Bob Silverstein

TESTIMONY OF

HAROLD C. JENKINS

GENERAL MANAGER

CAMBRIA COUNTY TRANSIT AUTHORITY

JOHNSTOWN, PENNSYLVANIA

BEFORE THE

SUBCOMMITTEE ON THE HANDICAPPED

MAY 16, 1989

Thank you, Mr. Chairman, and good afternoon. My name is Harold Jenkins and I'm the general manager of the Cambria County Transit Authority headquartered in Johnstown, Pennsylvania.

I've been asked to testify before this Committee this afternoon in support of the Americans With Disabilities Act of 1989. My support is based primarily upon our experiences in Cambria County with operating an urban transit system which is 100% accessible to those persons confined to wheelchairs. We've been operating a totally accessible transit system since 1983.

I want to emphasize from the outset that an accessible transportation system will only be as successful as the commitment behind the decision to provide accessible transit. I believe from our experience that unless management is firmly committed to the laudable goal of accessibility, persons with handicaps stand to be shortchanged somewhere along the line. Let me explain what I mean.

The very nature of physical disabilities contributes to the discrimination problems which exist with respect to individuals with handicaps. Many people are uncomfortable in dealing with those who are "different". This pattern has contributed immensely to the reluctance of many persons with handicaps to venture out into society in an attempt to join the

mainstream. Consequently, if their fears are met by a transit system which is not seriously committed to providing reliable and safe accessible transit, their fears will only be compounded and the discrimination perpetuated.

In Cambria County, we made a commitment from the beginning to provide the best possible accessible system. We believed that only with this degree of commitment would we be able to overcome the built-in reluctance of many persons with disabilities, especially those in wheelchairs, to use accessible transit. Let me outline some of the steps we took which go beyond the simple provision of wheelchairs lifts.

From the beginning, we realized the importance of selling the concept of fixed-route accessible transit to potential users. I emphasized the word "selling" for the reasons previously mentioned. Many folks in our community with disabilities where reluctant to utilize an un-tested form of public transit. Therefore, we had to "sell" it. These efforts took many forms.

We initially conducted public demonstrations of the accessibility features of the bus. The local media provided extensive coverage, a vital consideration in any public awareness program. Concurrent with the bus demonstrations, we inaugurated a program to contact all the organizations in the community who worked with persons with handicaps. A very

detailed slide show was prepared and presented to these groups, showing every step involved in the boarding and exiting of the bus. We prepared a special publication which highlighted the accessibility components of the bus and the sequence of steps involved in using the vehicles. Thousands of these brochures were distributed throughout the community. All these efforts helped to assure the passenger with a handicap that public transportation can be a safe and reliable means of transportation.

As a result of our educational efforts, we carried an average of 200 passengers in wheelchairs a month during the first eleven months of operation in 1980. That's 200 a month with only seven accessible buses. By 1983, our entire fleet of 27 buses was accessible, with the result that we now carry over 3000 passengers in wheelchairs each year. In addition, we annually transport about 36,000 passengers with other disabilities. And, we carry this number despite our inclement weather and hilly terrain. Why? Commitment. A strong commitment to quality transit.

Another important component of our program has been driver training. In addition to receiving basic training in lift operation, all operators receive intensive sensitivity training. Drivers complete a comprehensive course consisting of films, wheelchair familiarity, boarding procedures, securement, and emergency evacuation. Drivers also spend a portion of their training period confined to a wheelchair in order to enhance their sensitivity to the various needs and

feelings of passengers with disabilities. Annual refresher courses are also provided.

Another vital component of our program is wheelchair lift maintenance. There is no worse experience for a passenger in a wheelchair than to arrive at a bus stop expecting an accessible bus, only to find that the lift doesn't work. A quality maintenance program is critical. Drivers are also required, by union contract, to cycle their lift prior to beginning their work day. This procedure has benefits for the mechanical components of the lift. It also assures the operator that he or she has a functioning lift. If it doesn't operate properly, the operator is prohibited from leaving the garage with that bus.

All these steps I've just discussed go beyond the letter of the law. But without them, we believe an accessible system will be doomed to failure.

Finally, let me briefly touch upon several objections to accessibility which are frequently raised.

One objection concerns costs. The cost of the lift and its maintenance. We are in public transit to provide transit to the public. It's that simple. Persons with handicaps are members of the public. Therefore, we view the costs of equipping and maintaining buses with lifts as we do our other

expenses. It's the cost of doing business. But, our experience demonstrates that once an honest commitment is made to provide quality accessible service, maintenance costs can be controlled. Our maintenance history over the past nine years has confirmed this point.

With respect to lift costs, the cost per lift will go down as lift utilization increases. And lift utilization will increase as the degree of commitment and quality of service increases. It's the old "as you sow, so shall you reap" aphorism.

Another objection centers on the slowing down of the system due to the extra time it takes to load and unload passengers in wheelchairs. We initially conducted time studies to document this fear. But, after six months, we discontinued the study because the time factor was seen as insignificant. We have carried about 15,000 passengers in wheelchairs since 1980 and have never received one complaint from ambulatory passengers about time delays due to wheelchair transport.

Another objection sites problems with unions. When a transit system makes an honest commitment from the outset to establish a credible accessible system, union problems will not exist. But, if the union senses that management's commitment is lackluster, the door may be opened for problems. As I said before, our union contract actually requires operators to cycle their lifts prior to their shift. This was an easy clause to

get into the contract because the union understands the degree of management commitment. The special training received by operators also reinforces this commitment.

Finally, I want to state our contention that the establishment of a quality accessible fixed route system will often negate the need for a call and demand system to be simultaneously operated in the community. If the accessible system is developed and sold correctly, most individuals can avail themselves of the fixed route system. The existing non-profit social services can usually fill in the gaps which exist. But, to be required to operate both types of systems would be an unwarranted financial hardship, especially in this ers of steadily declining federal revenues.

Thank you very much for this opportunity to present Cambria County's experiences. If you have any questions, I'll be happy to answer them.

STATEMENT OF THE

AMERICAN PUBLIC TRANSIT ASSOCIATION

BEFORE THE

SUBCOMMITTEE ON HANDICAPPED

OF THE

LABOR AND HUMAN RESOURCES COMMITTEE

UNITED STATES SENATE

HONORABLE TOM HARKIN, CHAIRMAN

MAY 16, 1989

430 DIRKSEN SENATE OFFICE BUILDING

WASHINGTON, D.C.

American Public Transit Association
1201 New York Avenue, N.W.
Suite 400
Washington, DC 20005

TESTIMONY OF DENNIS D. LOUWERSE

AMERICAN PUBLIC TRANSIT ASSOCIATION

GOOD AFTERNOON MR. CHAIRMAN, MY NAME IS DENNIS LOUWERSE. I AM THE EXECUTIVE DIRECTOR OF THE BERKS AREA READING TRANSPORTATION AUTHORITY IN READING, PENNSYLVANIA. I APPRECIATE THE OPPORTUNITY TO APPEAR BEFORE THE SUBCOMMITTEE THIS AFTERNOON ON BEHALF OF THE AMERICAN PUBLIC TRANSIT ASSOCIATION (APTA). APTA IS A NON-PROFIT ORGANIZATION REPRESENTING LOCAL MASS TRANSIT SYSTEMS. APTA'S MEMBERS INCLUDE OVER 400 NORTH AMERICAN PUBLIC AND PRIVATE MASS TRANSIT SYSTEMS, WHICH CARRY OVER 95 PERCENT OF THE PERSONS USING PUBLIC TRANSIT IN THE UNITED STATES; AND OVER 430 MANUFACTURERS, CONSULTANTS, ACADEMIC INSTITUTIONS AND GOVERNMENT AGENCIES INVOLVED IN THE MASS TRANSIT INDUSTRY.

IN ADDITION TO SERVING AS THE EXECUTIVE DIRECTOR OF THE TRANSIT SYSTEM IN READING, PENNSYLVANIA, I SERVE ON APTA'S ELDERLY AND DISABLED PERSONS SERVICES TASK FORCE. THIS TASK FORCE, WHICH WAS CREATED TO ENSURE THAT THE TRANSIT INDUSTRY CONTINUES TO MEET ITS OBLIGATIONS TO THE ELDERLY AND PERSONS WITH DISABILITIES, HAS THE FOLLOWING OBJECTIVES:

- ON AN ON-GOING BASIS, TO SURVEY THE STATUS OF THE TRANSIT INDUSTRY'S SERVICE, POLICIES, AND PRACTICES REGARDING TRANSIT SERVICE TO THE ELDERLY AND PERSONS WITH DISABILITIES, AND TO MAKE RECOMMENDATIONS, AS APPROPRIATE.

- TO REVIEW THE IMPLEMENTATION OF THE U.S. DEPARTMENT OF TRANSPORTATION'S REGULATIONS GOVERNING MASS TRANSPORTATION SERVICES FOR DISABLED PERSONS.

- TO INTERFACE WITH RESPONSIBLE NATIONAL ORGANIZATIONS REPRESENTING ELDERLY AND DISABLED PERSONS IN ORDER TO EXCHANGE INFORMATION AND VIEWS ON THE PROVISION OF PUBLIC TRANSPORTATION AFFECTING THESE IMPORTANT CLIENTS OF THE PUBLIC TRANSIT INDUSTRY.

APTA AND THE TRANSIT INDUSTRY HAVE CONSISTENTLY RECOGNIZED THAT PROVIDING FOR THE MOBILITY NEEDS OF OUR NATION'S CITIZEN WHO ARE ELDERLY AND DISABLED IS A MAJOR OBJECTIVE AND CHALLENGE FOR PUBLIC TRANSIT SYSTEMS ACROSS THE COUNTRY. MEETING THE CHALLENGE OVER THE PAST FEW YEARS HAS BEEN MADE MUCH MORE DIFFICULT BECAUSE WE HAVE EXPERIENCED A DRASTIC REDUCTION IN THE FEDERAL TRANSIT PROGRAM OF MORE THAN 50% IN REAL DOLLARS. STILL DEEPER CUTS HAVE BEEN PROPOSED BY THE ADMINISTRATION IN THE FY 90 BUDGET WHICH, IF ADOPTED, WOULD FORCE MAJOR SERVICE CUTBACKS FOR ALL CITIZENS INCLUDING THE ELDERLY AND PERSONS WITH DISABILITIES.

OUR CURRENT INDUSTRY POLICY, WHICH IS NOW UNDER REVIEW BY APTA'S TASK FORCE, IS THAT EACH COMMUNITY SHOULD CONTINUE TO BE PERMITTED TO DETERMINE THE BEST MEANS OF PROVIDING SERVICE TO THE ELDERLY AND THOSE WITH DISABILITIES BY TAILORING SERVICE TO THE DIVERSE NEEDS, CIRCUMSTANCES, AND DESIRES OF THE LOCAL COMMUNITY.

AND PERSONS WITH DISABILITIES. CERTAINLY IMPROVEMENTS CAN BE MADE. HOWEVER, IT SHOULD BE NOTED THAT, ON AN INDUSTRY-WIDE BASIS, WE COMMIT SOME $850 MILLION PER YEAR, OR 6% OF OUR NATIONAL OPERATING BUDGET TO THIS SERVICE. VIRTUALLY EVERY TRANSIT SYSTEM IN THE COUNTRY PROVIDES SERVICE FOR PERSONS WITH DISABILITIES IN ONE OF THREE WAYS:

- FIXED ROUTE, LIFT-EQUIPPED SERVICE UTILIZING VEHICLES WITH WHEELCHAIR LIFTS TO MAKE REGULARLY SCHEDULED BUS SERVICE ACCESSIBLE TO THOSE WHO USE WHEELCHAIRS. APPROXIMATELY 18% OF THE TRANSIT SYSTEMS IN THE U.S. PROVIDE THIS TYPE OF SERVICE, EXCLUSIVELY.

- DEMAND RESPONSIVE OR PARATRANSIT SERVICE OFFERING DOOR-TO DOOR SERVICE IN SMALLER VEHICLES THAT ARE SPECIALLY EQUIPPED WITH THE NEEDS OF THE DISABLED IN MIND. NEARLY 44% OF THE NATION'S TRANSIT SYSTEMS PROVIDE THIS TYPE OF SERVICE, EXCLUSIVELY.

- A COMBINATION OF LIFT-EQUIPPED, FIXED-ROUTE SERVICE AND DEMAND-RESPONSIVE SERVICE. NEARLY 38% OF TRANSIT SYSTEMS NATIONWIDE PROVIDING THIS MIX OF SERVICES.

IT IS IMPORTANT TO NOTE THAT THE PERCENTAGE OF LIFT-EQUIPPED BUSES, IN OUR NATIONAL FLEET OF APPROXIMATELY 57,000, HAS GROWN SIGNIFICANTLY DURING THE 1980'S.

YEAR	PERCENTAGE OF LIFT-EQUIPPED BUSES
1981	11 PERCENT
1987	30 PERCENT
1993 (PROJECTED)	53 PERCENT

THIS INCREASE IN THE NUMBER OF LIFT-EQUIPPED BUSES HAS COME DESPITE A DRAMATIC CUTBACK IN FUNDING OF THE FEDERAL TRANSIT PROGRAM.

