduce a bill before the Administration acts, the disability community will perceive you as actively undermining their efforts to secure Administration support, as well as backing from other Congressional Republicans.

PREVIOUS DOLE POSITION:

You cosponsored the original version of the ADA in the last Congress (which was much broader than the current Harkin version). However, at that time, the bill was introduced as a symbolic gesture and was not pushed by its sponsors. In addition, you did a floor statement indicating that while you supported the broad objectives of the bill, you had a number of concerns about the impact of specific provisions.

RECOMMENDATIONS:

The legislation Senator Harkin intends to introduce could be highly controversial with the business sector and many conservative advocacy groups. Too much is still unknown about this legislation, and I am certain the major land mines that are hidden in the bill will surface in the course of hearings. Three days of balanced hearings are scheduled in May.

Should the Committee report a bill, you would still be well positioned to introduce your own version of the legislation, since, given the Committee's liberal composition, it is virtually certain that there will be insufficient support to pass the bill on the floor.

OPTIONS:

- ☐ Introduce a Bill now and take political risks.
- ☒ Introduce a refined bill after input from hearings.
- ☐ Wait until a compromise may be necessary on the Senate floor.

April 17, 1989

TO: Senator Dole  
FROM: Maureen West  
SUBJECT: Americans with Disabilities Act

The Americans with Disabilities Act originated with a proposal from the National Council on Disabilities to establish a comprehensive nationwide prohibition against discrimination on the basis of a handicap. Although federal legislation, section 504 of the Rehabilitation Act of 1973 already exists concerning discrimination against individuals with handicaps, the existing law is limited to programs or activities receiving federal financial assistance, executive agencies, or the U.S. Postal Service. The Americans with Disabilities Act seeks to parallel in scope the civil rights protections provided racial and ethnic minorities, women and older persons, but frames to combat the forms of discrimination people with disabilities face on a daily basis: inaccessible housing, transportation, and communication; denial of reasonable accomodation; and rampant prejudice. If enacted this legislation would go far to remove unfair and discriminatory barriers against people with disabilities. This, in turn, should result in significant Federal budget savings as limited transportation access is an impediment to the large numbers of people with disabilities who want to work but cannot due to inaccessible transportation to employment. The bill would provide broader coverage than section 504 since it would cover the private sector as well. Last year's bill (which Senator Weicker introduced) has changed substantially in the current draft proposals both Senators Harkin and Hatch together or individually may introduce.

## OVERVIEW OF THE LEGISLATION

### Findings and Purposes:

The purpose of the Act is to provide a clear and comprehensive national mandate to end discrimination against people with disabilities; provide protection against discrimination comparable to that afforded to minorities and others; and provide enforceable standards addressing discrimination against people with disabilities.

### Definitions:

The "term" definition is defined to mean, with respect to an individual -- a physical or mental impairment that substantially limits one or more of the major life activities of such an individual, a record of such an impairment, or being regarded as having such an impairment. This definition is the same definition used for purposes of section 504 of the Rehabilitation Act of 1973.

### Title I: General Prohibitions Against Discrimination:

Title I sets out the general forms of discrimination prohibited by the Act. It is considered discriminatory to subject an individual, directly or indirectly, on the basis of a disability, to any of the following:

(1) denying the opportunity to participate in or benefit from an opportunity;

(2) affording an opportunity that is not equal to that afforded others;

(3) providing an opportunity that is less effective than that provided to others;

(4) providing an individual or class of individuals with an opportunity that is different or separate, unless such action is necessary to provide the individuals with an opportunity that is as effective as that provided to others;

(5) aiding or perpetuating discrimination by providing significant assistance to others that discriminate;

(6) denying an opportunity to participate as a member of boards or commissions; and

(7) otherwise limiting an individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others.

For the purposes of this Act, for an aid, benefit, or service to be equally effective, an entity must afford an individual with a disability equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement in the most integrated setting appropriate to the individual's need.

Further an entity may not directly or indirectly use criteria or methods of administration that have the effect of subjecting an individual to discrimination on the basis of disability or perpetuate discrimination by others who are subject to common administrative control or are agencies of the same State. Nor can an entity discriminate against an individual or entity because of the association of that individual with another individual with a disability.

Title I also sets out several defenses to allegations of discrimination. It is not considered discrimination to exclude or deny opportunities to an individual with a disability for reasons entirely unrelated to his or her disability. Further, it is not discrimination to exclude or deny opportunities to an individual based on the application of qualification standards or other criteria that are shown by a covered entity to be both necessary and substantially related to the ability of the individual to perform or participate or take advantage of an opportunity and such participation cannot be accomplished by applicable reasonable accommodations, modifications, or the provision of auxiliary aids or services.

Qualifications standards may include requiring that the current use of alcohol or drugs by an alcohol or drug abuser not pose a direct threat to property or the safety of others in the workplace or program; and requiring that an individual with a currently contagious disease or infection not pose a direct threat to the health and safety of other individuals in the workplace or program. These defenses are comparable to the defenses currently available under section 504 of the Rehabilitation Act of 1973.

## Title II Employment:

The provisions in title II of the Act use or incorporate by reference many of the definitions in title VII of the Civil Rights Act of 1964 (employee, employer, Commission, person, labor organization, employment agency, joint labor management committee, commerce, industry affecting commerce). The scope of the bill is identical i.e., only employers who have 15 or more employees are covered.

A "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. This definition is comparable to the definition used for purposes of section 504.

Using the section 504 legal framework as the model, the bill specifies that no entity covered by the Act shall discriminate against any qualified individual with a disability in regard to application procedures, the hiring or discharge of employees and all terms, conditions and privileges of employment.

Thus, discrimination includes, for example, the failure by a covered entity to make reasonable accommodations to the known limitations of a qualified individual with a disability unless such entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business. Discrimination also includes the denial of employment opportunities because a qualified individual with a disability needs a reasonable accommodation.

The definition of the term "reasonable accommodation" included in the bill is comparable to the definition in the section 504 framework. The term includes: making existing facilities accessible, job restructuring, part-time and modified work schedules, reassignment, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations and training materials, adoption or modification of procedures or protocols, the provision of qualified readers and interpreters, and other similar accommodations.

Discrimination also includes the imposition or application of qualification standards and other criteria that identify or limit a qualified individual with a disability unless such standards or criteria can be shown by such entity to be necessary and substantially related to the ability of an individual to perform the essential functions of the particular employment position.

Consistent with title VII of the Civil Rights Act of 1964, every covered entity must post notices in an accessible format describing the applicable provisions of this Act. The Commission is also directed to promulgate regulations within 180 days in an accessible format.

The bill incorporates by reference the remedies and procedures set out in section 706, 709, and 710 of title VII of the Civil Rights Act of 1964. The bill also incorporates the remedies and procedures available under section 1981 of the Civil Rights Act of 1964. The bill also incorporates the remedies and procedures available under section 1981 of the Civil Rights Act of 1964 for acts of intentional discrimination.

### Title III: Public Services

Section 504 only applies to entities receiving Federal financial assistance. Title III of the bill makes all activities of State and local governments subject to the types of prohibitions against discrimination against a qualified individual with a disability included in section 504 (nondiscrimination) and section 505 (the enforcement procedures).

A "qualified individual with a disability " means an individual with a disability who, with or without reasonable modifications to rules, policies and practices, or the removal of architectural, communication, and transportation barriers or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a State or agency or political subdivision of a State or board, or other instrumentality of a State and political subdivision.

Title III also specifies the actions applicable to public transportation (not including air travel) provided by public entities that are considered discriminatory. The term "public transportation" means transportation by bus or rail, or by any other conveyance (other than air travel) that provides the general public with general or special service (including charter service) on a regular and continuing basis).

1. New fixed route buses of any size and rail vehicles for which a solicitation is made later than 30 days after the date of enactment of this Act must be readily accessible to and usable by individuals with disabilities. No retrofitting of existing buses is required.

2. Used vehicles purchased or leased after the date of enactment need not be accessible but a demonstrated good faith effort to locate a used accessible vehicle must be made.

3. Vehicles that are re-manufactured so as to extend their usable life for five years or more must, to the maximum extent feasible, be readily accessible to and usable by individuals with disabilities.

4. In those communities with fixed route transportation, there must also be a paratransit system to serve those individuals with disabilities who cannot use the fixed route public transportation and to other individuals associated with such individuals in accordance with service criteria established by the Secretary of Transportation.

5. Communities that operate a demand responsive system that is used to provide public transportation for the general public (nondisabled and disabled) must purchase new buses for which a solicitation is made in 30 days after the date of enactment of the Act that are accessible unless the system can demonstrate that the system, when viewed in its entirety, provides a level of service equivalent to that provided to the general public; in which case all newly purchased vehicles need not be accessible.

6. All new facilities used to provide public transportation services must be readily accessible to and usable by individuals with disabilities.

7. When alterations are made to existing facilities one year after the date of enactment that affect or could affect the usability of the facility, the alterations, the path of travel to the altered area, the bathrooms, telephones, and drinking fountains serving the remodeled area must be, to the maximum extent feasible, readily accessible to and usable by individuals with disabilities.

8. A mass transportation program or activity, when viewed in its entirety, must be readily accessible to and usable by individuals with disabilities. All stations in intercity rail systems and key stations in rapid rail, commuter rail systems must be readily accessible as soon as practicable but in no event later than 3 years after the date of enactment of this Act except that the time limit may be extended by the Secretary of Transportation up to 20 years for extraordinary expensive structural changes to, or replacement of, existing facilities necessary to achieve accessibility.

9. Intercity, light rail, rapid, and commuter rail systems must have at least one car per train that is accessible as soon as practicable to recipients of Federal financial assistance. The Secretary of the Department of Transportation is also directed to issue regulations in an accessible format that includes standards which are consistent with minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board.

#### Title IV: Public Accommodations and Services Operated by Private Entities

Title IV specifies that no individual shall be discriminated against in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, on the basis of disability.

The term "public accommodation" means privately operated establishments that are used by the general public as customers, clients, or visitors or that are potential places of employment and whose operations affect commerce. Examples of public accommodations include: auditoriums, theaters, restaurants, shopping centers, hotels, terminals used for public transportation, office buildings and recreation facilities.

Examples of discrimination include the following:

The imposition or application of eligibility criteria that identify or limit an individual with a disability.

A failure to make reasonable modifications in rules and policies and procedures when necessary to afford meaningful opportunity unless the entity can demonstrate that the modifications would fundamentally alter the nature of the program.

A failure to provide auxiliary aids and services unless the entity can demonstrate that such services would result in undue burden. Auxiliary aids and services include: qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments; qualified readers, taped texts or other effective methods of making visual materials available to individuals with visual impairments; acquisitions or modification of equipment or devices; and other similar services and actions.

A failure to remove architectural and communication barriers that are structural in nature in existing facilities and transportation barriers in existing vehicles where such removal is readily achievable; and, where the entity can demonstrate that such removal is not readily achievable, a failure to provide alternative methods.

With respect to a facility that is altered one year after the effective date of the Act, the failure to make the alterations in a manner that, to the maximum extent feasible, the altered portion, the path of travel, to the altered area, and the bathrooms, telephones, and drinking fountains serving the remodeled area where readily accessible to and usable by individuals with disabilities.

A failure to make facilities designed and constructed later than 30 months after the date of enactment readily accessible to and accessible by individuals with disabilities except where an entity can demonstrate that it is structurally impracticable to do so in accordance with standards set forth or incorporated by reference in regulations.

A failure by a public accommodation to provide a level of transportation services to individuals with disabilities equivalent to that provided for the general public and a refusal to purchase or lease vehicles that carry in excess of 12 passengers for which solicitations are made later than 30 days after the date of enactment which are readily accessible to and usable by individuals with disabilities.

The bill also includes a specific section prohibiting discrimination in public transportation services (other than air travel) provided by private entities. In general, no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of public transportation services provided by a privately operated entity that is primarily engaged in the business of transporting people (but not in the principal business of providing air transportation) and whose operations affect commerce.

Examples of discrimination include:

the imposition or application of eligibility criteria, that identify or limit an individual with a disability.

a failure to make reasonable modifications to criteria, provide auxiliary aids and services, and remove barriers consistent with the standards set out above;

new vehicles (other than automobiles) purchased 30 days after the date of enactment must be made accessible, new taxicabs are not required to be made Taxicab companies are liable, however, if their drivers refuse to pick up an individual with a disability.

The bill incorporates by reference the provisions in the Fair Housing Act, as recently amended, authorizing enforcement of private persons in court (section 813) and enforcement by the Attorney General (section 814 (a)). Regulations must be issued in

an accessible format by the Attorney General and by the Secretary of Transportation, consistent with the provisions applicable to public agencies under title .

#### Title V: Communications

Title V specifies that it is considered discrimination for a common carrier that offers telephone services to the general public to fail to provide, within one year after the date of enactment of this Act, interstate and intrastate telecommunication relay services so that such services provide individuals who use non-voice terminals devices because of their disabilities opportunities for communications that are equal to those provided to persons able to use voice telephone services. Nothing in this title is to be constructed to discourage or impair the developed of improved or future technology designed to improve access to telecommunications services for individuals with disabilities.

The Federal Communications Commission is directed to issue regulations establishing minimum standards and guidelines for telecommunications relay services. With respect to enforcement, the bill incorporates by reference the provisions in the Fair Housing Act, as recently amended, authorizing enforcement by private persons in court (section 813) and enforcement by the General Attorney General (section 814 (a)). Further, the Federal Communications Commission is authorized to use enforcement provisions generally applicable to it for remedying violations of the Communications Act of 1934.

#### Title VI: Miscellaneous Provisions

Title VI explains the relationship between section 504 and this Act; this Act and State laws that provide greater protections; and the relationship among the various titles of the Act. Title VI also includes an anti-retaliation provision; directs the Architectural and Transportation Barriers Compliance Board to issue minimum guidelines; and makes it clear that States are immune under the 11th Amendment for violations of the Act.

With respect to attorney's fees, the bill specifies that any action or administrative proceeding commenced under the Act, the court, or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including expert witness fees, and costs.

MEMORANDUM

April 15, 1989

TO: Senator Dole

FR: Judy Brotman

*Judy Brotman*

*Mo W.*

I attended several disability-related functions recently where a great deal of concern was expressed that you would soon be introducing another version of the American's With ~~Dis~~ Disabilities Act.

While I strongly concur with your belief that ADA as written is not passable, the disability community has not as yet come to this reality. They view your desire to introduce your own legislation as partisan and also as undercutting their efforts.

My suggestion would be to wait for the hearings to be held and let others take the heat for gutting the bill of some of its' more controversial provisions. In fact, I'd further suggest that you go on record by writing Senator Harkin requesting hearings at the earliest possible date.

ADA has some similar involvements on an emotional level as the Civil Rights Restoration Act. ~~You were~~ strongly criticized for your actions on the restoration act; I believe that could happen again.

*Mo-  
was introduced  
Oles  
draw*

March 10, 1989

TO: Senator Dole

FROM: Mo West

SUBJECT: Americans with Disabilities Act

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Senator Harkin will soon introduce a revised version of the Americans with Disabilities Act (ADA). You were an original cosponsor of last year's bill introduced by Senators Weicker and Harkin, which emanated from the National Council on Disability after several years of constructing the legislation. The disability community will look for your support again this year.

Senator Harkin shared a copy of the draft bill with Senator Hatch and it is my understanding that Senator Harkin approached Senator Hatch last November to ascertain whether he would like to be the chief Republican sponsor. To date, their staff are discussing the draft version. A final draft of the bill is not yet available, however, I have been in contact with many of the disability groups and was assured a copy of the draft legislation from staff of the Subcommittee on the Handicapped next week.

President Bush and Vice-President Quayle on numerous occasions expressed support for "Federal legislation that gives people with disabilities the same protections that is now enjoyed by women and minorities." President Bush has pledged a commitment that his Administration will oppose discrimination of the past that has kept too many people with disabilities out of the American mainstream. He has been on record in support of accessibility of new facilities and vehicles for people with disabilities. Statements to this effect were included in the President's first debate, his acceptance speech, as well as his address to the joint Members of Congress.

Justin Dart, a longtime disability rights advocate and a favored of this Administration to serve as the President's liaison with the disability community, is currently Chairperson of the Task Force on Rights and Empowerment of Americans with Disabilities. He is strongly opposed to the proliferation of bills similar to ADA and has to date, generated nationwide support for a bipartisan ADA bill.

You should be very wary of committing yourself to introducing your own version, as no one knows what Senators Harkin and Hatch will agree upon at this point. Should Senator Hatch refrain from joining Senator Harkin, because of differences which prevent him from sponsoring the bill at this time, you may want to consider joining Senator Harkin as an original sponsor?

It is my experience, that Senator Hatch hasn't always wanted to join in on disability legislation from its inception but rather will render his support at a later time. For example, Senator Hatch may not believe that retrofitting a number of new buses is legally required for mainstreaming to be a reality, whereas, Justin Dart and the disability community often think accessible buses are bottom line standards. Key disability advocates have approached me as to whether you would join Senator Harkin as an original cosponsor, given the principals the disability community has agreed to in this bill, as well as President Bush's vocal support of an ADA bill.

The momentum from the perspective of the disability community will be behind the Harkin bill and President Bush has made a point of embracing the concerns of the disabled and barring discrimination against persons with disabilities as previously explained.

My initial reaction at this point is to hold off on introducing your own bill and wait out the reaction to the draft bill. I would like to discuss perceptions of the draft legislation with the disability groups not yet privy to the bill as well as the National Council on Disability. In addition, the Administration will by then officially have commented on the bill.

I have reiterated your support for a civil rights bill for people with disabilities and shared with concerned groups your interest in seeing a draft bill before making a decision on supporting the ADA. I suggest you wait to see what compromise Senators Harkin and Hatch can agree upon and remain committed to a comprehensive civil rights bill for persons with disabilities.

I have attached a summary of the Americans with Disabilities Act and delineated draft revisions made to the original ADA bill from last Congress. I was informed today by key disability groups of the revisions made.

## Summary of the Americans with Disabilities Act

The Americans with Disabilities Act was introduced in the 100th Congress by Senators Weicker and Harkin and was cosponsored by 26 members, including you, and 7 other Republicans. On the House side the ADA was introduced by Rep. Coehlo with 124 cosponsors.

Senator Harkin has shared a draft bill with Senator Hatch which other Senate staff are to receive soon. Senator Hatch had concerns with the original version of ADA and has philosophical differences with the disability community on fundamental components of the bill that the disability community cannot accept.

The Americans with Disabilities Act of 1988 originated with a proposal from the National Council on Disability for legislation to establish a comprehensive nationwide prohibition against discrimination on the basis of a handicap.

Although federal legislation, (Section 504 of the Rehabilitation Act of 1973) already exists concerning discrimination against individuals with disabilities, the existing law is limited to programs or activities receiving federal financial assistance, executive agencies, and the U.S. Postal Service.

The ADA would provide broader coverage since it would apply to the private sector as well. The ADA uses basically the same conceptual framework as section 504 but is much more specific in its statutory requirements.

The Act prohibits discrimination on the basis of handicap in employment, public accommodations, transportation, communications; and State and local governments.

The Act covers employers engaged in commerce who have 15 or more employees; transportation companies; those engaged in broadcasting and communications; and State and local governments.

The Act specifically defines discrimination, including various types of intentional and unintentional exclusion; segregation; inferior or less effective services; benefits or activities; architectural, transportation, and communications barriers; failing to make reasonable accommodations; and discriminatory qualifications and performance standards.

The Act specifies those actions that do not constitute discrimination. They include unequal treatment wholly unrelated to a disability or that which is the result of legitimate application of qualifications and performance standards necessary and substantially related to the ability to perform or participate in the essential components of a job or activity.

The Architectural and Transportation Barriers Compliance Board will issue minimum accessibility guidelines. Other regulations will be issued by the Attorney General, the U.S. Equal Employment Opportunity Commission, the Secretary of Transportation, the Federal Communications Commission, and the Secretary of Commerce.

The Act builds upon section 504 of the Rehabilitation Act, which requires nondiscrimination on the basis of a handicap only in programs receiving federal financial assistance. Regulations under this section, which have been hard fought in their development, will remain in full force and effect.

Enforcement procedures include administration remedies, a private right of action in Federal Court, monetary damages, and attorney's fees and cut offs of Federal funds.

UNITED STATES SENATE, FOUNDATION OF AMERICA

DRAFT TRANSPORTATION LEGISLATIVE LANGUAGE

1. All new vehicles or rolling stock that are purchased, leased, or otherwise acquired after the date of enactment shall be readily accessible to and useable by persons with physical or mental impairments, including wheelchair users.
2. Paratransit or other specialized transportation services must meet DOT service criteria and shall be provided in addition to other forms of transportation for those persons with physical or mental impairments who cannot use accessible fixed route transit. Paratransit or other specialized transportation services should allow for the integration of nondisabled persons who are associated with physical or mental impairments who cannot use accessible fixed route transit.
3. All new construction of transit and related facilities including bus stops, platforms, rail stations and intermodal transfer points should be readily accessible to and useable by persons with physical or mental impairments, including wheelchair users.
4. All substantial future modifications of transit and related facilities including bus stops, platforms, rail stations and intermodal transfer points should be readily accessible to and useable by persons with physical or mental impairments, including wheelchair users. (SHOULD BE MADE CONSISTENT WITH PUBLIC ACCOMODATION STANDARDS).
5. Certain commuter rail vehicles, facilities, and related equipment have extended life spans and, therefore, key stations should be made accessible within (x years) and all other existing stations should be made accessible in (x+++). (within x years one car per train shall be accessible to and useable by persons with physical or mental impairments, including wheelchair users). (MAY HAVE TO BE MADE CONSISTENT WITH PUBLIC ACCOMMODATION STANDARDS).
6. Within xx days after enactment, the Department of Transportation shall develop and implement standards for the design, manufacture, use and maintenance of public transit vehicles, equipment and facilities to ensure that they are accessible to and useable by persons with physical or mental impairments, including wheelchair users.
7. Entities engaged in the business of providing taxi service for hire shall not discriminate on the basis of handicap in the delivery of that service.
8. For taxi service, a comparable level of accessible service shall be provided for those that can't use the nonaccessible taxis. To the extent that a taxi service is the only method of public transit in an area, then the system must have program accessibility.

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P.13

#### GENERAL PROHIBITIONS

The bill should include a section of General Prohibitions describing the types of actions or omissions that constitute discrimination on the basis of handicap.

It should include:

- o A prohibition of discrimination on the basis of handicap directly or through a contractual, licensing, or other arrangements.

- o A delineation of types of discrimination drawn from Section 504 regulations, including exclusion, segregation, less effective benefits and services, etc. (See 1988 ADA, Sec. 5(a)(1)(A) - (D)).

- o A subsection on Accessibility that includes:

##### [New Construction]

- 1) a requirement that all buildings or facilities, except for private housing, constructed more than xx days after the date of enactment shall be accessible to and readily usable by persons with physical or mental impairments,
  - with an exception only for manifestly exceptional cases in which particular accessibility features would be impossible.

##### [Existing Buildings and Facilities]

- 2) a requirement that when buildings or facilities are remodeled, restored, or altered, it shall be discrimination to establish or impose, or fail or refuse to remove any barriers that prevent or limit the access or participation of persons with physical or mental impairments in the remodeled, restored, or altered areas,

- this includes a requirement that the path of travel to the remodeled, restored, or altered areas and the key facilities serving these areas must be barrier free.

- 3 a requirement that access to existing buildings and facilities is to be achieved by several methods:

- a) - by making minor physical alterations not amounting to a substantial modification of a building or facility
    - by using other methods such as delivery or moving of services, goods, benefits.

- by referral to a similar business or facility under certain limited circumstances (only small providers?) (See HEW regs, Sec. 84.22(c))

- b) if a modification would result in a substantial modification of a building or facility, program access should be provided unless reasonable to do so.

1988 ADA, Sec. 5(a)(5))

o A prohibition such as that in the Fair Housing Amendments Act of discrimination against people because they associate with or have a relationship with a person with a physical or mental impairment (See 1988 ADA, Sec. 5(a)(5)).

o A prohibition of discriminatory qualifications standards, selection criteria, or eligibility requirements (See 1988 ADA Sec. 5(a)(4)).

o A statutory requirement of reasonable accommodation (See 1988 ADA, Sec. 5(a)(3)).

o A statement of what is not discriminatory (1988 ADA, Sec. 5(b)), including

- differential treatment wholly unrelated to physical or mental impairment
- legitimate application of necessary criteria substantially related to the essential components of the programs, activity, or opportunity.

o Requirements regarding the elimination of communication barriers.

o A statement of limitations on duties of barrier removal and reasonable accommodation based on a standard that such removals or accommodations do not have to be made if they would fundamentally alter the nature of the program, activity, facility, or business at issue, or in manifestly exceptional cases in which they would be impossible or prohibitively expensive.

--in such cases there is still a duty to make lesser changes or accommodations to enable participation by a person with a physical or mental impairment (See 1988 ADA, Sec. 7(a)(2)).

REPORT OF THE UNITED STATES FOUNDATION OF AMERICA

## EMPLOYMENT PRINCIPLES

1. The prohibition against discrimination on the basis of handicap should apply to all employers in the United States who employ 15 or more employees.
2. Discrimination should be prohibited against an individual because of his or her handicap. The term "handicap" should be as broad as it is under Section 504. (That is, it should cover individuals with a physical or mental impairment that substantially limits a major life activity, individuals with a record of such an impairment and individuals who are simply regarded as having such an impairment.)
3. The prohibited employment discrimination must include both direct and indirect actions (e.g., actions taken through contracting or actions that have the ultimate effect of discrimination on the basis of handicap.)
4. An employer must have the affirmative obligation of providing "reasonable accommodations", as required by Section 504, that will enable the person with handicaps to participate in the job.
5. If an employer uses qualification standards or tests that identify or disadvantage persons with handicaps, the employer must show that the standards or tests are substantially related to the individual's ability to perform essential components of the job and that such performance cannot be accomplished through a reasonable accommodation.
6. Prohibited employment discrimination must include adverse actions taken because of an individual's relationship to or association with a person with handicaps.

THE EPILEPSY FOUNDATION OF AMERICA

F. 1

#### PUBLIC SERVICES

1. It shall be guaranteed that any handicapped person have full access to all services provided by cities and counties.
2. All cities and counties should have to meet the same legal obligation required under Section 504.

SENATOR DOLE'S SCHEDULE - Week of September 4 - 10, 1989

MONDAY, SEPTEMBER 4 - Labor Day

TUESDAY, SEPTEMBER 5  
Senate not in Session

10:00 SD-106 INTERVIEW W/Peter Jennings, ABC News  
(Walt Riker arr.)