IN ADDITION, WE ARE PROUD TO POINT OUT THAT NEW, FULLY-ACCESSIBLE RAIL SYSTEMS ARE OPERATING IN A NUMBER OF COMMUNITIES: SAN FRANCISCO; WASHINGTON, D.C.; ATLANTA; MIAMI; SAN DIEGO; PITTSBURGH; BUFFALO; SACRAMENTO; PORTLAND; AND SAN JOSE. A NUMBER OF OTHER NEW RAIL SYSTEMS ARE UNDER CONSTRUCTION, OR IN THE PLANNING STAGE AND THEY WILL ALL BE FULLY-ACCESSIBLE.

WITH RESPECT TO THE OLDER RAIL SYSTEMS, ACCESSIBILITY IMPROVEMENTS ARE BEING MADE AND INCORPORATED INTO THESE SYSTEMS AS THEY UNDERGO MODERNIZATION. ONE VERY POSITIVE EXAMPLE IS IN NEW YORK CITY WHERE THE METROPOLITAN TRANSPORTATION AUTHORITY AND REPRESENTATIVES OF PERSONS WITH DISABILITIES HAVE AGREED, UNDER STATE LEGISLATION, TO DESIGNATE A NUMBER OF STATIONS AS "KEY STATIONS" THAT WILL BE MADE FULLY ACCESSIBLE AS PART OF A STATION MODERNIZATION PROGRAM.

TO FURTHER ILLUSTRATE THE SCOPE AND DIVERSITY OF SERVICES FOR THE ELDERLY AND PERSONS WITH DISABILITIES THAT ARE BEING PROVIDED, I WOULD LIKE TO PROVIDE SOME DETAILS ON A NUMBER OF SUCCESSFUL, LOCAL PROGRAMS, BEGINNING WITH MY OWN SYSTEM IN READING, PENNSYLVANIA.

THE BERKS AREA READING TRANSPORTATION AUTHORITY (BARTA) DEVELOPED THE FIRST SPECIALIZED TRANSPORTATION SYSTEM IN PENNSYLVANIA AND THE THIRD SPECIALIZED TRANSIT SYSTEM IN THE UNITED STATES. BARTA SERVES A POPULATION OF 172,000 AND PROVIDES 1,300 RIDES EACH DAY THROUGH ITS PARATRANSIT PROGRAM. BARTA HAS 22 PARATRANSIT VEHICLES, FOURTEEN OF THE 22 VEHICLES ARE LIFT EQUIPPED. BARTA ALSO USES THREE PRIVATE CONTRACTORS FOR PARATRANSIT SERVICES ON AN AS NEEDED BASIS. BARTA RECENTLY PURCHASED FIFTEEN NEW BUSES FOR ITS FIXED ROUTES, AND TEN OF THESE BUSES ARE LIFT EQUIPPED.

THE SAN DIEGO METROPOLITAN TRANSIT DEVELOPMENT BOARD OVERSEES TROLLEY AND BUS SERVICES IN THE SAN DIEGO METROPOLITAN AREA. THE SAN DIEGO TRANSIT CORPORATION OFFERS FIXED ROUTE ACCESSIBLE SERVICE WITH 108 LIFT-EQUIPPED BUSES. SAN DIEGO TROLLEY INC. CURRENTLY HAS A 16 MILE LIGHT RAIL SYSTEM THAT IS FULLY ACCESSIBLE TO INDIVIDUALS WHO ARE ELDERLY OR DISABLED.

THIS SUMMER, AN ADDITIONAL SIXTEEN MILES OF LIGHT RAIL WILL BE ADDED TO THE SYSTEM. ALL OF THE LIGHT RAIL VEHICLES (71 AFTER THE SUMMER EXPANSION) ARE EQUIPPED WITH FEATURES THAT ALLOW PERSONS WITH DISABILITIES TO BOARD AND EXIT WITH EASE. EACH RAIL STATION IS ACCESSIBLE TO WHEELCHAIR USERS. PEOPLE WHO ARE VISUALLY

IMPAIRED ARE ASSISTED BY BRIGHTLY PAINTED AND TEXTURED PATHWAYS AND BANISTERS IN THE TICKET PURCHASE AREA. BENCHES ARE SPECIFICALLY DESIGNED FOR THOSE WHO HAVE AMBULATORY DISABILITIES. SENSITIVITY TRAINING IS PROVIDED TO TROLLEY OPERATORS SO THEY WILL HAVE A BETTER UNDERSTANDING OF THE NEEDS OF RIDERS WHO ARE ELDERLY OR DISABLED.

THE IOWA CITY TRANSIT AUTHORITY OFFERS COMPREHENSIVE TRANSPORTATION SERVICES FOR PEOPLE WITH DISABILITIES. AS PART OF A REGULAR FIXED ROUTE SERVICE THAT RUNS FIVE TIMES A DAY EVERY WEEKDAY, IOWA CITY TRANSIT TRANSPORTS INDIVIDUALS WITH DISABILITIES TO AND FROM THEIR JOBS. IOWA CITY TRANSIT CONTRACTS WITH THE JOHNSON COUNTY GOVERNMENT "SEATS" PROGRAM WHICH PROVIDES DOOR-TO-DOOR PARATRANSIT SERVICES FOR THOSE NEEDING TO USE LIFT EQUIPPED BUSES OR VANS. RIDERS WITH DISABILITIES CAN MAKE WEEKLY RESERVATIONS WITH "SEATS" FOR REGULARLY SCHEDULED TRIPS. IN FY 1988, "SEATS" PROVIDED 35,185 TRIPS FOR THESE PASSENGERS. IOWA CITY TRANSIT ALSO CONTRACTS WITH LOCAL TAXI COMPANIES IF "SEATS" IS UNABLE TO ACCOMMODATE A PERSON WITH DISABILITIES.

THE UNIVERSITY OF IOWA'S CAMBUS PROVIDES PUBLIC TRANSPORTATION TO UNIVERSITY STUDENTS. CAMBUS OFFERS REGULAR FIXED ROUTE SERVICES AND A PARATRANSIT SERVICE FOR PEOPLE WITH DISABILITIES. CAMBUS CURRENTLY HAS THREE LIFT EQUIPPED MINI BUSES THAT OFFER DOOR-TO-DOOR DEMAND RESPONSE SERVICES. IN FY 1988, 11,255 TRIPS WERE PROVIDED TO INDIVIDUALS WITH DISABILITIES, AND TEN PERCENT OF CAMBUS' BUDGET WAS USED TO PROVIDE THIS SERVICE.

LAST YEAR, THE DULUTH TRANSIT AUTHORITY IN DULUTH, MINNESOTA PROVIDED 25,000 PARATRANSIT TRIPS WITH FIVE LIFT EQUIPPED MINI VANS. ACCORDING TO THE TRANSIT AUTHORITY, RESIDENTS OF DULUTH PREFER THIS DOOR-TO-DOOR TRANSPORTATION BECAUSE THEY ARE OFTEN FACED WITH SEVERE WINTERS. LAST YEAR, EIGHTEEN PERCENT OF THE TRIPS TAKEN BY PASSENGERS WHO ARE ELDERLY AND DISABLED REQUIRED THE USE OF A WHEELCHAIR LIFT.

THE MEMPHIS AREA TRANSIT AUTHORITY (MATA) CONTRACTS ITS PARATRANSIT SERVICES WITH A LOCAL TAXI COMPANY. CURB-TO-CURB PARATRANSIT SERVICE IS PROVIDED BY TAXIS AND LIFT-EQUIPPED VANS TO MEET THE TRANSPORTATION NEEDS OF PEOPLE WHO ARE ELDERLY AND DISABLE. ON AN AVERAGE DAILY BASIS, MATA'S PARATRANSIT SYSTEM SERVES 485 PEOPLE WHO ARE ELDERLY AND DISABLED.

THE PACE PARATRANSIT SERVICE IN ARLINGTON HEIGHTS, ILLINOIS, IS THE SUBURBAN BUS DIVISION OF THE CHICAGO RTA. PACE MEETS THE MOBILITY NEEDS OF RIDERS WHO ARE ELDERLY OR DISABLED THROUGHOUT A 2,000 SQUARE MILE AREA OF SIX COUNTIES IN ILLINOIS. PACE HAS DIAL-A-RIDE DOOR TO DOOR, SUBSCRIPTION BUS AND SHARED-RIDE TAXI SERVICES. PACE LEASES MANY OF THEIR VEHICLES DIRECTLY TO LOCAL COMMUNITIES IN ORDER TO PROVIDE THE GREATEST AMOUNT OF FLEXIBILITY FOR COMMUNITIES TO TAILOR THE SERVICES TO THE SPECIFIC NEEDS OF THEIR RIDERS.

THE GREATER CLEVELAND REGIONAL TRANSIT AUTHORITY (GCRTA) PROVIDES A DIVERSE PARATRANSIT SYSTEM FOR ITS PATRONS WHO ARE ELDERLY AND DISABLED. GCRTA OFFERED FOUR TYPES OF PARATRANSIT SERVICES. THE NEIGHBORHOOD SERVICE PROVIDES DOOR-TO-DOOR SERVICE WITH LIFT EQUIPPED AND LOW FLOOR RAMP EQUIPPED BUSES THROUGHOUT 18 NEIGHBORHOODS. GCRTA'S EXTRA-LIFT SERVICE PROVIDES SUBSCRIPTION SERVICE FOR INDIVIDUALS WHO ARE SEVERELY DISABLED PRIMARILY TO TRANSPORT THEM TO AND FROM WORK, COLLEGE, AND VOCATIONAL EDUCATION. RIDERS MAKE RESERVATIONS FOR REGULARLY SCHEDULED TRIPS. IN FY 1988, NEARLY 400,000 PASSENGER TRIPS WERE PROVIDED TO PEOPLE WHO ARE ELDERLY AND DISABLED.

FINALLY, SEATTLE METRO PROVIDES FIXED ROUTE ACCESSIBLE AND PARATRANSIT SERVICES. THIS NATIONALLY ACCLAIMED FIXED ROUTE BUS SERVICE HAS 773 LIFT-EQUIPPED BUSES. IN 1988, 139,000 RIDES WERE PROVIDED TO PEOPLE USING A LIFT. BY 1994, SEATTLE METRO EXPECTS THAT THEIR FIXED ROUTE BUS SERVICE WILL BE 100% LIFT-EQUIPPED.

IN ADDITION TO SEATTLE METRO'S FIXED ROUTE BUS SERVICE, A FIXED ROUTE VAN SERVICE IS PROVIDED, DOOR-TO-DOOR RESERVE A RIDE IS PROVIDED, AND PARATRANSIT TAXI SERVICES ARE PROVIDED. IN 1988, 148,000 DOOR-TO-DOOR TAXI TRIPS WERE PROVIDED TO PEOPLE WHO ARE ELDERLY AND DISABLED, AND INDIVIDUALS WITH LOW INCOMES AND WHO ARE ELDERLY AND DISABLED ARE ELIGIBLE FOR A 50% FARE SUBSIDY.

IN 1988, SEATTLE METRO DEDICATED OVER $2 MILLION TO SERVE PEOPLE WHO ARE ELDERLY AND DISABLED.

IN ADDITION TO OUR MEMBERS PROVIDING SERVICES TO PERSONS WITH DISABILITIES, APTA'S TASK FORCE SERVES ON THE NATIONAL STEERING COMMITTEE OF "PROJECT ACTION" (ACCESSIBLE COMMUNITY TRANSPORTATION IN OUR NATION). PROJECT ACTION IS A DIRECT RESULT OF A CONGRESSIONAL MANDATE TO BETTER ACCOMMODATE THE TRANSPORTATION NEEDS OF PEOPLE WITH DISABILITIES. THE THREE YEAR CONGRESSIONAL PROGRAM HAS AUTHORIZED UP TO SIX DEMONSTRATION PROJECTS NATIONWIDE TO EVALUATE AND IMPROVE TRANSIT ACCESSIBILITY. THE NATIONAL EASTER SEAL SOCIETY IS ADMINISTERING THE THREE-YEAR, $3 MILLION PROGRAM. CONGRESS HAS EARMARKED FUNDS FOR UMTA RESEARCH AND TECHNICAL ASSISTANCE TO INITIATE PROJECT ACTION. THE PROJECT FOCUSES ON FIVE MAJOR CONCERNS OF PEOPLE WITH DISABILITIES AND LOCAL TRANSIT OPERATORS IN LOOKING TO IMPROVE TRANSIT.

MR. CHAIRMAN, AS YOU KNOW, THE SERVICES PROVIDED TO PERSONS WITH DISABILITIES ARE GOVERNED BY REGULATIONS ISSUED BY THE DEPARTMENT OF TRANSPORTATION. THERE IS ONE SECTION OF THOSE REGULATIONS WHICH I BELIEVE FULLY ILLUSTRATES THE STRENGTH OF THE EXISTING SYSTEM. THE REGULATIONS MANDATE PUBLIC PARTICIPATION AND COORDINATION IN THE PLANNING OF SERVICES FOR PERSONS WITH DISABILITIES. EACH COMMUNITY IS REQUIRED TO CONSULT, AS EARLY AS POSSIBLE IN THE PLANNING PROCESS, WITH "HANDICAPPED PERSONS" AND GROUPS REPRESENTING THEM IN ORDER TO IDENTIFY THE NEEDS FOR SERVICE IN THE AREA SERVED BY THE LOCAL TRANSIT AUTHORITY, ANY WEAKNESSES OR PROBLEMS IN EXISTING SERVICE AND THE TYPES AND CHARACTERISTICS OF SERVICE TO BE PROVIDED BY THE LOCAL TRANSIT AUTHORITY. THE REGULATIONS FURTHER PROVIDE THAT THE LOCAL TRANSIT AUTHORITY SHALL

PROVIDE A MECHANISM FOR CONTINUING PUBLIC PARTICIPATION IN THE DEVELOPMENT AND OPERATION OF ITS SYSTEM OF TRANSPORTATION FOR "HANDICAPPED PERSONS".