3:30 p.m. White House Cabinet Room  
N.W. Gate Briefing on Drug Strategy. Senate/  
House Leadership invited. Please  
arrive by 3:15. Mtg. at 3:30, lasts  
30 min. (Karen 456-6782)

WEDNESDAY, SEPTEMBER 6

9:00 S-230 CAP. MTG. w/Sec'y Bennett & GOP Senators  
*OK - mtg. i mitchell* re drug strategy (Whit arr)

12:00 NOON SENATE RECONVENES

*lunch i president*

option State Dept. SWEARING-IN of Mike Sotirhos as  
4:00 Ben Franklin Rm. Amb. to Greece

Senator Dole's Schedule - Week of September 4-10, 1989 Page 2.

THURSDAY, SEPTEMBER 7

9:30	S-230 Cap.	MTG. w/Ginny Thornberg, Alan Reich & Soviet Parliamentarian on Disabilities, Mr. Zaslavsky (Maureen arr)
10:00 to 11:00	S-207 Cap.	RECEPTION w/Alan Reich, Pres. Natl. Org. on Disability, honor of Ilya Zaslavsky, Soviet disability advocate (Mo West arr.)
10:00	SD-215	FINANCE COMM. (Medicare-catastrophic)
2:00	S-230 Cap.	MTG. w/Don Byers, Maytag, Iowa & Doug Horstman, Wash. Ofc. re ESOPS (Carolyn sit in)
2:30	S-230 Cap.	PHOTO w/Vera Dawson, Kay Bridge & Marilyn Bridge, daughter from Cedar Rapids, Iowa (Marci)
option 7:00	Library of Cong. Jefferson Bldg. Great Hall	BLACK TIE DINNER by Librarian of Cong on opening of de Tocqueville exhib. (Senator on Hon. Comm.)
option 7-9:00	10208 Eisenhower Lane Great Falls	RECEP. by Tom & Joy Korologos for Mike Sotirhos

FRIDAY, SEPTEMBER 8

9:30	SR-332	AG. COMM. (hrsg. on futures trading abuses & emergency in soybean futures markets) Kalo Hineman is be lead off witness on soybean emergency) Kalo 254-6318
1:00	S-230 Cap.	MTG. w/Sec'y Mosbacher re his upcoming Poland trip (Bill Fritts 377-5485)
1:45	S-230 Cap.	MTG. w/Amb. Rowny Re: his help on upcoming Conf. on Defense Bill (Dave Smith, sit-in) (Col. Kirk (Lewis 647-3612)

Senator Dole's Schedule - Week of September 4-10, 1989      Page 3

SATURDAY, SEPTEMBER 9

SUNDAY, SEPTEMBER 10

SENATOR BOB DOLE  
WELCOMING REMARKS - ILYA SASLAVSKY  
10AM - S-207 - SEPTEMBER 7, 1989

I WANT TO WELCOME TO THE U.S. SENATE AND TO THE UNITED STATES THIS MORNING A DISTINGUISHED MEMBER OF THE SOVIET NATIONAL LEGISLATURE -- A MAN WHO CARRIES AN EXTRAORDINARY MESSAGE OF HOPE TO HIS FELLOW SOVIET CITIZENS AND THE REST OF THE WORLD AS WELL.

ILYA ZASLAVSKI (ILL'-YA ZAHs-LAHV'-SKI) WAS ELECTED TO THE SOVIET NATIONAL LEGISLATURE LAST MARCH. HE DEFEATED A COOL AND SMOOTH TELEVISION COMMENTATOR WHO HAD THE BACKING OF THE COMMUNIST PARTY IN AN ELECTION THAT OCCURRED IN MIKHAIL GORBACHEV'S OWN MOSCOW VOTING DISTRICT!

HIS MESSAGE WAS SO POWERFUL THAT NONE OTHER THAN ANDREI SAKHAROV BOWED OUT OF THE RACE AND BACKED HIM.

THIS WOULD BE AN AMAZING ACCOMPLISHMENT FOR ANY PERSON. BUT FOR A 29-YEAR-OLD TEXTILE RESEARCH SCIENTIST FROM MOSCOW THERE WERE EVEN MORE OBSTACLES TO OVERCOME. BECAUSE ILYA ZASLAVSKI IS DISABLED -- AND HAS BEEN SINCE CHILDHOOD.

NOW HE HAS TAKEN UP THE CAUSE OF THE DISABLED IN A COUNTRY WHERE WHEELCHAIR RAMPS ARE PRACTICALLY NON-EXISTANT AND PUBLIC POLICY TOWARD THE DISABLED HAS AMOUNTED MOSTLY TO SHUNTING THEM OFF TO SPECIAL HOMES IN FARAWAY PLACES.

ILYA ZASLAVSKI IS THE MAN WHO STANDS BEFORE THE KREMLIN POWERFUL.....AND QUIETLY, PASSIONATELY, ASKS THE QUESTIONS: "WHY NOT DEFEND THE WEAK?" "HOW LONG SHALL WE FORGET ABOUT THE SICK, THE OLD, THE ABANDONED CHILDREN?" "HOW LONG WILL HOSPITAL PATIENTS HAVE TO GO WITHOUT FOOD AND MEDICINE?"

HE IS A MAN OF COURAGE AND PERSEVERANCE. THOSE AROUND THE COUNTRY WHO WILL HEAR HIS WORDS IN THE COMING WEEKS SHOULD CONSIDER THEMSELVES PRIVILEGED.

TO ILYA ZASLAVSKI I CAN ONLY SAY WELCOME TO AMERICA...WE'RE GLAD YOU'RE HERE.

YOUR MESSAGE -- YOUR LIFE STORY -- WILL SERVE AS AN INSPIRATION TO EACH AND EVERY AMERICAN YOU WILL MEET.

I'M ALSO PRIVILEGED TO INTRODUCE THIS MORNING A MAN WITH A LONG RECORD OF ACCOMPLISHMENT IN THE AREA OF DISABILITY RIGHTS. A MAN I HAVE HAD THE PLEASURE TO WORK WITH ON OCCASION -- RECOGNIZED AROUND THE COUNTRY FOR HIS WORK IN THIS IMPORTANT PUBLIC POLICY AREA. THE PRESIDENT OF THE NATIONAL ORGANIZATION ON DISABILITY -- ALAN REICH.

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Joint Statement of Senators  
Harkin, Kennedy and Durenberger  
on Substitute Amendment to the  
Americans with Disabilities Act

We are very pleased to offer a Substitute for S.933, the Americans with Disabilities Act, that the sponsors of the original bill and the Administration can support unequivocally and enthusiastically. This historic legislation will end segregation and discrimination against people with disabilities in all aspects of American society.

The Americans with Disabilities Act bans discrimination based on disability in the public and private sector in the areas of employment, public accommodations, public service, transportation, and telecommunications.

The key components of the bill are:

- Persons with disabilities are defined as those who are protected by section 504 of the Rehabilitation Act of 1973, as amended.
- Private employers are covered.
- All public services are covered.
- All public accommodations which are part of daily independent living are covered.
- Public and private transportation, except for cars and taxicabs, are covered.
- Common carriers for telecommunications are covered.
- All covered entities are prohibited from discriminating against individuals with disabilities. Non-discrimination includes the provision of reasonable accommodations and auxiliary aids and services.
- All new public buses and trains for which solicitations are made 30 days after enactment of the bill must be accessible to and usable by individuals with disabilities.

- Paratransit to supplement fixed route public transportation for those who cannot use fixed route transit must be equivalent to service provided on fixed route.

- Key stations of light rail and commuter rail service must be made accessible within 20 years.

- New over-the-road coaches purchased 5 years after the date of enactment, 6 years for small providers, must be accessible to and usable by individuals with disabilities.

- New construction of places of public accommodation and potential places of employment must be readily accessible to and usable by individuals with disabilities, except that buildings of less than 3 stories or with less than 3000 square feet per floor need not have elevators, unless they are shopping centers, shopping malls, or professional offices of health care providers, or the Attorney General determines that elevators should be required.

- Telecommunications providers must include relay services for the hearing impaired as part of universal telephone service.

We look forward to favorable action by the Labor Committee and the full Senate on this landmark legislation.

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For further information, contact:

Senator Harkin - Bobby Silverstein - 224-6265

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OVERVIEW OF THE AMENDMENT IN THE NATURE OF A SUBSTITUTE TO THE  
AMERICANS WITH DISABILITIES ACT OF 1989  
August 2, 1989

The Americans With Disabilities Act of 1989 (ADA) is an omnibus civil rights statute that prohibits discrimination against individuals with disabilities in employment (in the private sector); all public services; public accommodations; transportation; and telecommunications.

Section 1 is the short title. Section 2 sets out congressional findings and the purposes of the bill. Section 3 defines several key terms, including "disability." This definition is comparable to the definition used for purposes of section 503 of the Rehabilitation Act of 1973 (which requires government contractors to take affirmative action to hire individuals with disabilities) and section 504 of the Rehabilitation Act of 1973 (which prohibits discrimination against persons with disabilities by recipients of Federal financial assistance).

Title I specifies that an employer, employment agency, labor organization, or joint labor-management committee may not discriminate against any qualified individual with a disability in regard to any term, condition or privilege of employment. The ADA incorporates many of the standards of discrimination set out in regulations implementing section 504. The ADA incorporates by reference the enforcement provisions under title VII of the Civil Rights Act of 1964 (injunctive relief and back pay).

Title II specifies that no qualified individual with a disability may be discriminated against by a department, agency, special purpose district, or other instrumentality of a State or a local government. Title II also includes specific actions applicable to public transportation provided by public transit authorities which are considered discriminatory. Finally, title II incorporates by reference the enforcement provisions in section 505 of the Rehabilitation Act of 1973.

Title III specifies that no individual shall be discriminated against in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation operated by a private entity on the basis of a disability. Title III also includes specific prohibitions on discrimination in public transportation services provided by private entities. Finally, title III incorporates provisions comparable to the applicable enforcement provisions in title II of the Civil Rights Act of 1964 (injunctive relief) and provides for pattern and practice cases by the Attorney General and civil penalties.

Title IV specifies that telephone services offered to the general public must include interstate and intrastate telecommunication relay services so that such services provide

individuals who use nonvoice terminal devices because of disabilities with opportunities for communications that are equivalent to those provided to individuals able to use voice telephone services.

Title V includes miscellaneous provisions, including: a construction clause explaining the relationship between the provisions in the ADA and the provisions in other Federal and State laws; the construction of the ADA as not disrupting the current nature of insurance underwriting; a prohibition against retaliation; a clear statement that States are not immune from actions in Federal court for a violation of the ADA; a directive to the Architectural and Transportation Barriers Compliance Board to issue guidelines; and authority to award attorney's fees.

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For more information, contact Bob Silverstein, Staff Director and Chief Counsel of the Subcommittee on the Handicapped at 202-224-6265 (voice), 224-3457 (TTY); or Carolyn Osolinik, Chief Counsel, Senator Kennedy 202-224-1322.

SUMMARY OF THE AMENDMENT IN THE NATURE OF A SUBSTITUTE  
TO THE AMERICANS WITH DISABILITIES ACT OF 1989  
AUGUST 2, 1989

FINDINGS AND PURPOSE

The purpose of the Act is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities; provide enforceable standards addressing discrimination against individuals with disabilities; and ensure that the Federal government plays a central role in enforcing these standards on behalf of individuals with disabilities.

DEFINITIONS

The term "disability" is defined to mean, with respect to an individual -- 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. This is the same definition used for purposes of section 503 and section 504 of the Rehabilitation Act of 1973 and the recent amendments to the Fair Housing Act.

TITLE I: EMPLOYMENT

The provisions in title I of the bill use or incorporate by reference many of the definitions in title VII of the Civil Rights Act of 1964 (employee, employer, Commission, person, labor organization, employment agency, joint labor-management committee, commerce, industry affecting commerce). For the first two years after the effective date of the Act, only employers with 25 or more employees are covered. Thereafter, the number goes down to 15.

A "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. This definition is comparable to the definition used for purposes of section 504.

Using the section 504 legal framework as the model, the bill specifies that no entity covered by the Act shall discriminate against any qualified individual with a disability because of such individual's disability in regard to application procedures, the hiring or discharge of employees and all terms, conditions and privileges of employment.

Discrimination includes, for example: limiting, segregating or classifying a job applicant or employee in a way that adversely affects his or her opportunities or status; participating in contractual or other arrangements that have the effect of subjecting individuals with disabilities to discrimination; and using criteria or methods of administration that have a discriminatory effect or perpetuate discrimination of others subject to common administrative control.

In addition, discrimination includes excluding or denying equal opportunities to a qualified nondisabled individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association.

Discrimination also includes not making reasonable accommodations to the known limitations of a qualified individual with a disability unless such entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business. Discrimination also includes the denial of employment opportunities because a qualified individual with a disability needs a reasonable accommodation.

The definition of the term "reasonable accommodation" included in the bill is comparable to the definition in the section 504 legal framework. The term includes: making existing facilities accessible, job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of policies, examinations, and training materials, the provision of qualified readers and interpreters, and other similar accommodations.

Discrimination also includes the imposition or application of tests and other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the test or other selection criteria is shown to be job-related for the position in question and is consistent with business necessity.

The bill also includes the pre-employment inquiries provision from section 504 which permits employers to make preemployment inquiries into the ability of an applicant to perform job-related functions but prohibits inquiries as to whether an applicant or employee is an individual with a disability or as to the nature or severity of such disability. Employers are permitted to undertake post-offer/pre-entrance medical examinations so long as the results are kept confidential, all entering employees take the examinations, and the results are used only in accordance with the provisions of the title.

The bill also prohibits employers from conducting or requiring a medical examination and inquiries as to whether an employee has a disability or the nature or severity of the disability unless such examination or inquiry is shown to be job-related and consistent with business necessity.

The bill also specifies several defenses to charges of discrimination under the Act. First, an employer need not hire an applicant or retain an employee who it shows has a currently contagious disease or infection that poses a direct threat to the health or safety of other individuals in the workplace.

With respect to drug addicts and alcoholics, an employer may prohibit the use of alcohol or illegal drugs at the workplace by all employees; may require that employees not be under the influence of alcohol or illegal drugs at the workplace; may require that employees conform their behavior to

requirements established pursuant to the Drug Free Workplace Act; and 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, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such individual.

With respect to religious entities, the bill adopts the religious preference provision from title VII of the Civil Rights Act of 1964 and includes a religious tenet exemption which provides that a religious organization may require, as a qualification standard to employment that all applicants and employees conform to the religious tenets of such organization.

Consistent with title VII of the Civil Rights Act of 1964, every covered entity must post notices in an accessible format describing the applicable provisions of this Act. The Commission is also directed to promulgate regulations within 1 year in an accessible format.

The bill incorporates by reference the remedies and procedures set out in section 706, 707, 709, and section 710 of title VII of the Civil Rights Act of 1964.

The effective date of title I is 18 months after the date of enactment.

## TITLE II: PUBLIC SERVICES

Section 504 only applies to entities receiving Federal financial assistance. Title II of the bill makes all activities of State and local governments subject to the types of prohibitions against discrimination against a qualified individual with a disability included in section 504 (nondiscrimination) and section 505 (the enforcement procedures).

A "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies and practices, or the removal of architectural, communication, and transportation barriers or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a department, agency, special purpose district, or other instrumentality of a State or a local government.

Title II also specifies the actions applicable to public transportation (not including air travel) provided by public entities that are considered discriminatory. The term "public transportation" means transportation by bus or rail, or by any other conveyance (other than air travel) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

1. New fixed route buses of any size, rail vehicles and other fixed route vehicles for which a solicitation is made later than 30 days after the date of enactment of this Act must be readily accessible to and usable by individuals with disabilities. No retrofitting of existing buses is required.

A transit authority may apply to the Secretary of Transportation for relief only if there are no lifts available in this country for installation.

2. Used vehicles purchased or leased after the date of enactment need not be accessible but a demonstrated good faith effort to locate a used accessible vehicle must be made.

3. Vehicles that are re-manufactured so as to extend their usable life for five years or more must, to the maximum extent feasible, be readily accessible to and usable by individuals with disabilities.

4. In those communities with fixed route public transportation, there must also be a paratransit system to serve those individuals with disabilities who cannot use the fixed route public transportation and to other individuals associated with such individuals in accordance with service criteria established by the Secretary of Transportation. Communities need not make expenditures that would result in an undue financial burden.

5. Communities that operate a demand responsive system that is used to provide public transportation for the general public (nondisabled and disabled) must purchase new buses for which a solicitation is made 30 days after the date of enactment of the Act that are accessible unless the system can demonstrate that the system, when viewed in its entirety, provides a level of service to individuals with disabilities equivalent to that provided to the general public; in which case all newly purchased vehicles need not be accessible.

6. All new facilities used to provide public transportation services must be readily accessible to and usable by individuals with disabilities.

7. When alterations are made to existing facilities that affect or could affect the usability of the facility, the alterations, the path of travel to the altered area, the bathrooms, telephones, and drinking fountains serving the remodeled area must be, to the maximum extent feasible, readily accessible to and usable by individuals with disabilities. This obligation to make the path of travel accessible only applies where the covered entity undertakes major structural modification.

8. All stations in intercity rail systems must be accessible within 20 years and key stations in rapid rail, commuter rail and light rail systems must be made readily accessible as soon as practicable but in no event later than 3 years after the date of enactment of this Act except that the time limit may be extended by the Secretary of Transportation up to 20 years for extraordinary expensive structural changes to, or replacement of, existing facilities necessary to achieve accessibility.

9. Intercity, light rail, rapid, and commuter rail systems must have at least one car per train that is accessible as soon as practicable, but in any event in no less than five years.

The bill directs the Attorney General to promulgate regulations within one year in an accessible format that implement the provisions generally applicable to state and local governments. These regulations must be consistent with the coordination of regulations issued in 1978 that governed the regulations applicable to recipients of Federal financial assistance, except with respect to "existing facilities" and "communications," in which case the Federally conducted regulations apply.

Within one year from the date of enactment, the Secretary of Transportation is directed to issue regulations in an accessible format that include standards which are consistent with minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board.

This title takes effect eighteen months from the date of enactment with the exception of the provision applicable to the purchase of new buses which takes effect on the date of enactment.

#### TITLE III: PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES

Title III specifies that no individual shall be discriminated against 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.

The bill lists categories of establishments that are considered public accommodations. The list includes restaurants, hotels, doctors' offices, pharmacists, grocery stores, museums, and homeless shelters. This list does not include religious institutions or entities controlled by religious institutions.

The bill includes general and specific categories of discrimination prohibited by the Act. In general, it is considered discriminatory to subject an individual or class of individuals, directly or indirectly, on the basis of disability, to any of the following:

- (1) denying the opportunity to participate in or benefit from an opportunity;
- (2) affording an opportunity that is not equal to that afforded others;
- (3) providing an opportunity that is less effective than that provided to others;
- (4) providing an opportunity that is different or separate, unless such action is necessary to provide the individuals with an opportunity that is as effective as that provided to others; however, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different.

With respect to places of public accommodation and potential places of employment, the bill also specifies that discrimination includes a failure to make facilities constructed for first occupancy later than 30 months after the date of enactment readily accessible to and usable by individuals with disabilities except where an entity can demonstrate that it is structurally impracticable to do so in accordance with standards set forth or incorporated by reference in regulations. The elevator exception applicable to alterations is also applicable to new construction.

-A failure by a public accommodation to provide a level of transportation services to individuals with disabilities equivalent to that provided for the general public and a refusal to purchase or lease vehicles that carry in excess of 16 passengers for which solicitations are made later than 30 days after the effective date of the Act which are readily accessible to and usable by individuals with disabilities. Special rules apply to demand responsive systems (e.g., shuttles to and from an airport and hotel).

The bill also includes a specific section prohibiting discrimination in public transportation services (other than air travel) provided by private entities. In general, no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of public transportation services provided by a privately operated entity that is primarily engaged in the business of transporting people (but not in the principal business of providing air transportation) and whose operations affect commerce.

Examples of discrimination include:

-the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability;

-a failure to make reasonable modifications to criteria, provide auxiliary aids and services, and remove barriers consistent with the standards set out above;

-new vehicles (other than automobiles) purchased 30 days after the date of enactment must be made accessible. Because there is no requirement that cars be made accessible, new taxicabs are not required to be made accessible. Taxicab companies are liable, however, if their drivers refuse to pick up an individual with a disability.

Special rules are included for entities using over-the-road coaches. Such buses must be readily accessible to and usable by individuals with disabilities within 6 years for small providers and 5 years for other providers. A study must be completed on how best to achieve this objective and its impact within 3 years from the date of enactment.

The bill uses the model of title II of the Civil Rights Act of 1964 (injunctive relief) and includes the pattern and practice authority (including civil penalties) from the recently enacted Fair Housing Act.

Further, an entity may not directly or indirectly use standards or criteria or methods of administration that have the effect of subjecting an individual to discrimination on the basis of disability or perpetuate discrimination by others who are subject to common administrative control or are agencies of the same State. Nor can an entity discriminate against an individual because of the known association of that individual with another individual with a disability.

Specific categories of discrimination include:

- The imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability unless such criteria can be shown to be necessary for the provision of the goods or services being offered.

- A failure to make reasonable modifications in rules and policies and procedures when necessary to afford meaningful opportunity unless the entity can demonstrate that the modifications would fundamentally alter the nature of the program.

- A failure to provide auxiliary aids and services unless the entity can demonstrate that such services would fundamentally alter the nature of the goods or services being offered or would result in undue burden. Auxiliary aids and services include: qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments; qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments; acquisition or modification of equipment or devices; and other similar services and actions.

- A failure to remove architectural barriers and communication barriers that are structural in nature in existing facilities and transportation barriers in existing vehicles where such removal is readily achievable; and, where the entity can demonstrate that such removal is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, and accommodations available through alternative methods if such methods are readily achievable.

- With respect to a facility that is altered, the failure to make the alterations in a manner that, to the maximum extent feasible, the altered portion, the path of travel to the altered area, and the bathrooms, telephones, and drinking fountains serving the remodeled area are readily accessible to and usable by individuals with disabilities. The obligation to make the path of travel accessible only applies if the facility is undergoing major structural changes. Further, a covered entity need not install an elevator if the building has fewer than three stories, has fewer than 3000 square feet per floor unless the building is a shopping mall, shopping center, or the professional office of a health care provider or the Attorney General determines that the category of usage requires an elevator.

The effective date of this title is 18 months from the date of enactment.

#### TITLE IV: COMMUNICATIONS

Title IV specifies that a common carrier that offers telephone services to the general public must also provide interstate or intrastate telecommunication relay services so that such services provide individuals who use non-voice terminal devices because of their disabilities opportunities for communications that are equivalent to those provided to their customers who are able to use voice telephone services, unless such services are provided pursuant to a State relay program.

Nothing in this title is to be construed to discourage or impair the development of improved or future technology designed to improve access to telecommunications services for individuals with disabilities.

The Federal Communications Commission is directed to issue regulations establishing minimum standards and guidelines for telecommunications relay services.

#### TITLE V: MISCELLANEOUS PROVISIONS

Title V explains the relationship between section 504 and this Act and this Act and State laws that provide greater protections. This title also explains that this bill is not to be construed as regulating the underwriting, classifying and administering of insurance risks. Title V also includes an anti-retaliation provision; a prohibition against interference, coercion or intimidation; directs the Architectural and Transportation Barriers Compliance Board to issue minimum guidelines; and makes it clear that States are not immune under the 11th Amendment for violations of the Act.

With respect to attorneys' fees, the bill specifies that in any action or administrative proceeding commenced under the Act, the court, or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

COMPARISON BETWEEN S. 933, THE AMERICANS WITH DISABILITIES ACT  
AND THE SUBSTITUTE AMENDMENT  
AUGUST 2, 1989

Set out below are the major changes included in the Substitute Amendment to S. 933.

GENERAL PROHIBITIONS

The Substitute deletes the general prohibitions set out in title I of S. 933 and in lieu thereof includes the basic concepts within the employment title and the public accommodations title.

EMPLOYMENT

The Substitute includes an effective date of 18 months after the date of enactment and a phase-in for coverage of employers. For the first two years after the effective date of the Act, only employers with 25 or more employees are covered. Thereafter, the number goes down to 15.

The Substitute incorporates many of the provisions from the regulations implementing section 504 of the Rehabilitation Act of 1973 and the language set out therein. The Substitute deletes the reference to "anticipatory discrimination."

The Substitute also clarifies the applicability of the title to drug addicts and alcoholics by stating that an employer may: prohibit the use of alcohol or illegal drugs at the workplace by all employees; require that employees not be under the influence of alcohol or illegal drugs 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 qualification standards for employment or job performance and behavior to which it holds other individuals, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such individual.

The Substitute also defines key terms used in the title such as "undue hardship" and "reasonable accommodation."

The Substitute also incorporates by reference the remedies set out in title VII of the Civil Rights Act of 1964 and deletes the authority to seek compensatory and punitive damages for acts of intentional discrimination under section 1981 of the Civil Rights Act of 1866.

## PUBLIC SERVICES

The Substitute includes three changes regarding public transportation. First, the Substitute includes limited relief to the obligation that all new fixed route buses must be accessible when no lifts are available from manufacturers.

Second, the Substitute includes an "undue financial burden" exception to the general rule that a public transit authority must make available paratransit services to supplement the mainline accessible buses.

Third, the Substitute provides twenty years for AMTRAK to make its stations accessible.

The Substitute also clarifies that when alterations are made to a facility, that the path of travel to the altered area needs to have accessible components if the facility is undergoing major structural alterations in accordance with criteria established by the Attorney General.

The effective date of this title is 18 months after the date of enactment with the exception of the provision applicable to new buses, which is effective on the date of enactment.

## PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES

The Substitute deletes the definition of the term "public accommodation" and substitutes in lieu thereof a list of categories of establishments. The list does not include religious institutions or entities controlled by religious institutions. Establishments included on the list must comply with all requirements of nondiscrimination. Public accommodations and potential places of employment (such as office buildings) constructing new buildings must ensure that such buildings are accessible to and usable by individuals with disabilities.

The Substitute defines such key terms as "readily achievable" and "auxiliary aids and services." The Substitute also incorporates many of the general forms of discrimination originally set out in title I of S. 933.

The Substitute includes clarifications that when alterations to a portion of a building are occurring, that the path of travel must be made accessible if the alteration consists of major structural changes. The Substitute also includes a special rule regarding the installation of elevators in new construction and where the entity is making major structural alterations. Elevators need not be installed if the building has fewer than three stories or fewer than 3000 square feet per floor unless the business is a shopping center, a shopping mall, or the professional office of a health care provider or the Attorney General determines that the usage of the building requires an elevator.

With respect to private transportation, the Substitute delays the effective date for the mandate to make all new over-the-road buses accessible

for 6 years for small providers and 5 years for all other providers. It also mandates that a study be completed within 3 years from the date of enactment.

With respect to charter services and motel shuttle services, the Substitute provides that if over-the-road buses are used, they are subject to the delay of the effective date described above. New vehicles that seat more than 16 passengers (S. 933 included 12), which are not over-the-road buses, must be accessible unless the entity can demonstrate that it is already capable of meeting the needs of those using wheelchairs directly or through contract or other arrangement.