THE SIGNIFICANCE OF THIS REQUIREMENT, MR. CHAIRMAN, IS THAT SPECIFIC SOLUTIONS ARE NOT BEING MANDATED BY THE FEDERAL GOVERNMENT. RATHER, LOCAL TRANSIT AUTHORITIES, ALONG WITH THE LOCAL DISABLED COMMUNITY THAT THEY SERVE, ARE WORKING TOGETHER TO CREATE TRANSPORTATION PROGRAMS THAT ARE WORKABLE AND SUCCESSFUL AT THE LOCAL LEVEL.

MR. CHAIRMAN, THE MEMBERSHIP OF APTA IS AWARE OF ITS RESPONSIBILITIES TO CARRY OUT THE NATIONAL POLICY AS DIRECTED BY CONGRESS. IF CONGRESS CHOOSES TO MANDATE ALL OF THE REQUIREMENTS SET FORTH IN THE PROPOSED LEGISLATION CONCERNING MASS TRANSPORTATION SERVICES, WE WOULD URGE THAT IT PROVIDE FINANCIAL ASSISTANCE TO ENSURE THAT ITS MANDATES CAN BE CARRIED OUT. LIMITED FUNDING FORCES INCREASINGLY DIFFICULT CHOICES ESPECIALLY FOR SMALLER OPERATORS IN THE USE OF AVAILABLE RESOURCES TO PROVIDE SERVICES FOR PEOPLE WHO ARE ELDERLY AND DISABLED.

MR. CHAIRMAN, THIS CONCLUDES MY TESTIMONY.

STATEMENT OF
CHARLES A. WEBB
GENERAL COUNSEL
AMERICAN BUS ASSOCIATION

before the

SUBCOMMITTEE ON THE HANDICAPPED
COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

on the

AMERICANS WITH DISABILITIES ACT OF 1989 (S. 933)

Mr. Chairman and Members of the Subcommittee:

I appreciate this opportunity to present the views of the American Bus Association on S. 933, the proposed Americans with Disabilities Act of 1989 (ADA).

The American Bus Association (ABA) is the national trade association for the intercity bus industry. ABA has approximately 700 operator members ranging in size from operators of two or three buses to Greyhound Lines, Inc., which has a fleet of some 4,000 buses.

We believe all Americans should be able to use all of the transportation services offered by the intercity bus industry. With but one exception, that right is honored by the industry today. Disabled Americans who are confined to wheelchairs should have access to intercity buses. That objective should be achieved in a way that does not destroy a substantial part of the intercity bus system.

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CHARLES A. WEBB
GENERAL COUNSEL
AMERICAN BUS ASSOCIATION

before the

SUBCOMMITTEE ON THE HANDICAPPED
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We believe all Americans should be able to use all of the transportation services offered by the intercity bus industry. With but one exception, that right is honored by the industry today. Disabled Americans who are confined to wheelchairs should have access to intercity buses. That objective should be achieved in a way that does not destroy a substantial part of the intercity bus system.

Disabled Americans in wheelchairs have a right to utilize all types of intercity bus service on precisely the same basis as able-bodied Americans. That right can be fully respected without modifying all of the vehicles of all intercity bus operators.

As shown in a report just prepared for ABA by Robert R. Nathan Associates, Inc.,[1] the intercity bus industry provides regularly scheduled bus service to more than 10,000 communities. (Nathan Report, p. 17). By contrast, only 477 cities are served regularly by scheduled air carriers and only 498 cities are served by Amtrak.

Our purpose in presenting this statement is to support the basic concepts embodied in the proposed legislation and to explain its impact on intercity bus service and on the traveling public who depend on that service. These are predominantly low income riders (less than $10,000 per year) who account for 45 percent of intercity bus passenger miles (Nathan Report, p. 17), persons under the age of 18 and 65 or older who account for half of the intercity bus travel demand (Nathan Report, p. 20), and residents of rural America in or near at least 9,000 communities for which the intercity bus is the only form of public transportation.

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[1] The Impact of Federal Subsidies to Public Passenger Transportation Systems on Travel Demand, Modal Choice, and the Intercity Bus Industry, dated May, 1989.

BUS TRANSPORTATION COVERED

BY THE PROPOSED LEGISLATION

Sections 303(a) and 401(3) of the ADA define "public transportation," as used in Titles III and IV, as transportation by bus that --

> provides the general public with general or special service . . . on a regular and continuing basis.

This language is taken directly from the definition of "mass transportation" in Section 12(c)(6) of the Urban Mass Transportation Act of 1964, as amended. (49 U.S.C. 1608(c)(6)). The transportation covered by the definition is that which is both open to the public and provided on a regular and continuing basis. Included are the fixed-route services provided by transit buses in cities; intercity scheduled service over regular routes in over-the-road coaches; and bus transportation to destinations such as theme parks, racetrack and other sporting events, and points of historical or cultural interest provided seasonally or throughout the year but not necessarily over fixed routes.

Since charter bus service is not open to the general public, it does not fall within the definition of "mass transportation" in the Urban Mass Transportation Act, but charter service is

specifically included in the definition of "public transportation" in Sections 303(a) and 401(3) of the ADA. Charter service is defined in essentially the same way by the Urban Mass Transportation Administration (49 C.F.R. 604.5(b) and by the Interstate Commerce Commission (49 C.F.R. 1054.2(a). In the UMTA charter service regulations, charter service is defined in pertinent part as follows:

> a group of persons who, pursuant to a common purpose and under a single contract . . . have acquired the exclusive use of the vehicle or service to travel together under an itinerary either specified in advance or modified after having left the place of origin. This definition includes the incidental use of UMTA funded equipment for the exclusive transportation of school students, personnel, and equipment. (49 C.F.R. 604.5(b)).

The following bus services are not covered by the ADA:

(1) Private bus transportation provided by a college or university for its students, by a church for its members, or by a social or service organization for its members; and

(2) Transportation of school children to and from school.

VEHICLES COVERED BY THE PROPOSED LEGISLATION

With one minor exception, the proposed legislation would cover all types of vehicles used in providing surface public transportation with the possible exception of taxicabs. Among the vehicles used by intercity bus operators that would be required to be "ready accessible to and usable by individuals with disabilities" would be --

(1) Vans, including those seating as few as eight or nine passengers;

(2) Trolley buses used primarily to showcase the attractions of a city to visitors and for weddings and other special events;

(3) Shuttle buses and minibuses with a seating capacity of 15 to 30 passengers;

(4) Conventional transit buses and over-the-road coaches; and,

(5) Conventional buses modified to seat as few as 16 to 20 passengers in order to provide a luxury-type service.

The only exception to this all-inclusive coverage is provided in section 401(7) of the bill. Under this exception, for example, a privately operated entity engaged only incidentally in the business of transporting passengers could operate vehicles having a seating capacity of 12 passengers or less without being subject to the vehicle accessibility requirements of the ADA.

COST OF THE PROPOSED VEHICLE

The following costs and losses of revenue would be incurred in bringing intercity buses into compliance with the accessibility requirements of the Act:

(1) Installation of Wheelchair Lifts -- $35,000 per bus

MCI Industries presently offers as a special feature on intercity coaches a wheelchair lift that costs approximately $35,000. Similar costs are estimated by Greyhound Lines, Inc., which uses both MCI and Fagle buses. Also, Massachusetts leases fully accessible buses to private operators for a charge that reflects its absorption of approximately $35,000 in bus modification costs.

(2) Maintenance of Wheelchair Lifts -- $2,000 a year (approx.)

This is a conservative estimate. Substantially higher maintenance costs have been experienced by some transit operators.

(3) Loss of Package Express Revenue -- $63.7 million a year (approx.)

Installation of a wheelchair lift on an MCI coach reduces the size of the luggage compartment from 330 to 205 cubic feet, a loss of 38 percent of the space available to transport baggage and

package express. Since baggage by ICC regulation takes precedence over the transportation of express shipments (49 C.F.R. 1063.4(d)), the reduction in space available for package express would be substantially greater than 38 percent.

Assuming, however, that the reduction in luggage compartment space would reduce package express revenues by only 38 percent, the loss to Class I motor carriers of passengers would be approximately $63.7 million a year. The basis for this estimate is set forth in Appendix A.

(4) Loss of Seating Capacity Resulting from Making Restrooms on Buses Accessible to Wheelchairs

Bus aisles are only 14 inches wide In order to make a restroom on an intercity coach accessible to a wheelchair, it would be necessary to sacrifice 11 or 12 seats, approximately one-fourth of the seating capacity.

This loss of seating capacity could be avoided in only one of two ways. First, rest stops could be made at the request of disabled passengers in wheelchairs but this seems inconsistent with the ideological thrust of the proposed legislation. Secondly, restrooms could be removed from intercity buses but this would increase travel time and inconvenience passengers.

IMPACT OF THE PROPOSED LEGISLATION ON PARTICULAR SEGMENTS OF THE BUS INDUSTRY

(1) Regular-Route Carriers

Carriers providing scheduled service over fixed routes would be compelled to discontinue all or a substantial part of that service because of revenue losses resulting from the use of equipment mandated by the proposed legislation, coupled with a substantial increase in capital and operating costs.

The financial condition of the intercity bus industry is anemic. Since 1965, the industry has been in decline. The following facts are highlighted in the Nathan Report at page 14:

> Real net operating revenue, before income taxes, has declined 9.4 percent per year.
>
> In 1986, the most recent year for which data are available, the industry operating ratio was 96.9 percent. In 1965, the ratio had been 79.9 percent.
>
> * * * * *
>
> For Class I carriers, passenger revenue from intercity regular routes grew only 2.6 percent per year between 1970 and 1986.

Greyhound, the only nationwide motor carrier of passengers, has indicated that its survival would be seriously threatened by

passage of the bill. The outlook for smaller bus companies having a substantial regular-route operation would be even more bleak. Since they are feeders into the Greyhound system, they depend on Greyhound's nationwide network for the transportation of passengers beyond a particular State or region.

Private unsubsidized bus operators cannot commit capital to regular-route operations which are hopelessly unprofitable. The ultimate cost of the proposed legislation would be paid in loss of service to most or all of the at least 9,000 communities where the intercity bus is the only form of public transportation and in the loss of service to persons who, although able-bodied, have limited access to public transportation because of rural residence or poverty-level income, or both.

(2) Charter Bus Operators

The proposed legislation would not apply to entities not engaged in for-hire transportation. The higher capital and operating costs imposed on charter bus operators would divert a substantial amount of traffic to private carriage. Colleges and universities, churches, service and social organizations, employers, and others would have a strong incentive to provide their own charter service with their own equipment and their own drivers.

This shift of charter traffic from the for-hire to the not-for-hire sector would be detrimental to motor carrier safety because less use would be made of full time professional drivers.

Additional business would be lost by private charter bus operators to local public transit authorities, not because they are more efficient operators, but because the costs mandated by the proposed legislation would be paid for them by Federal and local governments. Many charter bus operators cannot afford to pay for such increased costs themselves and such costs could not be passed on to their customers who could not afford to pay for them either.

(3) School Bus Operators

Many school bus contractors, including some members of ABA, transport school children to and from school in school buses. The buses may also be used to provide local charter service on weekends and at other times when the buses are not used in school work. Obviously, no school bus contractor will spend $35,000 to install a wheelchair lift on a school bus in order to use the bus in incidental local charter service. The end result would be loss of income for school bus contractors and, possibly, increases in the cost of transporting school children to and from school.

(4) Special Operations

Many disabled persons are transported in smaller vehicles -- vans and minibuses -- designed to accommodate wheelchairs. These smaller vehicles along with limousines are also used by private entities in providing numerous specialized transportation services. Shuttle service is provided, for example, to and from airports, hotels, and convention centers.

There is no apparent way in which small vehicles can be modified to transport disabled persons in wheelchairs in the same vehicle with other passengers and remain competitive with the operation of small vehicles in private carriage.

LET US REASON TOGETHER

Members of ABA are no less compassionate toward disabled Americans than sponsors of the proposed legislation. Neither bus operators nor the disabled would derive any gain from the destruction of a large part of the intercity bus industry. Many of the less affluent members of our society indeed would suffer.

We are willing to meet at any time and as often as necessary with promoters of the legislation and with the staff of concerned Senate committees to explore ways to improve the access of disabled Americans to intercity bus transportation services.

With respect to scheduled intercity bus service, we urge that the Massachusetts bus lease program be studied to ascertain whether it could be adopted to scheduled bus operations nationwide. Massachusetts leases intercity coaches equipped with wheelchair lifts to intercity bus operators for a period of seven years. After seven years they are auctioned off. Lease payments are set at a level which imposes the cost of the lift equipment on the State. If the costs of bus modification and maintenance can be shared on some equitable basis by Federal, State, and local governments and by intercity bus operators, one of the prime objectives of the ADA might be accomplished.