With respect to remedies, the Substitute deletes references to the enforcement scheme for private parties set out in the Fair Housing Act (compensatory and punitive damages) and incorporates in lieu thereof reference to title II of the Civil Rights Act of 1964, which provides for injunctive relief. The Substitute incorporates the provisions of the Fair Housing bill pertaining to pattern and practice suits by the Attorney General and the maximum allowable civil penalties provisions set out therein (\$50,000 for first offense and \$100,000 for second offense).

The Substitute also clarifies that injunctive relief includes retrofitting of new buildings and major alterations that were made in violation of the Act.

The effective date for the public accommodations title is 18 months from the date of enactment.

#### TELECOMMUNICATIONS RELAY SERVICES

The Substitute includes relay services as part of universal telephone services and permits states to establish their own systems in lieu of placing the responsibility on the common carriers.

#### MISCELLANEOUS PROVISIONS

The Substitute adds a construction section which clarifies that the ADA does not disrupt the current nature of insurance underwriting or the current regulatory structure of the insurance industry either in sales, underwriting, pricing, administrative and other services, claims and similar insurance-related activities based on classification of risks, as regulated by the states.

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For more information, contact Bob Silverstein, Staff Director and Chief Counsel of the Subcommittee on the Handicapped at 202-224-6265 (voice), 224-3457 (TTY); or Carolyn Osolinik, Chief Counsel, Senator Kennedy 202-224-1322.

QUESTIONS AND ANSWERS ON THE SUBSTITUTE AMENDMENT TO S. 933,  
THE AMERICANS WITH DISABILITIES ACT OF 1989  
August 2, 1989

Set out below are questions and answers on some of the issues that may be raised about the Committee Substitute Amendment to S. 933, the Americans with Disabilities Act of 1989. If you have any additional questions, please contact Bob Silverstein, Staff Director and Chief Counsel, Senate Subcommittee on the Handicapped (224-6265) or Carolyn Osolinik, Counsel to Senator Edward M. Kennedy (224-7878).

1. What is the purpose of the Americans with Disabilities Act of 1989? (ADA)?

The purpose of the ADA is to provide, clear, strong, consistent, enforceable standards addressing all forms of discrimination against individuals on the basis of disability.

2. What is the scope of the ADA?

The ADA extends civil rights protections for people with disabilities to cover such areas as employment in the private sector, public accommodations (such as theaters, hotels, restaurants, shopping centers, grocery stores), services provide by state and local governments, transportation, and telecommunication relay services.

3. Why is the ADA necessary?

The National Council on Disability (an independent Federal agency whose current membership consists of 15 persons appointed by President Reagan), the Civil Rights Commission, and two recent polls conducted by Lou Harris all conclude that discrimination against individuals with disabilities in the areas listed above is still pervasive in our society. The historic Civil Rights Act of 1964 does not cover people with disabilities, and thus, they have no Federal protections against discrimination in these areas. Federal law only protects against discrimination in Federal employment (section 501 of the Rehabilitation Act of 1973), affirmative action by Federal contractors (section 503), discrimination by entities receiving Federal aid (section 504), and activities conducted by the Federal Government (section 504).

Discrimination is sometimes the result of prejudice; sometimes it is the result of patronizing attitudes; and still other times it is the result of thoughtlessness or indifference. But whatever its origin, the results are the same: segregation, exclusion, or the denial of equal, effective and meaningful opportunities to participate in programs and activities.

Discrimination affects all categories of people with disabilities, including those with mobility impairments, sensory impairments, mental retardation, and other physical and mental

impairments. It affects those who have hidden disabilities such as cancer, diabetes, epilepsy, heart disease and mental illness; people who have a history of a disability but are no longer disabled; persons who have been incorrectly classified as having a disability; and those who do not have a disability but who are treated or perceived by others as having a disability.

#### 4. Who developed the provisions in the ADA?

In recent testimony before the Committee on Labor and Human Resources, former Senator Lowell Weicker, sponsor of last year's version of the ADA described the genesis of this legislation, "With the enactment of Section 504 of the Rehabilitation Act of 1973, Congress said that no longer will Federal funds support or assist discrimination [on the basis of disability] and last year we reaffirmed that commitment in the Civil Rights Restoration Act... The legislation before this committee today completes the work begun in 1973 to secure the civil rights of Americans with disabilities."

The ADA of 1988 had bipartisan support (17 Democrats and 9 Republicans). In the House of Representatives, the bill was introduced by Representative Tony Coelho (D. CA) and had 124 cosponsors. The bill was developed by the National Council on Disability, whose membership includes Justin Dart, long-time stalwart of the Republican Party, and Jeremiah Milbank, the founder of the Eagle Forum. All of the fifteen members of the National Council on Disability were appointed by President Reagan. The ADA was the product of two reports, Toward Independence and On the Threshold of Independence.

#### 5. Does the ADA enjoy bipartisan support?

Yes. The ADA of 1989 was introduced on May 9, 1989 and was sponsored by Senator Tom Harkin (D. IA), Senator Edward Kennedy (D. MA), Senator Dave Durenberger (R. MN), Senator Jim Jeffords (R. VT), Senator John McCain (R. AZ) and others. The sponsors in the House include Steny Hoyer (D. MD), Major Owens (D. NY), and Silvio Conte (R. MA).

Currently, 53 Senators have cosponsored the ADA (40 Democrats and 13 Republicans). The Democratic Senators who support the ADA include Mr. HARKIN (IA), Mr. KENNEDY (MA), Mr. SIMON (IL), Mr. CRANSTON (CA), Mr. MITCHELL (ME), Mr. LEAHY (VT), Mr. INOUE (HI), Mr. GORE (TN), Mr. RIEGLE (MI), 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. GLENN (OH), Mr. SHELBY (AL), Mr. HOLLINGS (SC), Mr. SANFORD (NC), 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. DeCONCINI (AZ), Mr. KOHL (WI) and Mr. LAUTENBERG (NJ).

The Republican Senators who support the ADA include Mr. DURENBERGER (MN), Mr. JEFFORDS (VT), Mr. McCAIN (AZ), Mr. CHAFEE (RI), Mr. STEVENS (AK), Mr. COHEN (ME), Mr. PACKWOOD (OR), Mr. BOSCHWITZ (MN), Mr. HEINZ (PA), Mr. PRESSLER (SD), Mr. WILSON (CA), Mr. SPECTER (PA) and Mr. D'AMATO (NY).

6. Who endorses the ADA?

The ADA has been endorsed by more than 150 national organizations representing people with a wide variety of disabilities, including every major disability group. The ADA has also been endorsed by the Leadership Conference on Civil Rights, an umbrella organization representing 185 organizations active in the area of civil rights. Many religious groups have also endorsed the ADA.

7. Has the bill, as introduced, been subject to close scrutiny and review?

Yes. In April 1988, Senator Lowell Weicker, (R-CT) introduced S. 2345, the Americans with Disabilities Act of 1988. A joint hearing between the House and Senate was held on September 27, 1989 on S. 2345.

S. 933 was introduced on May 9, 1989. Four hearings have been held in the Senate on S. 933, the last of which occurred on June 22, at which time Attorney General Dick Thornburgh testified on behalf of the Bush Administration.

Extensive discussions have occurred between the Business and Disability communities and the Administration.

8. Does the Substitute Amendment take into consideration the cost burdens faced by small businesses?

Yes. With respect to employment, the bill totally exempts all employers with fewer than 15 employees. For those employers with 15 or more employees, the bill provides an exemption from making accommodations to the needs of disabled applicants or employees that will result in undue hardship on the business. Thus, for example, a small employer who hires a person with a hearing impairment will only incur nominal costs such as purchasing a \$50 amplifier to be placed on a telephone headset.

The provisions in the bill regarding employment are not new; small employers doing business with the federal government or receiving federal aid have been complying with these provisions for almost 15 years. Every study has found that fear of costs has proven to be unfounded. In fact, the major conclusion of one study was the employers found that compliance was "no big deal." Another survey found that most accommodations cost between \$50 and \$100 and the benefit of having an exemplary employee far outweighed these expenses.

With respect to making the business facility accessible to customers who are disabled, the bill focuses on new construction,

For example, Iowa law already mandates that new buildings be made accessible to the handicapped. This federal bill follows the lead of Iowa and other states in this regard. An establishment need only make changes to existing facilities if these changes are easily accomplishable and able to be carried out without much difficulty or expense. Other accommodations need not be provided if they impose an undue burden on the business.

With respect to new construction, a small business need not install an elevator if the building is fewer than three stories or fewer than 3000 square feet per floor, unless the building is a shopping center, a shopping mall, or the professional office of a health care provider or the Attorney General determines that a particular category of such buildings should have elevators based on usage.

9. Will there be sufficient time for businesses to be educated before they must be in compliance with the ADA?

Yes. The ADA allows for regulations to be issued one year after the date of enactment. The provisions of the ADA become effective 18 months after the date of enactment, with the exception of the purchase of fixed-route buses, which must comply with the ADA upon the date of enactment.

10. May an employer fire an employee who uses or sells drugs at the worksite or poses a direct threat to the health or safety of others?

Yes. An employer may prohibit the use of alcohol or illegal drugs at the workplace by all employees. He or she may require that employees not be under the influence of alcohol or illegal drugs at the workplace; may require that employees conform their behavior to requirements established pursuant to the Drug-Free Workplace Act; and 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 even if any unsatisfactory performance or behavior is related to the drug use of alcoholism of such individuals.

The ADA treats drug addicts in the same way that they are treated under section 503 and 504 of the Rehabilitation Act and the Drug Free Workplace Act. However, the bill ensures that an employer will not fire a person who is falsely accused of being an addict or a person who may have been an addict or an alcoholic sometime in the past but who has been rehabilitated.

11. Are people with AIDS covered by the ADA?

Yes. However, the ADA makes it clear that a person with a contagious disease or infection may be excluded or denied a job or benefit if the covered entity can demonstrate that the person poses a significant risk of transmitting the infection to others through the receipt of a position or benefit. If no reasonable accommodation on the part of the employer or service provider can

eliminate such a risk, the individual may be denied the position or benefit.

The policy in the ADA is equivalent to the policy recently adopted by the Congress in the Civil Rights Restoration Act (the Harkin/Humphrey Amendment) and the Fair Housing Amendments Act of 1988. The policy is also consistent with the policy developed by the Office of Personnel Management under the Reagan Administration and the Reagan Administration's Presidential Commission on the Human Immunodeficiency Virus Epidemic. It is also consistent with statements by President Bush, C. Everett Koop (the former Surgeon General), the National Institute of Medicine, the American Medical Association, the American Public Health Association, and the American Nurses' Association.

12. Is the ADA a gay rights bill, protecting homosexuals from discrimination?

No. The ADA does not create any rights of protections against discrimination for homosexuals. Thus, a covered entity is not precluded by the ADA from discriminating against a person solely on the basis of homosexuality. The bill is modeled after section 504 of the Rehabilitation Act of 1973 and the Fair Housing Act, as recently amended. These statutes have never been interpreted to afford homosexuals protections from discrimination.

13. Will the ADA bankrupt the private/intercity bus industry?

No. For over-the-road coaches, the ADA provides an effective date of 5 years from the date of enactment for large carriers and 6 years for small providers. During this time, the Architectural Transportation Barriers Compliance Board, in conjunction with an advisory board consisting of 50 percent disabled consumers and 50 percent transportation providers, will conduct an interim study. Also during this time, private/intercity bus operators must modify their policies to assist persons who use wheelchairs onto and off the bus and store batteries.

For charter bus service providers, if using over-the-road buses, 5 and 6 year effective dates apply. Further, if operating a demand responsive type system (not using over-the-road buses) every new vehicle need not be accessible if operator can demonstrate it is providing equivalent services.

For hotel-type shuttles, the hotel need not make each vehicle with greater than 16 seat capacity accessible if the service provider can demonstrate that it is already meeting the demand with current vehicles or through alternative arrangements.

14. Does the Substitute Amendment establish new or accept existing remedies which have been applied to minorities?

With respect to employment, the ADA accepts the remedies found in Title VII of the Civil Rights Act of 1964. (injunctive

relief and back pay) No right to compensatory or punitive damages.

With respect to public accommodations, the ADA provides for injunctive relief comparable to Title II of the Civil Rights Act of 1964. In addition, the Attorney General is authorized to bring pattern or practice suits and seek penalties akin to those provided for in the Fair Housing Amendments Act (up to \$50,000 for first offense and up to \$100,000 for second offenses.)

15. Will compliance with the ADA hurt or help the economy?

Lou Harris recently found that "not working" is perhaps the truest definition of what it means to be disabled in America. Ending discrimination will have the direct impact of reducing the Federal government's expenditure of \$57 billion annually on disability benefits and programs that are premised on dependency of the individual with a disability. It will also have the immediate effect of making people with disabilities into consumers and taxpayers.

The Department of Labor concluded that its rule implementing section 504 of the Rehabilitation Act (nondiscrimination by recipients of Federal aid) would have a substantial beneficial effect in the form of reduced need for veterans benefits, rehabilitation, disability, medical and food stamp payments. Furthermore, "when individuals move from being recipients of various types of welfare payments to skilled taxpaying workers, there are obviously many benefits not only for the individuals but for the whole society." 45 Fed. Reg. 66,721 (1980)

Persons with developmental disabilities are still being placed in institutions because of the lack of placement in the community and the availability of jobs. In Iowa, it costs \$200 per day to place a person in an institution, which is \$73,000 per year. If a person is institutionalized for 20 years, the cost to society is \$1.46 million; for 40 years, the cost is \$2.92 million, etc. Many of these persons, with appropriate early intervention and special education services and training can lead independent lives in the community and hold down a job. In this way, they can become taxpayers and consumers and reduce these staggering costs to society.