Accessibility to buses used in intercity charter services seems to us to be an easier problem to solve. In the first place, charter trips usually are planned well in advance and carriers can be notified if special arrangements are required for disabled members of the group. Also, the chartering party controls the bus. It can demand, for example, that rest stops be made at such times and places as it deems desirable to meet the needs of particular individuals in the group.

Finally, fully accessible buses are already available for charter service and more will be coming on line. UMTA's charter service regulations published on April 13, 1987 (49 C.F.R. Part 604) and amended on December 30, 1988 (53 Fed. Reg. 53348) provide

for cooperation between public and private bus operators in handling requests for charter service by groups having one or more disabled members. Transportation for such groups may be provided directly by UMTA grantees using UMTA-funded buses. (49 C.F.R. 604.9(b)(5)(i)). If a private bus operator requires the use of a fully accessible bus to accommodate a disabled member of a charter group, UMTA regulations provide that its grantees many lease UMTA-funded buses to private charter operators if they are "unable to provide equipment accessible to elderly and handicapped persons." (49 C.F.R. 604.9(b)(2)(i)).

The cooperative arrangements of public and private bus operators in meeting the transportation needs of disabled persons have worked well. We are not aware of any person who has been excluded from a charter trip because a fully accessible bus was not available.

Finally, it is not necessary to make all of the charter buses and all of the smaller vehicles of intercity bus operators fully accessible in order to insure that all disabled Americans in wheelchairs have the ability to use charter buses and smaller vehicles on exactly the same basis as able-bodied Americans.

ABA deeply appreciates this opportunity to present its views on the proposed Americans with Disabilities Act of 1989.

APPENDIX A

ESTIMATED LOSS OF PACKAGE EXPRESS REVENUE RESULTING FROM THE INSTALLATION OF WHEELCHAIR LIFTS ON INTERCITY COACHES

(1)	Operating Revenues of Class I Intercity Motor Carriers of Passengers in 1986 (1987 Annual Report of the Interstate Commerce Commission, p. 130)	$1,117,320,000
(2)	Package Express Revenue (typically 15% of total operating revenues but shown to be 16.1 percent in 1982 in The Intercity Bus Industry ICC Office of Transportation Analysis, January, 1984, p. 8)	167,598,000*
(3)	Loss of Package Express Revenue Attributable to Loss of 38% of Cargo Space	63,683,820

* Total revenues from the transportation of package express by all motor carriers of passengers in 1987 were estimated to be $177 million in Transportation in America, Transportation Policy Associates, 6th ed., March, 1988, p. 11.

The
NATIONAL
DISABILITY
ACTION
CENTER

Timothy M. Cook
Director

TESTIMONY OF

TIMOTHY M. COOK
EXECUTIVE DIRECTOR
THE NATIONAL DISABILITY ACTION CENTER
WASHINGTON, D.C.

BEFORE

THE COMMITTEE ON LABOR AND HUMAN RESOURCES
SUBCOMMITTEE ON THE HANDICAPPED
UNITED STATES SENATE

ON

THE AMERICANS WITH DISABILITIES ACT OF 1989

MAY 16, 1989

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Although there are many important provisions contained in the Americans with Disabilities Act, none are more important than the portion that would guarantee accessible transportation for persons with disabilities. It is that provision of the bill that I would like to address this afternoon.

As the Director of the National Disability Action Center, an advocacy organization representing persons with disabilities, I have had the opportunity to see, first-hand, the effect of exclusionary transportation policies on persons with disabilities. I have represented disability rights organizations and individuals with disabilities in several cases concerning recalcitrant transit systems and federal agencies that have insisted upon retaining their privilege to continue to exclude us.[1]

Access to transportation particularly has become the rallying cry of the burgeoning disability civil rights movement across the country.

In the past, it didn't seem to matter as much. Persons with severe disabilities frequently were sent off to a lives of

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[1] My experiences as a disability civil rights lawyer over the past decade are detailed more fully in the attached curriculum vitae.

segregation at isolated institutions. Others were hidden at home. Children and young adults with disabilities were fortunate if they received some education for a few hours a week in someone's basement, let alone be hired for a job when they reached adulthood.

In the 1970s, however, persons with disabilities began building on the experience of other minorities, seeking an end to segregated, inadequate, exclusionary public services. We went to the Congress and to the state legislatures, and laws were enacted to eliminate architectural and transportation barriers we faced in some facilities, such as those that were built with federal assistance, to require public schools to accept students with disabilities, to provide a modicum of attendant services, and to establish independent living centers around the country, managed by persons with disabilities.

As a result, there are today millions of persons with disabilities who have attended public school, and who are living in their own accessible houses and apartments that their local independent living center may have helped them find and renovate. We have the training and the skills to work at challenging, well-paying jobs and to lead lives of dignity and independence.

Persons with disabilities desire to work. The problem is we often have no means of transportation to get there. Nor are we able to get to educational and training opportunities. And forget about recreational and social events.

If you have a disability necessitating the use of a wheelchair for mobility, in most cities you still cannot ride public transit buses to training programs, to work, or even to a favorite restaurant. You are relegated to "special service," segregated, paratransit vans that must be reserved several days in advance, without possibility of later changing the reservation. If you rely upon paratransit, you'll also find that it doesn't cover the same geographic area as the bus system. Nor are you permitted to bring companions along on the paratransit vans, making it impossible to travel with a spouse or parent or child or friend to and from your destination -- you must arrange to meet them there. If you are fortunate enough to reserve a paratransit ride to the place you need to get to, you probably will be charged a higher fare. Paratransit services have a well-earned reputation for not coming on time. And you'll have to go home early, since most paratransit systems shut down at 8 or 9 p.m.

But the greatest evil of forcing persons with disabilities to use paratransit is not that it takes away all spontaneity from our lives. Even if paratransit were not an inherently unequal system, it would still be immoral and wrong to relegate us to those services because they are segregated.

As Rosa Parks taught us, and as the Supreme Court ruled thirty-five years ago in Brown v. Board of Education,[2]

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[2] 347 U.S. 483 (1954). In Brown, the Supreme Court overruled its previous decision in Plessy v. Ferguson, 163 U.S. 537 (1896), which had upheld the constitutionality, under the Equal Protection Clause of the Fourteenth Amendment, of a

segregation "affects one's heart and mind in ways that may never be undone. Separate but equal is inherently unequal."

What better opportunity for people without disabilities to learn about our disabilities than to ride the mainline transit system with us? Forcing those of us who are able to use lift-equipped buses onto a separate transportation system stigmatizes us, demeans us, and subjects us to discrimination. The two steps up to the bus represent by far the greatest barrier to mainstreaming facing this country's citizens with disabilities.

Aside from the moral imperative, providing accessible public transit for persons with disabilities makes good economic sense. If you talk to any vocational rehabilitation counselor in this country, they uniformly will tell you that the chief reason for the 68% unemployment rate for persons with disabilities is the lack of accessible transportation.

Lifts on buses translate into substantially less public benefits paid to unemployed and underemployed persons with disabilities, and far greater taxes collected from newly employed persons with disabilities who finally will have a way of getting to work. Indeed, the United States Commission on Civil Rights has projected that approximately $800 million in economic

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racially segregated transportation system in Louisiana under the "separate but equal" doctrine.

benefits would accrue to the American economy if only transportation barriers were eliminated.[3]

* * *

The struggle to obtain accessible transportation has been a hard and long one for persons with disabilities. Congress sought to address many of these issues when it enacted the Urban Mass Transit Act of 1970.[4] As a condition for the receipt of the billions of dollars in federal assistance provided to transit systems, persons with disabilities were guaranteed "the same right" to utilize mass transportation services.

The U.S. Department of Transportation (DOT) failed to enforce that requirement, so the Congress reiterated it, in even stronger and clearer terms, in the Federal Aid-Highway Act Amendments of 1974, expressly requiring that all new "equipment" and "projects" be accessible to persons with disabilities.[5]

In the meantime, Congress also enacted Section 504 of the Rehabilitation Act,[6] which broadly prohibited all federal grantees from excluding persons with disabilities from their activities.

In 1979, DOT Secretary Brock Adams finally issued mandatory rules requiring that all new buses be accessible. DOT based

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[3] U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities (1983).

[4] § 16(a), 49 U.S.C. § 1612(a).

[5] § 105(b), amending § 165(b) of the Federal Aid-Highway Act of 1973, 23 U.S.C.A. § 142 note.

[6] 29 U.S.C. § 794.

this requirement on comprehensive factual findings, including the finding that public transit buses are "the most widely used means of public transit."[7] DOT extensively discussed the costs and benefits of requiring all new vehicles to be accessible and found that:

> In most communities, bus systems provide the only fixed route means of public transportation. The accessibility of bus systems to the handicapped is crucial if handicapped people in these communities are not to be denied the benefits of Federal aid to urban mass transportation. Even in cities with other modes of mass transit, the bus system -- which normally has a much more comprehensive route structure than rail and other means of transportation -- is a key to ensuring that handicapped people have an equitable opportunity to use transportation services.[8]

Discussing the potential market to be served, the Secretary found that there were:

> [A]bout 1.5 million who live within a half-mile of a bus stop and for whom bus steps are a barrier which would prevent them from using buses. Given the increase in the average age of the population, it is likely that the number and proportion of mobility-handicapped people will increase, because as people age, the likelihood that they may become mobility-handicapped increases. . . . We believe that the use of accessible bus service by handicapped people will increase over time. Given the history of almost total inaccessibility, most handicapped people probably do not think first of the city bus when they make transportation plans. It is necessary to create accessible service and educate the public about it before the significant potential market of handicapped users is likely to ride the buses in large numbers. The Department is persuaded that, under this rule, and with the cooperation of transit operators, mainline bus service can be safe, convenient, and attractive for handicapped persons.[9]

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[7] 44 Fed. Reg. 31,442 (1979).

[8] Id. at 31,455.

[9] Id. at 31,456-57.

In order to alleviate the costs to DOT grantees of providing accessible bus service, the Secretary established a phase-in period "during which new accessible buses can be purchased to make a fleet accessible by accretion."[10] This would, the Secretary concluded, keep costs to transit systems "within reasonable bounds"[11]:

> The capital cost impact of this portion of the regulation will therefore consist principally of incremental costs of lift-equipped buses over the costs of inaccessible new buses. This cost appears to be within reasonable bounds. The marginal increase in operating costs is estimated to average about 1.3 percent.[12]

DOT also extensively discussed and flatly rejected the contention of members of the transit industry that commented on the rule, that lift-equipped buses would slow service, would be unsafe or would be unreliable, and concluded that "lifts are a feasible solution to the problem of making buses accessible."[13]

The nation's transit systems were not pleased at this regulation. They enjoyed the new buses purchased with federal

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[10] Id. at 31,455.

[11] Id.

[12] Id. at 31,456. DOT additionally stressed that "the Department's decisions ... cannot be exclusively tied to cost benefit analysis. The human value of providing accessible transit services to all persons must weigh heavily in the decision." Id. at 31,459.

[13] Id. at 31,457. The Secretary's conclusions have been borne out by the uniformly positive experience of transit systems throughout the country -- Seattle, New York City, Denver, Atlanta, and Johnstown, Pa., to name a few -- that have made the commitment to access, successfully, even in climates that frequently are cold or rainy.

money. But providing disability access would take away some of those precious federal dollars. Besides, "normal" passengers might be offended if they had to ride the bus with funny-looking persons with disabilities.

So, the transit systems went to court to block the regulation. At first, the validity of the regulation was upheld by a United States District Court, ruling that transit systems must take the opportunity provided by new purchases to build accessible transit systems. In a 1981 appeal, however, the government informed the court that the new administration now was reviewing the rules with an eye toward permitting transit systems to comply with all of their duties under federal disability civil rights laws solely by providing a modicum of segregated paratransit.[14]

When the court remanded the regulation to DOT, the agency swiftly, within 45 days, attempted to take that opportunity to abrogate all of the requirements that buses be accessible. It is important to recognize that this action was taken <u>not</u> because there was any disagreement with the administrative factual findings made by the previous Secretary that accessible buses were essential for persons with disabilities, and feasible for transit systems to employ. The 1979 requirements were abrogated solely because the newly installed Secretary of DOT disagreed as a matter of policy with the requirements of the 1979 rule. As the new Secretary explained:

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[14] <u>See American Public Transit Ass'n v. Lewis</u>, 655 F.2d 1272, 1280 n. 14 (D.C.Cir. 1981).

> Early in this Administration, the Department identified its accessibility requirements as requiring priority review and began that review. The Presidential Task Force on Regulatory Relief . . . identified the mass transit requirements . . . as one of the Federal government's costly and controversial regulations deserving priority review. . . . As a result of this review, the Department established a clear policy on this issue: ensuring the provision of transportation that handicapped persons can use is an obligation of recipients of Federal assistance for mass transit, but the major responsibility for deciding how this transportation is to be provided should be returned to local communities. Both our legislative proposal and regulatory changes are based on this policy.[15]

Congress refused to enact DOT's "legislative proposal" to codify the "local option" policy.[16] Congress instead, in a floor amendment to the Surface Transportation Assistance Act of 1982 (STAA),[17] required DOT to "establis[h] minimum criteria for the provision of transportation services to handicapped and elderly individuals by recipients of Federal financial assistance." The amendment required that regulations be issued within 180 days, and that they be "consistent with any applicable government-wide standards for the implementation of § 504."[18]

In stark contrast to the rapidity with which it had abrogated the 1979 rule, DOT failed to meet the 180-day deadline imposed by § 317(c), forced the disabled community to wait an

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[15] 46 Fed. Reg. 37,488 (1981).

[16] See id.

[17] § 317(c), 49 U.S.C. § 1612(d).

[18] Id.

additional 3-1/2 years, and then only issued a rule after being ordered by a federal court to do so.[19]

And when the new regulation did come out it still permitted transit systems to relegate riders with disabilities to inadequate, segregated paratransit. In addition, transit systems were absolved of all responsibility for providing access so long as they spent a minimum of three percent of their budgets on disability access.[20]

* * *

This time it was the disability community's turn to challenge the regulation in court. Twelve disability civil rights organizations, led by Americans Disabled for Accessible Public Transportation (ADAPT), requested a federal court to strike down the cost cap and require that all new buses purchased by transit systems be accessible.

In a decision issued on February 13, 1989, ADAPT v. DOT,[21] the disability community won the victory we had been seeking for a long time. The U.S. Court of Appeals for the Third Circuit ruled that new buses purchased with federal assistance are to be accessible to persons who have mobility impairments, including wheelchair users. The Court of Appeals also eliminated the three percent cost cap on services for persons with disabilities.

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[19] See Maine Ass'n of Handicapped Persons v. Dole, 623 F.Supp. 920 (D. Maine, 1985).

[20] 51 Fed. Reg. 18,994 (1986).

[21] 867 F.2d 1471 (3d Cir.1989).

No retrofitting of any buses with wheelchair lifts was required; the ruling only applied to future purchases. The Court said that because transit systems may phase-in accessible buses as new vehicles are purchased, the ruling would not lead to undue financial burdens for any transit systems. The Court stated:

> "Only a mixed-system of lift-equipped buses for those able to utilize them and a paratransit system for those who cannot will adequately implement the statutory mandates."[22]

The Court correctly stated that a segregated paratransit system alone would always result in "uneven treatment to the disabled," not only because it is segregated, but also because by its nature it "deprives the handicapped of spontaneous activity, whether it be of an emergency, business, or pleasurable nature."[23]

The court recognized that, unlike paratransit, which requires unchangeable reservations well in advance, mainline access enables persons with disabilities to go to the nearest bus stop and board the next bus to come along, just like everyone else.

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[22] Id. at 1473.

[23] Id. at 1485. Similarly, the Chief Administrative Law Judge of the Illinois State Human Rights Commission recently determined in a decision requiring the Chicago transit system to purchase 600 accessible buses that "be it eight hours or twenty-four, the [paratransit] reservation requirement eliminates the possibility of spontaneous activity. It also greatly diminishes, if not eliminates, the disabled rider's ability to adjust to unexpected emergencies or simply changes in plans beyond his/her control." Jones v. Chicago Transit Authority, Charge Nos. 1984CP50, -49, -52, -47, -84, -54, Interim Recommended Order and Decision (Jan. 15, 1988), p. 107.

The Court of Appeals also properly determined that a requirement that newly purchased buses be accessible "does not exact a fundamental alteration to the nature of mass transportation," nor would it impose any "undue financial burdens" on any transit systems.[24] In view of the major benefits that accessible transportation will bring to persons with disabilities, and to the American economy as a result of diminished unemployment and underemployment among persons with disabilities, the costs of providing access to transportation are minimal.[25]

The national disability community immediately hailed this decision as an important milestone for disability civil rights. At the same time, there was significant trepidation that DOT would appeal the decision in an attempt to have it reversed. Others believed that the decision would not be appealed, especially since President Bush had promised the disability community during the fall campaign, and most recently, just four days before the ADAPT decision, in his February 9 speech before the joint session of the Congress, that he wanted to bring persons with disabilities into "the economic mainstream":

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[24] Id. at 1473.

[25] The cost of equipping newly purchased buses with lifts is about $10,000 per bus. Since, by statute, eighty per cent of that cost is paid for with federal assistance (see 49 U.S.C. §§ 1602, 1604), the actual cost to transit systems to enable persons with disabilities to get on the bus is only $2,000 per bus, far less than the expense of providing extra comforts, such as air conditioning, to passengers once they already are aboard.

> "I believe in a society that is free from discrimination and bigotry of any kind. I will work to knock down the barriers left by past discrimination and to build a more tolerant society that will stop such barriers from ever being built again. . . . To those 37 million Americans with some form of disability: You belong in the economic mainstream. We need your talents in America's workforce. Disabled Americans must become full partners in America's opportunity society."[26]

President Bush made similar statements on several occasions during the campaign, including his acceptance speech in New Orleans, his closing statement during the second debate with Governor Dukakis, and in the national spot that ran on the networks on election eve.

Many persons with disabilities felt that this was just more rhetoric when the administration filed its appeal and the Court of Appeals agreed to rehear the case on May 15. The government continues to argue in its appeal that federal law provides persons with disabilities no right to federally assisted services that would integrate us, and that transit systems can meet all of their duties under federal disability rights laws by providing segregated paratransit services, with all of their inadequacies.

* * *

The Americans with Disabilities Act would provide persons with disabilities the civil right that we so urgently need, the right to utilize the regular transportation system. The Act would clarify what § 504 of the Rehabilitation Act of 1973, § 16(a) of the Urban Mass Transportation Act, and § 105 of the

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[26] Washington Post, Feb. 10, 1989.

Federal Aid-Highway Act Amendments already require: That all new or newly altered transportation facilities be made accessible to persons with disabilities, to the maximum extent feasible. Additionally, paratransit is to be made available as a supplemental service, for those who may be unable to utilize lift-equipped buses or accessible train systems.

The Act is needed, despite the well-reasoned decision of the Court of Appeals in ADAPT v. DOT, because DOT continues to fight that decision on appeal. DOT needs to be told, once and for all, loud and clear, that the Congress means what it has said, and that no new public transportation facilities are to be purchased or built in this country unless they are accessible. Thus, the Act would codify the reasoning of the ADAPT decision.

In order to reduce the costs to transit systems, the Act does not require the retrofitting of a single vehicle. Only new or remanufactured vehicles must be accessible. This means that the disability community will have to wait an additional 12 years before we have a fully accessible system. But that is a compromise we are willing to make in order to obtain a transportation system that we and future generations of persons with disabilities will be able to utilize.

In terms of train systems, many in the disability community are disappointed that the Act does not include a requirement of eventual accessibility for all train stations. Instead, the Act would only require "key" existing stations to be rendered accessible, and that at least one car per train be accessible.

However, it would require all new train cars and all new or newly altered stations to be accessible, regardless of whether they are labeled "key." Once again, this is a significant compromise, especially given how long we already have waited for access to transportation.

* * *

The provisions of the Americans with Disabilities Act that would guarantee us access to transportation are not simply a good idea. They are essential to the lifeblood of the disability community in this country. It is a civil right whose time has come.

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PROFESSIONAL EXPERIENCE

National Disability Action Center, Washington, DC (1988-present): Director. Responsible for all operations of disability civil rights advocacy organization, representing persons with disabilities seeking effective, meaningful, and integrated community services such as housing, education, and transportation.

Public Interest Law Center of Philadelphia (1984-1988): Attorney, Disabilities Project, responsible for all aspects of complex class action constitutional and statutory litigation on behalf of disability rights organizations and their members.

Western Law Center for the Handicapped, Los Angeles, CA (1983-84): Director, responsible for administration and litigation conducted by foundation-supported public interest law firm, representing handicapped persons in the courts and before administrative agencies in matters involving public benefits and civil rights.

Civil Rights Division, U.S. Department of Justice, Washington, DC (1980-83): Trial attorney, Office of Special Litigation, responsible for investigations and litigation in eleven states, to enforce the Civil Rights of Institutionalized Persons Act of 1980, 42 U.S.C. § 1997 (conferring upon the Attorney General the authority to litigate the constitutionality of conditions of confinement of disabled people in state institutions); and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (the Disabled Persons' Civil Rights Act).

Antioch School of Law, Washington, DC (1981-82): Adjunct Professor of Law, responsible for portions of the clinical program in addition to an academic seminar, "The Civil Rights of Disabled Persons."

Law Clerk, Honorable Dudley B. Bonsal, United States District Judge, Southern District of New York (1979-80): Assisted with drafts of opinions, memoranda, and jury charges; prepared bench memoranda and drafts of opinions assigned to the Judge sitting on the Temporary Emergency Court of Appeals and by designation of the Courts of Appeal for the 1st, 2d, and 9th Circuits.

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Reginald Heber Smith Community Lawyer Fellow (1978-79): Law Reform Unit, Legal Aid Society of New York City. Established a Disability Rights Litigation Project, responsible for class action suits involving discrimination in employment and education. Also assigned weekly to intake for Legal Aid's general clientele, responsible for all aspects of client counseling from intake interviews through trials and appeals.

Office for Civil Rights, Department of HEW, Washington, DC (summer, 1977): Developed guidelines to interpret a newly promulgated regulation to enforce Section 504 of the Rehabilitation Act; provided technical assistance to aid federal grantees' regulatory compliance; trained equal opportunity specialists to investigate complaints of handicap discrimination.

Center for Law and Social Policy, Washington, DC (January-May, 1977): Law school externship assisting CLASP attorneys in class action cases concerning exclusionary practices of health and social service agencies.

EDUCATION

University of Pennsylvania Law School, J.D. 1978, Jefferson Fordham Human Rights Award, National Moot Court Team, Student Government.

University of Pennsylvania Graduate School of Arts & Sciences, M.A. 1975, Thesis on "Value Systems and Group Conflict and Cohesion in American History: The Philadelphia Political System, 1828-32, as a Test Case."

University of Pennsylvania College of Arts and Sciences, B.A. 1975, magna cum laude, Honors in American History, Pi Gamma Mu -- National Social Sciences Honor Society, President of the Varsity Debate Team, Student Government Finance Committee, Chairperson of the International Affairs Association, University Judiciary, Student Committee for Disability Rights, Sphinx Senior Society.

TIMOTHY M. COOK

SELECTED CASES

Counsel for plaintiffs or amici curiae in the following representative reported cases:

School Board of Nassau County, Fla. v. Arline, 107 S.Ct. 1123 (1987). Coverage of contagious handicaps under § 504. Counsel for the American Diabetes Ass'n, et al.

Bowen v. American Hospital Ass'n, 476 U.S. 610 (1986). The "Baby Doe" case. Counsel for the American Coalition of Citizens with Disabilities, et al.

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985). The first occasion for Supreme Court interpretation and application of the Equal Protection Clause to classifications based upon retardation. Counsel for the Association for Retarded Citizens/U.S. and seventeen national and state disability organizations.

Alexander v. Choate, 469 U.S. 287 (1985). The Supreme Court's richest analysis of the legislative history of § 504. Counsel for the Association for Severely Handicapped Persons, et al.

Irving Independent School District v. Tatro, 468 U.S. 883 (1984). The Supreme Court's first case concerning the related services requirements of the Education of the Handicapped Act, 20 U.S.C. §§ 1401-15. Counsel for the Spina Bifida Ass'n.

Southeastern Community College v. Davis, 442 U.S. 397 (1979). First Supreme Court interpretation of § 504. Counsel for the New York City Mayor's Office for the Handicapped, et al.

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employment practices of federal contractors under § 503 of the Rehabilitation Act. Counsel for the plaintiff class.

ADMINISTRATIVE REPRESENTATION

Counsel to disabled individuals in a variety of administrative proceedings including social security disability, vocational rehabilitation, and right-to-education hearings.

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National Legal Aid and Defenders Ass'n, Annual Meeting, Workshop on Ending the Segregation of Disabled People, Miami, FL (December 3, 1987).

Spina Bifida Ass'n, Annual Conference, The Rights of People with Spina Bifida to Accessible Transportation, Philadelphia, PA (November 14, 1987).

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Pennsylvania Coalition of Citizens with Disabilities, Annual Conference, Hershey, PA (October 20, 1984).

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D.C. Neighborhood Legal Services, Disability Rights Training Conference, Washington, DC (April 2-3, 1981).

Federal Interagency Advisory Group, Conference on the Supervisor and Disabled Employees, Washington, DC (February 12, 1981).

Legal Services Corporation, Disability Rights Lawyer Training Conference, St. Paul, MN (October 8, 1980).

Vocational Rehabilitation Service Providers Conference, Berkeley, CA (July 14, 1979).

Other Professional Activities

Chair, Disability Rights Section, National Legal Aid and Defenders Association

Officer (Secretary/Historian), Member of the Executive Board, and Member of Litigation Review Committee, The Association for Severely Handicapped Persons

Legal Advisory Committee, Association for Retarded Citizens of the United States

NFIB

National Federation of Independent Business

STATEMENT OF

Sally L. Douglas
Assistant Director of
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for Research and Policy

NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Before: Senate Subcommittee on the Handicapped

Subject: Americans with Disabilities Act of 1989

Date: May 10, 1989

On behalf of the 570,000-plus small and independent business owner members of the National Federation of Independent Business (NFIB), I welcome the opportunity afforded NFIB by the Chairman and members of the Subcommittee to express our views on the proposed "Americans with Disabilities Act of 1989" (ADA).