###

For more information, contact Bob Silverstein, Staff Director and Chief Counsel of the Subcommittee on the Handicapped at 2-2-224-6265 (voice), 224-3457 (TTY); or Carolyn Osolinik, Chief Counsel, Senator Kennedy 202-224-1322.

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. INOUE (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) 6-12  
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)  
Mr. LAUTENBERG (NJ)  
Mr. D'AMATO (NY)

Carolyn - Use Ways Means  
to go to this bill

budget neutral  
limit to 500 or less

Cost  
revenue  
done

## Things To Do

- ✓ Dole ADA Statement  
ADA Memo
- ✓ Memo re definition  
Read Report/ Highlight / Memo
- ✓ List of Amendments  
Technical Asst piece in statement  
Tax Bill in statement  
Move
- ✓ Fred Curry Memo - Thurs 3<sup>00</sup>

Hatch 1. excessive penalty  
2. breadth of coverage of Pub Acc.  
3. private bus industry

Admin: 1. Drug Lang - clear by Bennett

Boschwitz 1. SBA concerns - Boschwitz

Domenici 1. Domenici - AG should give more dir  
could handle via Dole audit

Dole 1. T.A. = Tax Cr.

Helm 2

colleagues

April 20, 1989

Memorandum

To: Republican Members of the Education and Labor Committee  
From: Pat Morrissey and Randy Johnson  
Subject: Background Information on the Americans with Disabilities Act

Anticipated Date of Introduction

According to staff with Mr. Coehlo and Senator Harkin, these gentlemen would like to introduce *the Americans with Disabilities Act* (ADA) in **early May**. The White House has had several meetings with its staff and selected Executive Branch Departments concerning the legislation, and anticipates a position **by April 19, 1989**. They would like to know the impressions/reactions of House Republicans before developing a position.

Purpose of the ADA

The purpose of the legislation is to prohibit discrimination on the "basis of disability", in areas such as -- employment, public accommodation and services (services were explicitly added in the drafts circulated this Congress), transportation, and communication. The most well known prohibition of this nature is contained in Title V of the Rehabilitation Act of 1973. The prohibition in that Act applies to any entity that is a recipient of Federal funds (section 504 of that title is the most commonly referenced section). It also covers Federal contractors specifically in the area of employment (section 503); and opportunities, services, and employment provided directly by Federal agencies (section 501). Simply stated these sections provide that a covered entity may not discriminate against an individual with a handicap, on the basis of that handicap, unless the handicap renders the individual unqualified for the position or program in question. However, in the evaluation of the individual's qualifications, the entity must evaluate whether the handicap can be reasonably accommodated without undue hardship. The ADA would not amend Title V of the Rehabilitation Act, but extend prohibitions against discrimination on the basis of disability to the private sector. The rights and remedies

PR important  
Dear Callaghan  
available

in the ADA would exist independently of title V of the Rehabilitation Act and there would be no preemption

### Action and Activities in the Last Congress

In May, 1987, Chairman Major Owens of the Subcommittee on Select Education, appointed Justin Dart to chair a Task Force on the Rights and Empowerment of People with Disabilities. This task force had as its central purposes, the identification of the full range and magnitude of discrimination faced by people with disabilities and to develop grassroots support for legislation to overcome such discrimination.

Mr. Dart held hearings in every state, most territories, and in Puerto Rico. Over 9,000 people gave oral or written testimony on examples of discrimination and the need for comprehensive legislation. As a result, broad-based grassroots support for this legislation has been established.

The concept of the ADA was promoted by and the initial drafts prepared by the National Council on Disability, an independent Federal body whose members are appointed by the President. In addition, President Reagan's Commission on AIDS recommended that such protections as those offered in section 504 be made available to persons with AIDS.

*Resume  
here* In April, 1988, the Americans with Disabilities Act was introduced simultaneously in the House and Senate. The principal sponsors were Congressman Coelho and Senator Weicker. The House bill, H.R. 4498 (S. 2345), had 36 cosponsors on its first printing; selected Republican cosponsors included Representatives Conte, Jeffords, Morella, Schneider, and Shays; selected members of the Committee on Education and Labor included Representatives Owens, Clay, Ford of Michigan, Hayes, Solarz, Kildee, Sikorski, Weiss, and Williams.

A joint hearing was held on the bill by the House Subcommittee on Select Education and the Senate Committee on Labor and Human Resources on September 13, 1988. We will soon have a composite video tape of the hearing which was carried in full on C-SPAN.

### Concerns with H.R. 4498/S. 2345

Reactions to the ADA in the last Congress from the private sector and the Executive Branch were few and limited, though substantive. The principal reason for this reaction was that everyone was aware that passage was not the intent of the sponsors during the 100th Congress.

Although there were some general concerns about costs of compliance specifically in the area of barrier removal tied to architecture and transportation, most specific concerns were raised in the area of employment.

First, there was concern that a covered entity (employer) would have to be on the verge of bankruptcy before it would be relieved from the duty to accommodate.

Second, employers are thoroughly familiar with section 503 of the Rehabilitation Act and Title VII of the Civil Rights Act, both of which address employment, yet they were concerned that the ADA would create a third set of independent standards.

Third, handicap as defined in the bill, was so broadly construed, that even minor limitations (e.g. left-handedness), might force accommodation or result in a charge of discrimination.

Fourth, the bill would have allowed an individual who was discriminated against on the basis of handicap or **thought he/she was about to be** discriminated against, to pursue private cause of action.

A fifth major area of concern was that persons with AIDS would also be covered by the ADA. The Supreme Court, the Department of Justice, and President Reagan's Commission on AIDS have concurred that such persons are covered under section 504, if they can be reasonably accommodated without posing a direct threat to the health and safety of others.

Although there was not serious opposition raised to covering such persons in connection with the ADA, strong, serious opposition occurred during consideration of the Civil Rights Restoration Act and the Fair Housing Amendments (which included a prohibition against discrimination on the basis of handicap in the sale or rental of housing).

## Overview of the Current Proposal

We have been given two drafts thus far, which differ in some respects from the bill introduced in the last Congress, and from each other.

Attached is a brief comparison done by Nancy Jones with the CRS American Law Division of the bill introduced in the last Congress and the **first draft** we received. This overview addresses the **second draft** and identifies selected differences between it and the **first draft** we received in this Congress.

### *Purposes*

The purposes of the Act are to provide  
a clear and comprehensive mandate to end discrimination against  
people with disabilities,  
protection comparable to that afforded to other minorities;  
and enforceable standards addressing discrimination against  
individuals with disabilities.

### *Key Definition*

The term disability is defined to mean, with respect to an individual --  
a physical or mental impairment that **substantially limits** one or  
more of the major life activities;  
a record of such impairment; or  
**being regarded as having such an impairment.**

This is the same definition contained in section 504 of the Rehabilitation Act and the Fair Housing Amendments of 1988. Two comments --

first, the phrase "on the basis of handicap" and similar phrases used in section 504, the Fair Housing Amendments, and the first draft of the ADA circulated this Congress, have been replaced in the second draft of the ADA; in the second draft the phrase is **"on the basis of disability;"**

second, this change reflects the preferred term and should not be construed as a substantive change; and

third, the inclusion of "substantially limits" in the drafts circulated this year eliminates concerns about frivolous claims.

The definition section also includes definitions for "reasonable accommodation" and "auxillary aids and services."

Reasonable accommodation includes making facilities accessible and usable, job-restructuring, modified work schedules, reassignments, modification of equipment or devices, appropriate adjustments or modifications of examinations and training materials, adoption or modification of procedures or protocols, the provision of qualified readers or interpreters, and other similar modifications.

Auxiliary aids and services shall include qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments; qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments; acquisition or modification of equipment or devices, and other similar services and actions.

### *Title I General Prohibition Against Discrimination*

This title identifies a broad range of forms of discrimination on the basis of disability with regard to services, programs, activities, jobs, or other opportunities -- subject to the standards and procedures established in other titles -- it would be discriminatory to:

- deny an opportunity to participate;
- afford a person with a disability an opportunity to participate that is *not equal* to that afforded to others;
- afford an opportunity that is *less effective*;
- afford an opportunity to an individual or class of individuals with disabilities that is different or separate than that afforded to others, unless it is as effective;
- aiding an entity to perpetuate discrimination;
- denying participation on a board or commission;
- otherwise limiting an individual in the enjoyment of *any right, privilege, advantage or opportunity* enjoyed by others.

This title further clarifies these conditions by addressing the concepts of "equal opportunity" as an equal opportunity to obtain the *same* result, to gain the *same* benefit, or to reach the *same* level of achievement in the most integrated setting appropriate to the individual's needs. This title also clarifies prohibitions in terms of the use of administrative methods that have the effect of discrimination; that substantially impair the intended objectives of the opportunity for the person with the disability; or that perpetuate discrimination by others. The title addresses discrimination pertaining to relationships and associations of individuals with individuals with disabilities.

The title outlines the conditions which do not constitute discrimination. First, it would not be considered discrimination to exclude an individual with a disability, if the exclusion is unrelated to the disability.

Second, in the area of standards and criteria, exclusion of an individual with disability would be allowed if such standards or criteria were shown to be both necessary and substantially related to an individual's ability to perform or participate.

Third, qualification standards may include requiring that the current use of alcohol or drugs by an alcoholic or drug abuser **not pose a direct threat to property or the safety of others in the workplace or program.**

Fourth, qualification standards may include requiring that an individual *with a currently contagious disease or infection* not pose a direct threat to the health or safety of others in the workplace or program.

### ***Title II Employment***

This title defines a "qualified individual with a disability" as an individual who, with or without reasonable accommodation, can perform the essential functions of a job --either held or desired by that individual.

Discrimination under this title includes situations when a covered entity fails to make reasonable accommodations to the known limitations of an individual unless the entity can demonstrate that such an accommodation would constitute an undue hardship **(This addresses/alleviates the concern about the bankruptcy standard in the original bill introduced in the last Congress.)**

As in title I, the entity would have to show that standards and criteria for a job be necessary and substantially related to perform the essential functions of the job.

**Exempted entities include those who are -- covered by section 501(c) of the Internal Revenue Code (This includes corporations organized and operated for religious or charitable purposes.), elected officials, Indian Tribes, or entities who have less than 15 employees.**

This title incorporates by reference the remedies and procedures set out in sections 706, 709, and 710 of title VII of the Civil Right Act of 1964 ; section 1981 of the Civil Rights Act of 1866. Such remedies and procedures would be available to any individual who **believes that he or**

she is being or *about to be* subjected to discrimination on the basis of disability. Note that under section 1981, an individual has a private cause of action and may recover for compensatory damages\*such as pain and suffering. The individual may also pursue a cause of action through EEOC.

The 1988 version of ADA allowed for enforcement under section 505 of the Rehabilitation Act (injunctive relief and attorney's fees). The first draft circulated this Congress did not include section 505, did reference the 1866 statute, did reference title VII, **but not section 709 and 710 of title VII**. The authors of the current draft indicate that all remedies and procedures under these laws may only be used in cases of intentional discrimination (which is more difficult to prove) as distinguished from practices which are unintentional but have a disparate adverse impact on individuals with disabilities. This intended limitation is not directly apparent in the current draft of the ADA.

### *Title III Public Services*

In this title, a "qualified individual with a disability" means one who, with or without reasonable modifications to rules, policies, and practices, the removal of architectural, communication, or transportation barriers, or the provision of auxillary aids and services, meets the essential eligibility requirements for services from or participation in a program of a public agency.

Although broadly construed as the above suggests, most of this title addresses public transportation. **Such language does not limit coverage to public entities.**

This title covers a wide range of actions related to public transportation and reasonable accommodation/accessibility, including:

purchase or lease of new buses and rail vehicles (those purchased after 30 day of enactment must be accessible to and usable by individuals with disabilities);

\*Punitive damages are also recognized under section 1981.

purchase or lease of used vehicles (standard -- demonstrated good faith to acquire accessible vehicles, "**demonstrated**" was added in the second draft),

purchase or lease of remanufactured vehicles (new provision in second draft; standard -- to the maximum extent feasible vehicles with five-years of life should be made accessible);

operation of paratransit systems (standard -- it shall be considered discrimination for an entity which provides public transportation to **fail** to provide (first draft used "**refuse**") such a system as a supplement and comparable to that of the fixed route public transportation system),

operation of a community demand responsive system for the public (standard -- comparable to that available to the general public, in the first draft this standard **applied only to communities** which *exclusively* operated a demand system for the general public)

This title also deals with new facilities, alterations to existing facilities, existing facilities, rail systems, and key stations. The standards include

for new facilities -- readily accessible and usable by individuals with disabilities;

for alterations -- after one year of enactment, to the maximum extent feasible, the path to the altered area, bathrooms, telephones, and drinking fountains serving the remodeled area must be accessible;

existing facilities -- when viewed in their entirety are readily accessible and usable;

intercity, rapid, light, and commuter rail systems -- within five years (**in the first draft it was 10 years**) at least one car per train must be accessible;

key stations -- of any system shall be accessible within three years, but the Secretary of Transportation may extend the period of compliance for up to 20 years for extraordinarily expensive modifications.

For enforcement, the remedies and procedures (probably limited to injunctive relief and fees) of section 505 of the Rehabilitation Act would apply. An individual who believes he or she is being or about to be subjected to discrimination on the basis of disability, may access the protections in section 505.