For those of you who aren't familiar with NFIB, we are a member-driven organization, comprised of more than a half million owners of small, independently-owned businesses across the nation. Our membership profile closely parallels the national business population: roughly 50% of our members own retail or service enterprises; another 25% are in manufacturing and construction; the remaining 25% operate agricultural,

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The Guardian of Small Business

transportation, mining, wholesale, and financial, insurance, or real estate enterprises. NFIB's average member has 13 employees and grosses about $350,000 in annual sales.

The proposed ADA represents both a significant expansion of existing civil rights protections for persons with disabilities, and an equally significant expansion of federal regulatory authority over private enterprises. To date civil rights statues have targeted specific entities to shoulder the responsibilities of ensuring equal protections and opportunities to minorities, women, persons with disabilities, and other groups which, for one reason or another, have suffered from discrimination. The ADA's scope, however, is far broader and will impose requirements and enforcement procedures uniformly across the broad spectrum of the business community, affecting thousands, if not millions, of businesses which have not heretofore been affected directly by the Civil Rights Act of 1964, the Fair Housing Act, or the Rehabilitation Act of 1973.

Such sweeping legislation merits -- if not demands -- deliberative analysis and consideration by the Congress and all affected parties. Since our membership ranges across the entire spectrum of American business, the proposed ADA would have a profound impact on the

day-to-day operations of these firms. The stakes are high. The right of every American to have the opportunities to realize his or her full potential cannot and should not be denied. Nor should we deny any American the right to conduct his or her life in a reasonable manner, without undue interference from the government. Achieving the proper balance between the rights and needs of persons with disabilities and the rights and needs of American businesses is the challenge we face, and I believe we can succeed if we can work together in the spirit of cooperation.

There is an old Chinese curse which says, "May you live in interesting times." The times we live in are, at the very least, interesting. We are in the midst of the greatest peacetime expansion in our economic history. Vast numbers of new entrants into the labor force have been accommodated, new businesses have been created in record numbers, and in their wake have come new opportunities, new jobs. The small business sector has been termed "the American miracle" by observers in other countries. Many, if not all, Americans have benefitted in some way from this dynamic process.

Yet there are substantial problems facing us today, and more are coming in the near future. There are still disadvantaged groups within our society who have not

shared equally in the economic boom. Businesses will be facing an acute labor shortage in the next few years. Noone can predict with any certainty how long our economic expansion will continue, nor can anyone predict with accuracy when our federal budget crisis will be stabilized. Challenges all, and no easy solutions for any of the component parts.

One of the challenges we face is integrating persons with disabilities into the mainstream of American life. Certainly discrimination exists, but in fairness not everyone -- not even all business owners -- willfully and intentionally discriminate against the disabled. This fact needs to be recognized and understood, for it is key to our accomplishing the worthwhile goal of providing the opportunities for persons with disabilities to be judged by their abilities and not their disabilities.

NFIB has been requested to focus our comments about the ADA on Title IV, "Public Accommodations and Services Operated by Private Entities." If I understand correctly the intent of the authors of this legislation, the objective of the ADA is to afford persons with disabilities the same protections currently contained in other federal civil rights laws prohibiting discrimination on the basis of race, sex, national origin, and religion. This is an objective with which hardly anyone could

disagree. Yet as written, Title IV appears to go well beyond these protections, introducing new, more expansive concepts for the treatment of persons with disabilities.

First, the scope of coverage is significantly greater than current law. The Civil Rights Act of 1964 covered in essence establishments which lodged transient guests, public eating places, and public entertainment facilities. Subsequent court cases have refined the accommodation list to include businesses which obviously cater to tourism.

Other businesses which have been covered by other civil right statutes are establishments that receive federal assistance in one form or another, and firms that contract with the federal government. Title IV of the ADA, however, covers virtually every business in America. By definition in Section 401(2)(A), businesses that are brought within the scope of the bill are:

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

The bill then explicitly lists the types of businesses included within this definition. I would be hard put to find a kind of business that is not covered by this list.

Further, the coverage under Title IV extends to "potential places of employment", so Title II and Title IV would appear to be inextricably linked. Clarification is therefore needed as to the exemption expressly delineated in Title II for businesses with fewer than 15 employees (itself an extension from the original 25-employee threshold contained in the Civil Rights Act of 1964). No explicit exemption is included in Title IV. Does this mean that the exemption only applies to the hiring practices of smaller firms (Title II), or does it also apply to "potential places of employment" with fewer than 15 employees (Title IV)? Is there an exemption from coverage in effect under Title IV if the person with a disability enters an establishment with the purpose of gaining employment, and does not apply if he/she enters the same business as a client, customer, or visitor? If the exemption for smaller businesses is meant to apply to both titles, or indeed to the entire bill, might it not better be placed either in the definitional section of the preamble or in Title VI - "Miscellaneous Provisions"?

There is a distinct philosophical difference between the ADA and Title VI of the Civil Rights Act, and the

practical implications could well be overwhelming for many small firms. Title VI requires acceptance as its standard of accommodation. The ADA requires much more, requiring specific restructuring of "architectural and communication barriers, removal of transportation barriers, provision for "auxiliary aids and services," and the like.

All of these requirements would incur financial costs of varying amounts, some of which could be substantial for a smaller business. In addition, these firms would be expected to provide different "accommodations" to overcome different disabilities. The language in Title IV demands, in effect, that business owners be prepared for any and all contingencies, since the bill affords protection to all "customers, clients, or visitors" who are persons with a wide range of disabilities.

Further complicating the situation, since by definition Title IV covers all "potential places of employment," all these businesses seem to be required to go to great lengths to "accommodate" persons with disabilities -- even when there is no disabled worker requiring such accommodation.

What is being asked of small businesses is that they perform structural modifications, buy special equipment, provide qualified interpreters, readers, taped texts,

other "effective methods", or "alternative methods" aid persons with disabilities -- whether or not any such persons ever make contact with these businesses. Business owners will be perceived as discriminating against persons with disabilities not only if they willfully exclude such individuals, but if they "fail" to make the modifications or provide the services required in accordance with Title IV, unless they can demonstrate that modifications would "fundamentally alter the nature of such privileges, advantages, and accommodations", or they can show that providing auxiliary aids and services would result in "undue burden", or that removal of architectural and communication barriers is not readily achievable. On the last point, however, they must also be prepared to adopt "alternative methods" to achieve accommodation.

What these alternative methods would be would, I presume, have to be decided on a case-by-case basis, but might include items such as a business initiating home delivery of goods and services if the business simply cannot retrofit the facility to overcome barriers. What does the business owner do, for example, as a "potential employer" if the place of business cannot readily be modified? Does he allow the disabled worker to work at home? And doesn't this contravene the requirement in Title I that an individual with a disability must be afforded "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 individuals' needs" (emphasis added)?

The business owner is subject under the dictates of this bill to the same onerous requirements and enforcement procedures whether discrimination is intentional or unintentional. And since Title IV defines a business as a "potential place of employment", presumably the owner is also subject to the prohibition in Title II against "potential discrimination", that is, the claim of a person with a disability that he/she is "about to be" discriminated against.

All of this is daunting enough to the small business owner, but the enforcement procedures contained in this bill raise even more serious concerns. Different remedies are contained in each title of the bill, and access to multiple remedies is assured. I have already stated that no distinction is made between acts of intentional and unintentional discrimination, and there is nothing in the bill to suggest that first instance violations would be treated any differently than pattern and practice violations.

In Title IV, remedies include private cause of action, possible intervention by the Department of Justice, actual

and punitive damages, recovery of attorney fees, and civil penalties. These are significant penalties, particularly for the business owner who neither willfully, intentionally, or with malice discriminates against someone with a disability.

The tone of the bill is substantially different from Title VII of the Civil Rights Act, even though we are told that ADA is intended to afford the same protections as Title VII. Where Title VII encourages conciliation and cooperation, the ADA encourages adversarial relations. No attempt is made to highlight administrative remedies as the first step in reviewing discrimination. Direct resort to civil litigation is the preferred approach in the ADA. Such procedures are a deterrent to conciliation and as such, will prove counterproductive to the purposes of the proposed legislation. Inducements for civil litigation will further clog our courts and result in substantial new grey areas of liability for small business owners who, over the past few years, have already been hit with overwhelming liability insurance rate increases, and in some instances loss of coverage.

There are other, significant problems with this bill: inconsistent standards; direct contravention of the employers' ability to define qualifications for and essential components of jobs in his/her workplace; lack of

any clear language to determine who carries the burden of proof in which instance; inconsistencies between Acts, such as the inclusion of drug abusers as disabled individuals under the ADA versus the strict requirements imposed on employers by the drug-free workplace statute; requiring that equal, not comparable, means and outcomes be used in achieving accommodation for the individual with a disability; and the like.

One final general comment remains to be made. The ADA is intended to be implemented in addition to, rather than instead of, existing civil rights statutes pertaining to persons with disabilities. What is being created is a regulatory maze through which small business owners are expected to navigate, with no false steps or detours allowed. In addition to the federal requirements, businesses will also have to comply with pertinent state and local laws. Opportunities for duplication and/or conflicting requirements are rife within this context.

I urge the Subcommittee to deliberate carefully over this legislation. The ADA, if enacted, will be a landmark statute, affecting the day-to-day lives of millions of people. It is critical that a reasonable balance be achieved between the rights of persons with disabilities and the small business community. Let us not, in attempting to provide equal rights to the disabled, create

new and different types of disabilities within the job-generating sector of our economy.

I referred earlier to the impending labor shortage, most notably delineated in the Hudson Institute's Workforce 2000 and Opportunity 2000. The shortage promises to have a devastating impact on small firms, by nature labor intensive and traditionally the group that hires new entrants into the labor force.

Even in boom labor markets, small businesses face heavy competition with their larger counterparts. All too often the small business owner hires the new entrant and provides him/her with the on-the-job training he/she needs to build a career. Many skilled workers are enticed away by larger firms offering fast-track career advancement, larger salaries, bigger and better benefits. Yet small business continues to generate new jobs for new workers.

As we approach the end of this century, the pool of available workers will shrink in absolute terms, and the composition of the workforce will change drastically. Competition for workers will be fiercer than ever before. The challenge to small business will be to find ways to integrate individuals outside the economic mainstream into their workplaces, and to do so in an efficient and economic manner so they can continue to compete with

larger firms with greater resources. Businesses are, after all, economic institutions by their nature. Small firms who have hired persons with disabilities have found in most cases that the extra effort makes good economic sense. I have no doubt that, faced with the demands of the marketplace, many other small firms will soon learn the same lesson.

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NATO National Association of Theatre Owners

Testimony of

Malcolm C. Green
Chairman

National Association of Theatre Owners

Before The

Subcommittee on the Handicapped

Committee on Labor and Human Resources

May 10, 1989

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NATO National Association of Theatre Owners

STATEMENT OF NATIONAL THEATRE OWNERS ASSOCIATION

May 10, 1989

RE: Americans with Disabilities Act of 1989

The members of the National Association of Theatre Owners (NATO) operate more than 12,000 motion picture theatre screens in all 50 states. NATO includes the very largest chains in the nation as well as hundreds and hundreds of independent theatre owners.

NATO members provide entertainment that is available to all. Last year over one billion people went to the movies in the United States. Truly, everyone enjoys motion pictures. The young, the old, the highly educated and less highly educated, the wealthy and the economically less fortunate, all have an opportunity to seek out a motion picture that meets their interests and usually for a price of less than $6. Unlike the Broadway theatre, the big city concert or professional sports, where tickets can cost $50 each, motion picture theatres offer entertainment that is economically available to most Americans. The 12,000 NATO motion picture theatre screens are geographically diversified so that almost everybody has a choice of several theatres within a reasonable distance of his or her home.

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Motion picture theatre owners are experienced at moving a large number of people into and out of semi-darkened auditoriums, rapidly and safely. Although motion picture theatre staffs have traditionally included a large proportion of young first time job holders and an increasingly large number of senior citizens, the industry trains its employees to be able to deal with a large number of people in a relatively confined space. Theatre staff members are trained to deal with normal conditions and emergency conditions. Whenever one has a large number of people in a limited physical space, it is essential that preparations be made to deal with the worst case scenario and the theatre industry has accepted this responsibility. Our staff has to be able to move quickly should the need arise. This situation has caused NATO members to spend much time considering the special problems of the disabled both as patrons and employers.

The motion picture theatre industry has been a leader in facilitating innovations in construction to insure that disabled individuals have access to the nation's motion picture theatres. New theatre construction is engineered to provide ramps and auditorium space that permit persons in wheelchairs access to all of the theatre facilities. Restrooms are fully equipped in accord with state and local building codes to meet the needs of the disabled. Special sound facilities are being installed in many auditoriums that will enable hearing impaired individuals to enjoy a "night at the movies."

The National Association of Theatre Owners supports legislation designed to prohibit discrimination on the basis of

disabilities but at the same time NATO recommends that Congress recognize that there are certain rules of reason that must be followed in connection with this legislation.

I. ACCESS TO PUBLIC ACCOMMODATIONS

A. New Construction.

NATO supports the concept that new construction should be carefully engineered to insure full access for disabled persons. Theatres should include ramps to permit access to the auditoriums. Seating for persons in wheelchairs should be provided in close proximity to exits within each facility. NATO has compiled data which shows the number of persons in wheelchairs, on crutches, or using walkers, that attend theatres on a theatre/per week basis in various areas of the country.

For example, a wheelchair count was conducted in 28 theatres in Maryland, Virginia, and Pennsylvania from December, 1987, through March, 1988. The results of the survey showed that there was very little usage of the spaces for disabled persons available. Although many of our theatres provide two to four wheelchair positions, the theatres surveyed averaged one to two wheelchair patrons per week.

The survey also showed that over sixty percent (60%) of our wheelchair patrons do not sit in the spaces for disabled persons, they prefer to be removed from their wheelchairs to a theatre seat. Our ushers and door persons provide assistance.

A similar survey conducted in 10 theatres with a total of 53 screens in the state of Massachusetts shows that in a typical week the theatres served approximately 66,000 patrons. Among

these patrons, there were an average of 38 persons in wheelchairs, 48 persons on crutches, and 28 persons using walkers.

NATO will be glad to share these data with the Congress.

There has been some discussion as to whether it is discriminatory to limit wheelchair seating to the front and back of a motion picture theatre auditorium as distinguished from seating in the center of the auditorium. We contend that it is not only reasonable, but it is essential from a safety standpoint that wheelchair patrons be seated near an exit.

Today the typical motion picture theatre auditorium is much smaller than it has been in the past. Auditoriums with 200 to 300 seats are typical. In such a facility, every seat offers an excellent view of the screen. Motion picture theatres do not have price differentials for preferred seating. Attending a motion picture can be distinguished from attending a play or concert where seating prices vary based on location within the auditorium.

There is no discrimination in placing wheelchair seating in the front and rear of a motion picture theatre. By contrast, in the environment of a motion picture theatre, placing a wheelchair in the center of the auditorium and away from an exit can create a significant safety hazard. In the rare event of a fire, the theatre staff is trained to quickly enter the auditorium and assist disabled individuals. If such individuals are close to an exit, the theatre employee can effectively assist the disabled patron. If the disabled patron was seated in the middle of the

theatre far from an exit, theatre employees would have difficulty in getting to the disabled individual. Furthermore, other patrons of the theatre would be impeded in exiting rapidly as may be required by the situation. For these reasons, state fire marshals have uniformly indicated that seating for disabled persons should be placed near an exit and not in the middle of an auditorium.

We recommend that whatever legislation is adopted by the Congress, recognition must be given to the fact that wheelchair patrons of theatres should be seated near an exit.

The proposed legislation would not only cover wheelchair theatre patrons but also patrons with other disabilities. As we indicated before, the motion picture theatre industry is now including audio equipment for the hearing impaired in new construction. The proposed legislation does discuss the need for special equipment for the visually impaired. It is our understanding that some equipment is available for such individuals but that the equipment would only meet the needs of a small number of individuals and is extremely expensive. We would recommend that studies be undertaken to determine whether such equipment would be cost effective for use in a motion picture theatre. Unless a specific benefit can be shown without undue economic burden, we would oppose legislation that such equipment be required.

B. Existing Facilities.

Many motion picture theatres are located in the innercity, in buildings that are quite old. These locations are often of

marginal profitability and have great difficulty in competing with modern theatres located in suburban shopping malls. The shift in the movie going population from the city to the suburb can be easily documented by analyzing new theatre construction. In our industry, it is unusual to find significant new theatre construction in downtown areas.

Due to the age of these innercity theatres and the marginal profitability, it is not feasible to require substantial expenditures for renovating such facilities to meet the needs of disabled individuals. We therefore recommend that any legislation that is approved by the Congress exempt existing structures from the requirements of the law. However, we think it is reasonable to include in the statute a provision that where an existing facility is substantially renovated, the plans for the renovation require adequate facilities to insure that disabled individuals can use the renovated theatre comfortably.

Various definitions have been proposed for what constitutes "substantial renovation." In certain state regulations dealing with this issue, it has been determined that a substantial renovation occurs in the event that the cost of the renovation is equal to at least 50% of the value of the building being renovated. NATO would support such a concept. We think that it is reasonable in light of existing economic realities. However, we caution that any legislation that is adopted should make it absolutely clear that it will constitute an undue burden to require that special facilities be put in any building unless it can be shown that such facilities will actually be used by a

reasonable number of people in a foreseeable circumstance. Statistical data should be developed showing what type of handicapped or disabled individuals actually could visit various public accomodations including theatres. Any renovations or special facilities included in new construction should be limited to situations where it can be shown that the actual work done will accomplish a real goal that can be documented.

II. DISCRIMINATION IN EMPLOYMENT.

NATO supports legislation that would eliminate discrimination in employment on any basis whether race, religion, national origin, sex or disability. Our industry has been in the forefront of those promoting equal opportunity for all. However, we believe that it is necessary to again apply a rule of reason when evaluating specific job classifications. We would like to present three examples for consideration:

A. Motion picture theatre ticket seller.

Today's motion picture theatres are equipped with high technology computerized ticket booths. The equipment used in these booths has not been designed for persons in wheelchairs. A person in a wheelchair sitting behind a typical ticket booth counter could not reach from the wheelchair to the counter and certainly could not reach the money being proffered by the customer or return a ticket to the customer. Due to the mechanical limitations of this type of equipment and the size limitations of existing ticket booths, it is unreasonable to require that motion picture theatre owners offer this job to all disabled individuals if in fact such individuals could not

physically perform the job under the structural limitations of the ticket book.

B. Food concession operator.

The food concession operator in a motion picture theatre is required to move back and forth down a walkway behind a food service counter, reach and obtain the various items selected by the customer, dispense certain items, i.e., popcorn and soft drinks, and obtain payment and make change. Certain types of disabled individuals can perform this function efficiently. Persons in wheelchairs would have obvious difficulties. NATO recommends the rule of reason be applied to this job classification and the employer be required to determine whether the disabled individual in question can physically perform the task in light of existing job conditions. If in fact the person cannot perform the tasks under existing conditions, it should not be considered discriminatory for an employer to refuse to hire such an individual for this job.

D. Projection operator.

The projection operator in a motion picture theatre must be able to move easily in and out of the projection booth and must be able to pick up heavy disks of film and lift the film and insert it onto the projection platter. This activity requires not only access to the facility but certain manual dexterity, upper body strength and reach. Projection booths generally are extremely limited in space. Persons in wheelchairs would have difficulty moving around within the confines of such booths and will probably be unable to lift the film and place it in the

projection equipment. Motion picture projection booths are often designed so that one booth services multiple screens. A person in a wheelchair would have great difficulty moving from one work station to another. Thus, this job classification is not one which can be reasonably engaged in by a person in a wheelchair.

Again, NATO urges that a rule of reason be applied in evaluating whether an individual with a particular disability can perform in this job classification. It could well be that individuals with limited disabilities could perform efficiently as a projectionist. However, an individual with a severe disability such as a paraplegic, could not perform as a projectionist.

NATO believes that whatever legislation is passed clear recognition must be given to the proposition that before a finding of discrimination can be made, it must be determined whether the individual claiming discrimination is in fact capable of doing the job in question within the physical limitations that may be established by the disability and the limitations that may be established by the nature of the employer's facility.

A recent decision by the state of California not to require exhibitors to hire disabled workers supports NATO's position.

In March of 1989, California exhibitors successfully defeated a state government proprosal that would have forced them to hire persons with disabilities in projection booths, cashier's cages, and at theatre refreshment stands.

The issue was settled when the Handicapped Access Division of the State Building Standards Commission accepted the validity

of exhibitor's claims that the physically disabled would be unable to perform their necessary tasks in those jobs, and that the cost of mandatory accommodation (access) would be prohibitive, and further exacerbate the burden on theatre owners.

This position, supported by NATO of California, does not indicate a lack of sympathy with or understanding of the plight of the disabled. NATO simply demonstrated that after working with the disabled over a period of three years, it is physically impossible for a person in a wheelchair to serve as a projectionist, work behind a snack bar, or handle ticket-dispensing equipment.

III. CONCLUSION

The proposed legislation continually refers to a "reasonable" standard and includes a restriction that no undue burdens shall be placed on owners of public accommodations or employers. We have provided specific examples with regard to our industry to indicate standards of "reasonableness" and "undue burden" that we think appropriate. We suggest that these examples be included in the legislative history supporting this Act.

We also recommend that when drafting regulations, the agencies in question be directed to develop specific facts to prove that the acts and practices required by the regulations will effectively meet the underlying objectives of the statute. Ultimately the increased costs required by the legislation will be paid by the public. It is senseless to require that the public pay the cost of regulatory action that does not meet its

intended purposes. Use data should be developed on an industry by industry basis that will clearly show that the regulations that apply to such industry will actually result in more jobs for the disabled and increased use of public facilities by persons with such disabilities.

NATO supports the concept of elimination of all discrimination. NATO supports the concept of federal legislation to specifically eliminate discrimination based on disability. NATO believes that antidiscrimination legislation should establish general guidelines but permit sufficient latitude to enable employers, employees, state and local officials, educators and the public, to work together to promote reasonable standards to eliminate job discrimination based on disability.

We will be glad to provide any additional information requested.

Respecfully submitted,

Malcolm C. Green
Chairman

STATEMENT OF
MALCOLM C. GREEN, BOSTON, MASSACHUSETTS
CHAIRMAN OF THE BOARD, NATIONAL ASSOCIATION OF THEATRE OWNERS

MAY 10, 1989

GOOD MORNING. MY NAME IS MALCOLM GREEN. I AM FROM BOSTON, MASSACHUSETTS AND I AM CHAIRMAN OF THE BOARD OF THE NATIONAL ASSOCIATION OF THEATRE OWNERS. WE ARE THE LARGEST NATIONAL ASSOCIATION OF THEATRE OWNERS IN THE WORLD AND REPRESENT OVER 12,000 SCREENS IN THE UNITED STATES. THE MOTION PICTURE THEATRE INDUSTRY HAS BEEN A LEADER IN PROVIDING ACCESS FOR THE DISABLED TO PUBLIC FACILITIES.

I HAVE BEEN IN THE MOTION PICTURE THEATRE BUSINESS SINCE 1946 AND MOST RECENTLY SERVED AS TREASURER OF CINEMA CENTERS, INC. CINEMA CENTERS OPERATED 111 SCREENS IN THE NEW ENGLAND STATES AND IN NEW YORK STATE.

NATO HAS PREPARED A WRITTEN STATEMENT WHICH I AM SUBMITTING FOR THE RECORD AND I WOULD LIKE TO EXTEND OUR REMARKS TO PROVIDE THE MEMBERS OF THIS COMMITTEE WITH SOME OF MY EXPERIENCES IN OPERATING MOTION PICTURE THEATRES FOR MORE THAN 40 YEARS. LAST YEAR MORE THAN ONE BILLION AMERICANS WENT TO THE MOVIES. WE AT NATO ARE VERY PROUD OF THIS FACT.

MY COMPANY, CINEMA CENTERS, INC., IS CONSTANTLY SEEKING FEEDBACK FROM OUR CUSTOMERS. WE WANT TO KNOW WHETHER THEY LIKED THE MOVIE THAT THEY SAW. WE WANT TO KNOW IF THE THEATRE WAS COMFORTABLE; IF IT WAS CLEAN; IF THE PATRON HAD ANY COMPLAINTS.

TO BETTER SERVE OUR CUSTOMERS, WE DEVELOPED A SYSTEM USING COMMENT CARDS. PATRONS WERE ASKED TO COMPETE THESE CARDS AND MAIL THEM BACK TO US. EACH RESPONSE WAS CAREFULLY SCRUTINIZED. IN RECENT YEARS, ALL OF OUR THEATRES WERE CONSTRUCTED TO PROVIDE WHEELCHAIR ACCESS FOR DISABLED PERSONS. WE HAVE NEVER TO MY KNOWLEDGE RECEIVED A COMPLAINT FROM A DISABLED PERSON THAT OUR THEATRES WERE INACCESSIBLE OR INHOSPITABLE TO THEIR NEEDS. IN MASSACHUSETTS, TEN THEATRES TOTALLING 53 SCREENS, COMPLETED AN INDUSTRY SURVEY ON ATTENDANCE BY PATRONS WITH CRUTCHES, WALKERS AND WHEELCHAIRS DURING MARCH 1989. DURING THIS TIME PERIOD, AVERAGE ATTENDANCE FOR ALL THEATRES WAS 65,807 PER WEEK. OF THIS NUMBER 114 WERE PERSONS WITH DISABILITIES INCLUDING 38 WHEELCHAIR PERSONS, 48 WITH CRUTCHES AND 28 WITH WALKERS. DISABLED PERSONS APPROXIMATED LESS THAN 2/10 OF 1% OF TOTAL PATRONS DURING THIS TIME PERIOD.