Two key points -- in both drafts these requirements apply to newly covered entities under ADA *and those covered under section 504 of the Rehabilitation Act*; and the second draft replaces "refuse to" to "fail to" which would appear to make it easier to prove discrimination since this would appear to eliminate the requirement for proving intent.

*Title IV Public Accommodations and Services Operated  
by  
Private Entities*

This title defines several terms broadly --

**Commerce** -- means travel, trade, traffic, commerce, or communication among the States....

**Public accommodation** -- means privately operated establishments that are used by the general public... and are potential places of employment, including auditoriums, convention centers, stadiums, theaters, restaurants, shopping centers, inns, hotels, motels (except for those covered by section 201(b)(1) of the Civil Rights Act of 1964; e.g., those with less than five rooms), terminals, gas stations, sales establishments, professional offices of health care providers, office buildings, personal and public service buildings, private schools, parks and recreational facilities.

**Public transportation** -- defined as in title III

The title states that no individual shall be discriminated against in the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation, on the basis of disability.

Discrimination includes --

**the imposition of eligibility criteria that *identify or limit* or *tend to identify or limit*, an individual with a disability or a class of such individuals from fully and equally enjoying...**

**the failure to make reasonable accommodations unless it would fundamentally alter the nature of privileges, advantages....**

**the failure to ensure no exclusion, segregation, or different treatment, unless such would result in an undue burden,**

**the failure to remove architectural, communication, and transportation barriers, where such removal is readily achievable (if such a standard can not be achieved, an alternative must be offered to avoid discrimination);**

**with respect to a facility, to the maximum extent feasible, the failure to make it or its altered part accessible and usable within one year of enactment (New facilities built 30 months after enactment shall be accessible, unless the covered entity can demonstrate that it is structurally impracticable to do so.);**

with respect to transportation, the failure to provide transportation equivalent to the general public; and in the case of vehicles that carry 12 or more individuals, purchased after 30 months of enactment, that are accessible and usable by individuals with disabilities.

This title also includes a separate section on prohibition of discrimination in public transportation provided by private entities that appears to restate some previous requirements, and is therefore partially redundant. Given the broad construction of this title and the specific references to public transportation in this title and in title III, it would seem unnecessary and possibly confusing.

This title, like title III, replaces *"refuse to"* in the first draft with *"fail to,"* in the second draft, and would appear to allow discrimination charges on effects of, as well as intent to, discriminate. Selected enforcement provisions in the Fair Housing Act would apply to this title. They represent a very broad and permissive basis for discrimination charges.

#### *Title V Telecommunication Relay Services*

This title defines -- Telecommunications Relay Services -- as services that enable simultaneous communication to take place between individuals who use nonvoice terminal devices (like a telecommunication device for the deaf --TDD) and individuals who do not use such devices.

The title states that it shall be considered discrimination for any common carrier (as defined in section 3(h) of the Communications Act of 1934), that offers telephone service to the general public, *to refuse (not changed in second draft)* to provide, not later than one year after enactment, interstate and intrastate telecommunication relay services.

Enforcement provisions reference provisions in the Fair Housing Act (in the case of charges brought by an individual), and for purposes of administrative enforcement, various provisions in the Communications Act of 1934, access to cease and desist orders, and the requirement that each violation of this title shall be construed as a separate offense.

## Recommendations

The most likely concerns, reservations, and bases for changing the proposed legislation are the following

First, a major concern may be the use of multiple remedies and procedures within titles with no preemption, and the use of different remedies and procedures across titles. A possible solution would be to adopt the remedies and procedures of title V of the Rehabilitation Act for all titles or at least as applicable to private sector employment. (It should be noted that the procedures and remedies of sections 503 and 504 of the Rehabilitation Act are different; e.g., section 503 has no private cause of action, whereas section 504 does, and allowable damages also differ under these two sections.) Further, in provisions pertaining to compensatory damages, the conditions, limits, and nature of such damages should be clearly defined in the ADA\*.

The second concern may be making the standard for discrimination "failure," rather than "refusal." If the intent of the legislation is to encourage access for individuals with disabilities, the public and private sector must first be educated. The use of "refusal" as the standard, requires proving conscious intent to discriminate not just demonstrating that an action has the effect of discrimination. The "failure" standard could be applied later after the public and private sectors have had experience with and have been educated about the prohibition of discrimination on the basis of disability.

The third concern is that the draft bill speaks in terms of absolute equality in both process and results. Since a disability may have a varying impact on an individual's ability to perform or participate, even with reasonable accommodation, a standard such as similarity or comparability may be more appropriate.

Two provisions warrant clarification. First, what is the practical effect of an individual charging discrimination when that individual **believes he/she is *about to be* discriminated against on the basis of disability?** What does this concept mean? How would it be proved or disproved?

\*Elimination of punitive and compensatory damages altogether may be appropriate, bringing the remedy provisions more in line with other labor statutes.

Second, what is the effect of including the section 504 Rehabilitation Act under the coverage of title III of the ADA?

One element of the employment title may warrant a phase-in approach. It may be appropriate, for the first three years following enactment, to have the employment provisions apply to employers with 50 or more employees, and then after that period to have it apply to employers with 35 or more employees. (These are the current restrictions in the Family Leave legislation.) As mentioned previously, in the ADA draft an exemption to coverage applies to employers with less than 15 employees.

Finally, the provisions pertaining to transportation and public transportation, as drafted, are confusing in terms of their varied placements, varying discrimination standards, and applications of differing remedies and procedures, and should be redrafted to be more clear, consolidated, and consistent.



Washington, D.C. 20540

Congressional Research Service  
The Library of Congress

March 22, 1989

TO: House Education and Labor  
Attention: Pat Morrissey

FROM: American Law Division

SUBJECT: Analysis of Draft Version of the Americans with Disabilities Act  
of 1989

This memorandum is furnished in response to your rush request for an analysis of a draft version of the Americans with Disabilities Act of 1989 (hereafter cited as draft bill). You were particularly interested in comparing the draft bill with the Americans with Disabilities Act of 1988, H.R. 4498 and S. 2345, from the 100th Congress. For convenience, these identical bills will be referred to as H.R. 4498.

The Americans with Disabilities Act originated with a proposal from the National Council on the Handicapped<sup>1</sup> to establish a comprehensive nationwide prohibition against discrimination on the basis of handicap. Although federal legislation, section 504 of the Rehabilitation Act of 1973, 29 U.S.C. sec. 794, already exists concerning discrimination against individuals with handicaps, the existing law is limited to programs or activities receiving federal financial assistance, executive agencies, or the U.S. Postal Service. Both the draft bill and H.R. 4498 would provide broader coverage than section 504 since they would cover the private sector as well. However, there are significant differences between the two pieces of legislation. Due to time constraints, this memorandum will be limited to a brief discussion of several of the major distinctions.

OVERVIEW OF THE LEGISLATION

First, it is helpful to look at the forms of the legislation. H.R. 4498 has two central sections, sections 4 and 5 which contain the general prohibitions of discrimination. Section 4 of H.R. 4498 discusses the scope of discrimination prohibited and provides that no person shall be subjected to discrimination on

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<sup>1</sup> The National Council on the Handicapped is an independent federal agency. Its statutory functions include providing recommendations regarding individuals with handicaps to the Congress.

the basis of handicap in employment, the sale or rental of housing, public accommodations covered by title II of the Civil Rights Act of 1964, transportation services, the action, practices and operations of a State or its political subdivision, or broadcasts, communications or telecommunications services. Section 5 of H.R. 4498 discusses the forms of discrimination prohibited and describes certain acts and omissions that constitute discrimination on the basis of handicap. These provisions parallel requirements contained in the regulations under section 504.<sup>2</sup> The draft bill, in contrast, does not contain a section comparable to section 4 but does contain a section parallel to section 5 of H.R. 4498.

H.R. 4498 contains a specific section on housing, a section discussing the limitations on the duties of accommodation and barrier removal, a section on regulations which contains specific guidance relating to such subjects as transportation and communications, and a section on enforcement. The structure of the draft bill is quite different. It contains specific sections on employment and telecommunications relay services and divides the other requirements into two categories: one relating to public services and one relating to public accommodations and services operated by private entities. The requirements for public accommodations and services operated by private entities are generally less stringent than those imposed on the public sector. Both H.R. 4498 and the draft bill contain similar statements of findings and purposes and contain differing sections describing the relationship of the new legislation to section 504. They both also contain definitions sections which have some significant differences. Having examined the structure of the two pieces of legislation, several of the specific distinctions between the bills will now be analyzed.

#### DEFINITIONS

One of the major distinctions between the bills is found in the definitions section. H.R. 4498 defines the terms "on the basis of handicap," "physical or mental impairment," "perceived impairment," "record of impairment," and "reasonable accommodation." The draft bill, on the other hand, only contains general definitions of "handicap," and "state."<sup>3</sup> The draft bill's exclusion of the majority of terms defined in H.R. 4498 is probably not of critical importance since those terms are those defined in the regulations under section 504 and the general definition of "handicap" used in the draft bill is like that applicable to section 504. Therefore, it would be likely that the regulatory definitions of the terms used in the general definition of "handicap" under section 504

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<sup>2</sup> See e.g., 28 C.F.R. sec. 41.51.

<sup>3</sup> Other definitions which are applicable only to particular titles of the legislation are found elsewhere in the draft bill. For example, title IV of the draft bill, public accommodations and services operated by private entities contains definitions of "commerce," "mass transportation," and "public accommodation."

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would also be used in defining the same language in the draft bill thus rendering their inclusion in statutory language unnecessary.

A more significant distinction regarding the definitions is the fact that the draft bill, in using the definition applicable to section 504, includes the phrase "substantially limits." For the purposes of the draft bill, the term handicap is defined in part as "a physical or mental impairment that substantially limits one or more of the major life activities of such individuals...." H.R. 4498, in contrast, defines the term "on the basis of handicap" as meaning "because of a physical or mental impairment, perceived impairment, or record of impairment." The definition in H.R. 4498 is arguably broader and could include minor, common conditions such as left-handedness.

#### GENERAL PROVISIONS ON DISCRIMINATION

Although the general sections relating to the forms of discrimination prohibited are similar in the two bills, there are some potentially significant distinctions. The draft bill deletes the section that was contained in H.R. 4498 providing that it will be discriminatory to establish or impose or to fail or refuse to remove any architectural, transportation or communication barriers. Arguably this would be covered by the more general statements in the draft bill and the more specific references in the draft bill's subsequent sections dealing with transportation and communications. The draft bill adds a section not contained in H.R. 4498 concerning qualification standards which allows such standards to include requiring that the current use of alcohol or drugs not pose a direct threat to property or the safety of others in the workplace or program and that an individual with a currently contagious disease or infection not pose a direct threat to the health or safety of other individuals in the workplace or program. This section is similar to amendments which have been made to the definitions section applicable to section 504<sup>4</sup> and thus would most likely be included in the interpretation of H.R. 4498 even in the absence of specific language since the general language of H.R. 4498 is similar to that of section 504. However, the draft bill's version is broader in that it includes programs whereas the section 504 definition refers only to employment. The addition of the section adds clarity but probably does not change what would be applicable statutory requirements in its absence.<sup>5</sup>

#### EMPLOYMENT

Both the draft bill and H.R. 4498 would prohibit employment discrimination but there are significant differences in the way in which this is done. Generally, the draft bill contains less stringent requirements than H.R. 4498. The draft bill specifically exempts bona fide private membership

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<sup>4</sup> 29 U.S.C. sec. 706(8).

<sup>5</sup> See *School Board of Nassau County v. Arline*, 94 L.Ed.2d 307 (1987).

clubs from coverage, and does not contain specific provisions found in H.R. 4498 concerning preemployment inquiries, affirmative action, and confidentiality. Some of these specific provisions found in H.R. 4498, such as the provision on preemployment inquiries could arguably be required under the draft bill as well due to the general language prohibiting employment discrimination. However, it is unlikely that a court would read in the affirmative action requirement of H.R. 4498 from the general language of the draft bill.

Both the draft bill and H.R. 4498 limit the nondiscrimination requirements of accommodation but do so in differing ways. The draft bill does not require accommodation if such accommodation would impose an undue hardship on the operation of a business while H.R. 4498 would not require accommodation if it would fundamentally alter the essential nature, or threaten the existence of, the program, activity, business, or facility in question.<sup>6</sup> The undue hardship language is similar to that used by the Supreme Court in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), and subsequently placed in regulation. These regulations state that a recipient must make reasonable accommodation for an otherwise qualified handicapped applicant or employee "unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program."<sup>7</sup> The fundamental alterations language is more closely akin to the Supreme Court's discussion of section 504's requirements in *Alexander v. Choate*, 469 U.S. 287 (1985). There the Court found that "while a grantee need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped it may be required to make 'reasonable' ones." It could be argued, however, that the language in H.R. 4498 is more expansive than the requirement articulated by the Court.

It is interesting to compare the possible substantive differences between the language of the draft bill (undue burdens) and the language used by the Court in *Alexander v. Choate* (fundamental or substantial modifications). In a recent third circuit case, *ADAPT v. Burnley*, No. 96-2989 (3d Cir. Feb. 13, 1989), the court discussed the meaning of accommodation in the context of transportation and found that ordering newly purchased buses to be accessible to the mobility-disabled was not a fundamental alteration and did not create an undue financial or administrative burden. The *ADAPT* court did not specifically attempt to distinguish between these two phrases but rather read them together as part of the section 504 nondiscrimination mandate. It could be argued that since the draft bill's language in the general prohibition against discrimination parallels the section 504 regulatory language and the draft bill's language on accommodation also parallels the undue burden language used in section 504 jurisprudence, it would be likely that section 504 interpretation generally would apply. In other words, it is likely that a court

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<sup>6</sup> H.R. 4498, sec. 7(a).

<sup>7</sup> 28 C.F.R. sec. 41.53.

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interpreting the draft bill would look for guidance to cases such as *ADAPT* and utilize the concept of fundamental or substantial alterations in conjunction with the concept of undue burden. However, it should be emphasized that the language in H.R. 4498 was arguably more expansive than the interpretations under section 504 so that the change in the draft bill would most likely bring the draft bill into conformity with section 504 but would make it less stringent than H.R. 4498.

TRANSPORTATION

Both H.R. 4498 and the draft bill would mandate transportation accessibility but the requirements of the draft bill would appear to provide less coverage than H.R. 4498. First, the draft bill divides the coverage of transportation accessibility into two categories, public and private, and transportation services run by private entities would appear to have fewer standards applicable to them. There is no such division of requirements in H.R. 4498. The draft bill only requires a good faith effort to locate accessible used vehicles while H.R. 4498 contains no such exception for used vehicles. The time limitations on accessibility requirements also vary. The draft bill requires public transportation to make all structural changes required by the bill within 10 years with regard to intercity, rapid and light rail vehicles, 5 years with regard to commuter rail, and 3 years with regard to key stations, although this time limit for key stations could be extended by the Secretary of Transportation for up to 20 years for extraordinarily expensive structural changes or replacements. H.R. 4498 requires that all vehicles purchased or placed into service later than one year after enactment shall be accessible and that within a reasonable amount of time, not to exceed 7 years, the peak fleet must have 50% of vehicles and rolling stock accessible.

PUBLIC ACCOMMODATIONS

Section four of H.R. 4498 concerns the scope of discrimination, and specifically prohibits discrimination in public accommodations to the same extent that such discrimination is covered by title II of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000a. The draft bill does not contain a section parallel to section 4 of H.R. 4498 but it does prohibit discrimination in public accommodations in its title IV and contains a general provision parallel to that of title II of the Civil Rights Act of 1964. However, the draft bill also contains a section construing the general prohibition on discrimination in public accommodations which limits the general prohibition. For example, the draft bill would prohibit segregation of persons with disabilities because of the absence of auxiliary aids and services "unless the entity can demonstrate that taking such steps would result in undue burden (sic)."<sup>8</sup> In addition, the draft

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<sup>8</sup> Draft bill, section 402(b)(1)(C).

bill would require the removal of architectural and communication barriers "where such removal is readily achievable."<sup>9</sup>

### COMMUNICATIONS

Discrimination in communications is prohibited in the draft bill and in H.R. 4498 but they do so in different ways. H.R. 4498 specifically includes broadcasts, communications, or telecommunications in its section 4 on the scope of discrimination prohibited. The draft bill contains no similar section but both bills contain sections on forms of discrimination which could arguably cover communications. In addition, H.R. 4498 provides for regulations to be used by the Federal Communications Commission requiring the prohibition or removal of communication barriers and for making reasonable accommodations. In addition, H.R. 4498 requires these regulations to include requirements for progressively increasing the proportion of programs, advertisements, and announcements that are captioned. The draft bill, in addition to the general section, contains a title V specifically on telecommunications relay services. The draft bill contains no specific section on captioning.

### SECTION 504

Both the draft bill and H.R. 4498 draw heavily on section 504 jurisprudence for their general concepts and, in some places, specific language. Therefore, the question of the relationship between these bills and section 504 has been an important issue under both pieces of legislation. H.R. 4498 contains a specific section providing that "[n]othing in this Act shall be construed to affect or change the nondiscrimination provisions contained in title V of the Rehabilitation Act...."<sup>10</sup> This language raises the issue of whether, in a situation where both section 504 and the ADA would apply, the proposed legislation would preclude any change in section 504 coverage, even a change which might broaden the protections against discrimination. The draft bill contains a similar section but is drafted so as to avoid this issue. The draft bill provides that "[n]othing in this Act shall be construed to reduce the scope of coverage or apply a lesser standard than the coverage required or the standards applied under title V of the Rehabilitation Act...."<sup>11</sup> In addition, the draft bill, in several places contains specific references to section 504 which could be interpreted as changing the coverage of the section. For example, the draft bill at section 303(b) concerning discrimination in mass transportation provides that it shall be considered discriminatory for the purposes of the act and section 504 of the Rehabilitation Act for an

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<sup>9</sup> Draft bill sec. 402(b)(1)(D)(i).

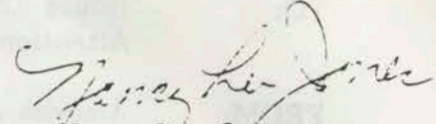
<sup>10</sup> H.R. 4498, sec. 4(b)(1).

<sup>11</sup> Draft bill, sec. 601(a). It should be noted that both bills contain parallel language relating to other federal, state or local laws.

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individual or entity to purchase or lease certain vehicles if they are not readily accessible. Arguably, this provision and others could be interpreted as expanding the existing coverage of section 504 although many of the provisions may be consistent with section 504 as interpreted by courts such as in ADAPT.

We hope this information has been useful to you. If you need further information, please call us.

  
Nancy Lee Jones  
Legislative Attorney



Washington, D.C. 20540

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March 28, 1989

TO: House Education and Labor  
Attention: Pat Morrissey

FROM: American Law Division

SUBJECT: Questions on Draft Americans with Disabilities Act Bill

The enclosed list contains questions, prepared at your request, which could be posed to the drafters of the proposed Americans with Disabilities Act (ADA). We hope this is useful to you.

  
Nancy Lee Jones  
Legislative Attorney

## QUESTIONS ON THE DRAFT AMERICANS WITH DISABILITIES BILL

1. The ADA version introduced last Congress contained several general definitions of terms such as "reasonable accommodation," and "physical and mental impairment." These are not included in the general section in the draft bill, although "reasonable accommodation" is defined for the purposes of employment. What difference did you intend by not including these terms in a general definition section?

2. The coverage of employment in the draft bill contains an exception for a "bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986." What would be some examples of the types of organizations excluded?

3. In section 205 of the draft bill, the remedies, and procedures of sections 706 and 707 of the Civil Rights Act of 1964 and the remedies and procedures of 42 U.S.C. sec. 1981 and made available to individuals who believe that they are being discriminated against in violation of any provision of the act. What are the differences you intended by including this language rather than the language in the ADA version from last Congress? Section 305 of the draft bill provides that the remedies, procedures and rights set forth in section 505 of the Rehabilitation Act shall be similarly available. What is the relationship between sections 205 and 305 of the draft bill and what was your rationale for inclusion of both provisions?

4. Section 303 of the draft bill contains a general rule providing that it shall be considered discriminatory for the purposes of the act and section 504 to purchase certain vehicles if they are not accessible. To what extent would this language, and similar language in other sections of the bill, change the present interpretation of section 504?

5. What is the relationship in the draft bill regarding mass transportation accessibility and paratransit?

6. Title III of the draft bill covers public services while title IV covers public accommodations and services operated by private entities. What are the differences in applicable discrimination standards in these sections?

7. Section 405 of the draft bill discusses enforcement mechanisms and applies various sections of the Fair Housing Act. What is the scope of this enforcement coverage and can you include some examples of situations which might be covered by the exception contained in section 405.

8. Title V of the draft bill covers telecommunications relay services while the bill from the 100th Congress covered communication more generally. What are the precise distinctions in coverage between the draft bill and H.R. 4498? Would the general provisions relating to discrimination contained in title I of the draft bill essentially cover the more general forms of

communication discrimination that were more specifically delineated in the bill from the 100th Congress?

1. The ADA section introduced in Congress contained several provisions of broad scope to "prohibit discrimination" and "ensure equal opportunity." These provisions were included in the bill in the form of a "general prohibition" which is defined for the purpose of employment. When differences are not covered by the bill, there is a general prohibition against discrimination.

2. The scope of the bill in the draft bill contains an exception for a "small business" which is defined as a business with fewer than 25 employees. This exception is contained in the bill in the form of a "small business" exception which is defined for the purpose of employment. When differences are not covered by the bill, there is a general prohibition against discrimination.

3. In section 505 of the bill, the bill contains a provision of broad scope to "prohibit discrimination" and "ensure equal opportunity." These provisions were included in the bill in the form of a "general prohibition" which is defined for the purpose of employment. When differences are not covered by the bill, there is a general prohibition against discrimination.

4. Section 505 of the bill contains a provision of broad scope to "prohibit discrimination" and "ensure equal opportunity." These provisions were included in the bill in the form of a "general prohibition" which is defined for the purpose of employment. When differences are not covered by the bill, there is a general prohibition against discrimination.

5. Section 505 of the bill contains a provision of broad scope to "prohibit discrimination" and "ensure equal opportunity." These provisions were included in the bill in the form of a "general prohibition" which is defined for the purpose of employment. When differences are not covered by the bill, there is a general prohibition against discrimination.

6. Section 505 of the bill contains a provision of broad scope to "prohibit discrimination" and "ensure equal opportunity." These provisions were included in the bill in the form of a "general prohibition" which is defined for the purpose of employment. When differences are not covered by the bill, there is a general prohibition against discrimination.

7. Section 505 of the bill contains a provision of broad scope to "prohibit discrimination" and "ensure equal opportunity." These provisions were included in the bill in the form of a "general prohibition" which is defined for the purpose of employment. When differences are not covered by the bill, there is a general prohibition against discrimination.

8. Section 505 of the bill contains a provision of broad scope to "prohibit discrimination" and "ensure equal opportunity." These provisions were included in the bill in the form of a "general prohibition" which is defined for the purpose of employment. When differences are not covered by the bill, there is a general prohibition against discrimination.

*from the office of*

# *Senator Edward M. Kennedy*

## *of Massachusetts*

STATEMENT OF SENATOR EDWARD M. KENNEDY AT ADA HEARING  
JUNE 22, 1989

Today, this committee is holding the fourth and final hearing on the Americans with Disabilities Act.

We are pleased to welcome two distinguished witnesses this morning - Attorney General Dick Thornburgh, who will present the views of the Administration on the bill, and former Senator Lowell Weicker, a tireless champion for people with disabilities and the original sponsor of the Americans with Disabilities Act.

The Americans with Disabilities Act is comprehensive legislation to eliminate barriers that prevent disabled individuals in our society from fully participating in all aspects of American life and to prohibit segregation and discrimination against people with disabilities. The simple justice embodied in this bill is too long overdue for the 43 million disabled Americans whose lives are limited, not by their impairments, but by prejudice, fear and misinformation on the part of non-disabled persons.

I know that President Bush shares my commitment to integrating disabled Americans into the mainstream of our society. On January 18, 1989, President elect George Bush pledged "action on the Americans with Disabilities Act in order, in simple fairness, to provide the disabled with the same rights ... afforded other minorities."

The ADA is carefully crafted to give disabled persons the same protections from discrimination that apply to racial minorities - no more, no less. It protects the same people that are currently protected by section 504 of the Rehabilitation Act of 1973 from discrimination by recipients of federal aid.

In the area of employment, the ADA parallels the scope of Title VII of the Civil Rights Act, and provides the same remedies that are available to minorities who suffer employment discrimination. The ADA incorporates the principle in section 504 of the Rehabilitation Act of 1973 that otherwise qualified disabled workers are entitled to reasonable accommodations, unless such accommodation would be an undue hardship on the employer. Undue hardship is a flexible concept which takes into account the size of the business and assures that the ADA will not adversely affect small businesses. In 1986, this nation spent \$169 billion to keep disabled persons dependent, yet 66% of working age disabled persons say they would like to work. We cannot afford to deny job opportunities to these people.

In the area of public accommodations, the ADA extends to the disabled the protections given to minorities by section 1981 and Title II of the 1964 Civil Rights Act. The public accommodations provisions are critical to mainstreaming disabled persons. They guarantee access to doctors' offices, supermarkets, dry cleaners, and shopping malls, as well as movie theaters and restaurants. People with disabilities cannot fully participate in our society if they can't buy groceries and take their children to the dentist. The principle in the ADA is simple - if an establishment is open to the public, it should welcome the disabled as members of the public.

With the exception of transportation, in the area of public services, the ADA simply extends the protections of section 504 to those governmental entities that are not covered by section 504. Our experience under section 504 demonstrates that its requirements have not been burdensome. Accessible transportation is the lynchpin for

integration of the disabled. It does little good to open the doors of institutions, to provide rehabilitation and early intervention programs, if the disabled cannot even leave their homes and move freely in society.

The ADA focuses on the future and adheres to the basic principle of non-discrimination and integration in public and private transportation services. It is not equality to make local public transportation accessible so that disabled individuals can get to work, but deny them the recreation and travel opportunities offered by private interstate transportation.

In the area of telephone communications, the ADA requires that special operators be available to assist the hearing impaired.

In the area of remedies, the ADA provides enforcement schemes tailored to the kinds of discrimination prohibited and comparable to the remedies available to minorities for civil rights violations. In the twenty years after the Fair Housing Act was passed in 1968, we learned the hard lesson that a right without a remedy is a hollow promise. Finally, last year Congress put teeth into the enforcement provisions of the Fair Housing Act and prohibited discrimination against the disabled in housing. We have incorporated some of the consensus enforcement provisions of the new Fair Housing Act into the ADA.

I have taken the time this morning to highlight the key principles of the ADA because it consists of a very carefully crafted set of provisions that are necessary to give disabled Americans protection from discrimination that is comparable to other minorities and to allow them to become full participants in our society. I look forward to working with the Administration to enact the Americans with Disabilities Act.

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