AS AN INDIVIDUAL AND AS CHAIRMAN OF NATO, I SUPPORT LEGISLATION GUARANTEEING DISABLED PERSONS ACCESS TO PUBLIC FACILITIES AND ACCESS TO JOBS. AT THE SAME TIME, ONE MUST BE REASONABLE. IN A THEATRE, WHEELCHAIR PATRONS MUST BE SEATED EITHER IN THE FRONT OR BACK OF THE THEATRE. TO SEAT A WHEELCHAIR PATRON IN THE MIDDLE OF THE THEATRE WOULD CREATE OBVIOUS SAFETY PROBLEMS IN THE EVENT THAT THERE WAS A NEED TO EMPTY THE THEATRE QUICKLY. STATE FIRE MARSHALS HAVE CONSTANTLY TAKEN THE POSITION THAT WHEELCHAIR PATRONS SHOULD BE SEATED EITHER IN THE FRONT OR THE BACK OF THE THEATRE IN CLOSE PROXIMITY TO AN EXIT. MOTION PICTURE THEATRE STAFFS ARE TRAINED IN THE EVENT OF AN EMERGENCY

TO QUICKLY ASSIST DISABLED INDIVIDUALS. THIS TASK WOULD BE IMPOSSIBLE IF SUCH INDIVIDUALS WERE SEATED IN THE MIDDLE OF THE AUDITORIUM.

ALTHOUGH ALL THE THEATRES THAT WE BUILT IN THE LAST 15 OR 20 YEARS ARE ACCESSIBLE TO DISABLED PEOPLE, I NOTE THAT CERTAIN INNER CITY THEATRES BUILT MANY YEARS AGO MAY NOT HAVE SUCH MEANS OF ACCESS. SOME OF THESE THEATRES ARE IN DEPRESSED INNER CITY AREAS AND ARE STRUGGLING TO STAY OPEN. THEY ARE OF MARGINAL PROFITABILITY BUT SERVE AS A FOCAL POINT FOR ENTERTAINMENT IN THEIR COMMUNITIES. ANY NEW LEGISLATION ENACTED SHOULD RECOGNIZE THAT IT WOULD BE IMPOSSIBLE TO INVEST THE CAPITAL NECESSARY TO BRING SUCH FACILITIES INTO COMPLIANCE WITH A LAW REQUIRING TOTAL ACCESS FOR THE DISABLED. SUCH FACILITIES MUST BE EXEMPT UNLESS AND UNTIL THEY ARE TOTALLY RENOVATED.

SIMILARLY, ELIMINATION OF JOB DISCRIMINATION ON THE BASIS OF DISABILITY IS A CONCEPT THAT MUST BE SUPPORTED BUT WITHIN REASON. IN A MOTION PICTURE THEATRE SETTING, CERTAIN TYPES OF DISABLED INDIVIDUALS COULD OBVIOUSLY WORK IN CERTAIN JOBS. OTHER DISABLED INDIVIDUALS COULD NOT. THE PHYSICAL LIMITATIONS OF EXISTING THEATRES WOULD PROHIBIT UTILIZING WHEELCHAIR PERSONS FROM OPERATING PROJECTORS. PROJECTION BOOTHS ARE USUALLY LOCATED BETWEEN AUDITORIUMS IN RELATIVELY LIMITED SPACE. THEY REQUIRE CLIMBING STEEP STAIRWAYS FOR ENTRANCE. PROJECTOR OPERATORS MUST LIFT HEAVY PLATTERS OF FILM WHICH AGAIN WOULD BE IMPOSSIBLE FOR PERSONS WITH A CERTAIN TYPE OF HANDICAP. RECENTLY A CALIFORNIA COMMISSION SPECIFICALLY EXEMPTED THIS JOB CLASSIFICATION FROM THE

REQUIREMENT OF THE CALIFORNIA ANTIDISCRIMINATION STATUTE. WHILE I DON'T WANT TO APPEAR NEGATIVE, I MUST URGE THE COMMITTEE TO RECOMMEND LEGISLATION THAT IS REASONABLE IN SCOPE AND DOES NOT PLACE UNREASONABLE OR UNDUE BURDENS ON EMPLOYERS.

I THANK YOU FOR INVITING US TO TESTIFY THIS MORNING AND I WILL BE GLAD TO ANSWER ANY QUESTIONS THAT YOU MAY HAVE.

aspa
Managing Human Resources

TESTIMONY OF LAWRENCE Z. LORBER

ON BEHALF OF

THE AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION

AMERICANS WITH DISABILITIES ACT OF 1989

BEFORE THE

SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

MAY 9, 1989

American Society For Personnel Administration
National Headquarters • 606 N. Washington Street • Alexandria, Virginia 22314 • Phone: 703/548-3440

I am Lawrence Z. Lorber, a partner in the law firm of Kelley Drye & Warren; previously, I was Deputy Assistant Secretary of Labor and Director of the OFCCP in 1975 and 1976. During my tenure at the Department of Labor, the OFCCP was officially amalgamated with the addition of the handicapped and veterans functions of Section 503 of the Rehabilitation Act of 1973 as amended and Section 2012 of the Vietnam Era Veterans Act of 1974. And it was during my tenure that the initial regulations implementing § 503 were issued by the Department of Labor.

Today, I am testifying on behalf of the American Society for Personnel Administration (ASPA). With over 40,000 individual members, ASPA is the world's largest society dedicated exclusively to excellence in human resources management. ASPA members work for large and small employers which collectively employ more than 41 million people. We are therefore vitally concerned with the orderly evolution of laws defining, in practical terms, the meaning of equal employment opportunity.

ASPA has long recognized its special responsibility to support and encourage compliance with fundamental principles of equal employment opportunity, and has encouraged its members to actively recruit from <u>all</u> pools of qualified candidates. We believe that adherence to these principles is sound management practice and contributes significantly to the success of our membership and our members' organizations.

ASPA has also acted to give its members the tools to improve their efforts to recruit people with disabilities. In 1985, as part of ASPA's Human Resource Management Series, we published a monogram which is available to ASPA members entitled "Job-Match: A Process for Interviewing and Hiring Qualified Handicapped Individuals".

More recently, in December of 1988, ASPA assumed the expense of providing its 40,000 members with a copy of the Fall issue of Worklife: A Publication on Employment and People With Disabilities, published by the President's Committee on Employment of People With Disabilities (see Attachment 1). ASPA was willing to do so because we share the goal of the President's Committee -- to make companies aware of the employment potential of people with disabilities.

As you can see, ASPA has been in the forefront of employers' efforts to ensure that disabled Americans participate fully in the workplace to lend their considerable and unfortunately untapped talents to a productive and vibrant economy. We, therefore, applaud the notion of a unified statute establishing one standard to deal with the problem of lingering employment discrimination against disabled Americans. However, in reviewing the latest draft of the Americans with Disabilities Act of 1989, we are concerned that serious legal, and practical employment issues are created which will make effective implementation difficult and create an unnecessary legal quagmire.

To address those concerns, we respectfully offer these comments and suggestions on the legislation. ASPA looks forward to the opportunity to work with the Committee to structure a feasible and workable statute.

With respect to the basic premise of the proposed legislation, we suggest one significant problem. The explanatory materials provided by the Committee suggest that the drafters looked to § 504 of the Rehabilitation Act and its implementing regulations as the model upon which this legislation is based. Yet the draft legislation which is the subject of these hearings seems designed in part to specifically countermand the interpretations of § 504 by the Supreme Court in a series of cases, most notably Alexander v. Choate, 469 U.S. 287 (1985). In that case Mr. Justice Marshall, speaking for a unanimous Supreme Court stated that the serious problems faced by disabled Americans did not lend itself to a broad based impact review of all policies and procedures. Justice Marshall suggested that a more tailored response weighing the legitimate aspirations of the disabled with equally legitimate concerns of business and government was appropriate. While the Congress obviously has wide latitude in crafting new legislation, the historical interpretations of legislation which serve as the predicate for new legislation ought not to be cast aside without careful consideration.

The general definition of prohibited forms of discrimination found in Title I prohibits the employer from

providing a job that is "less effective" than those provided to others. That section goes on to require that the standards for defining equal opportunity assure that individuals with disabilities achieve the same result as non-disabled individuals. Such a legal obligation in the context of employment exposes employers to litigation potential of unimaginable complexity. In the employment context, a same result standard could compel an average compensation analysis to ensure that disabled employees achieve the same average compensation as all employees. This combination of the § 504 program access concept with general employment concerns is an unwieldy and unnecessary burden to be placed on employers.

In this context, the definitions of reasonable accommodations found in Section 3(3)(B) is a clear affirmative action requirement looking to creative efforts to ensure access rather than a legal standard against which to determine if an employer was guilty of discrimination. However, Title II defines employment discrimination as, inter alia, the failure to make reasonable accommodation to the known physical or mental limitation of a qualified individual with a disability. The only coherent construction of these obligations would compel employers to undertake continuous job restructuring to ensure that particular disabilities are accommodated. Thus, where an employer provides open bidding for jobs, whether union or not, and in which the standards for selection are based on seniority and prior

performance, an employer would be compelled to constantly restructure a job for each applicant with a disability before selection to avoid being found in violation of the non-discrimination standards of the law.

This mixing of the § 504 non-discrimination requirements with the § 503 affirmative action obligations in the employment context will be unworkable. Too, the notion of a qualified individual with a disability presumes that with accommodation the individual can perform the job. Whereas the definition of reasonable accommodation in the statute requires wholesale job and job function restructuring prior to the employment decision so as to avoid allegations of discrimination. Concepts are combined without reference to the particular concerns of the workplace.

We would further question the efficacy of including within the theories of discrimination permitted by the legislation an impact test in the context of a universal statute which in separate sections deals with every other aspect of commercial intercourse and which is additive to the already extensive requirements of the 1973 Rehabilitation Act. The impact test evolved under Title VII of the 1964 Civil Rights Act to deal with those limited circumstances in which broad based employment practices, unproven as job related, served to exclude classes of individuals. The draft legislation before this Committee would, however, establish the impact analysis as an individual standard insofar as each separate disability requires a different response

in the employment situation. Here again, Mr. Justice Marshall spoke to this issue and we would urge the Committee to examine closely the reasoning in the Alexander decision. We would suggest that the serious employment problems this legislation is designed to attack are not well suited for such a broad based assault -- and that employers will be held to standards they will be unable to address before litigation. While there might be eventual relief for certain individuals with the wherewithal and resources to conduct extended litigation, this provision will surely inhibit broad scale reasonable accommodation efforts.

In this context, we would note that Section 202(b)(3) proscribes the application of tests or selection criteria would limit opportunities for individuals or groups "unless such standards, tests or other criteria can be shown by [the employer] to be necessary and substantially related to the ability of an individual to perform the essential functions of the particular employment position."

This provision ought to raise several caution signals. The legislation is silent, as it must be, in defining what constitutes an "essential function" of a particular job. Courts will be asked to parse job descriptions to separate the essential from the merely additive regardless of the employer's own inputs. Job descriptions will have to be drafted with excruciating specificity in order to enumerate all "essential" functions, though for executive, professional, technical and even some

administrative jobs without defined products or specified methods of production, such specificity would be impossible. Too, this section will surely encompass performance appraisals and compensation systems which are designed for general application and would require instead tailored systems for each employed disabled worker. And actual physical employment criteria such as lifting requirements, strength and agility tests would be subjected to individual review in which the selection criteria would have to be shown to be necessary for the essential function of the job, a standard which probably cannot be met.

Such a burdensome requirement in the employment context which would require individual test validation is in contrast with the current regulations of the Department of Labor found at 41 CFR § 60-741.5(C)(2) which adopt the accepted legal standards for test validation. We would urge the Committee to look to those employment standards as its model rather than mix in the programmatic requirements of § 504 which are inapplicable in a private employment context where the employer, not the government, pays for the changes.

Too, we would note with particular concern that this legislation, which defines discrimination as the failure to undertake reasonable accommodation also provides that the affirmative action requirements of § 503 of the Rehabilitation Act for federal contractors remains in place. See Section 601(a)(b). Contractor employers are thus placed in the untenable position of

complying with the dictates of the Labor Department with respect to the affirmative action to undertake reasonable accommodation only to find that an OFCCP administrative determination that the affirmative action obligation has not been met, becomes by action of this statute, a prima facie determination of discrimination. The clash of concepts will inevitably result in more cautious explorations by employers of reasonable accommodation alternatives because of the attendant risk of legal liability.

The enforcement structure contemplated by the legislation providing both Title VII and § 1981 type relief makes little sense. Disabled Americans in particular would benefit from rapid administrative redress of concerns. Expertise in the design of feasible alternative work procedures to accommodate individual disabilities can best be accomplished in an administrative and not judicial setting. Does this Committee truly want the access of disabled Americans to employment opportunities be dependent upon resolution of disputes by overcrowded courts following a lengthy clash of experts through deposition and court testimony only to be followed by the next contest with a different disability for a different job? The case by case resolution before a jury required by the § 1981 option makes no sense nor are the extensive contract based remedies under § 1981 applicable to the disability context. Were this Committee to ensure that adequate resources were available in the EEOC to carry out the functions required by this

legislation, the Title VII model, with administrative review in the first instance is the only feasible way to proceed.

Our courts are now understandably hostile to the multiplicity of statutory and common law relief available in the employment context. We should not unnecessarily increase that problem with this legislation.

We would address this Committee's attention to the provisions of Section 101(b)(2) pertaining to alcohol and drug use in the workplace and note, at the very least, the conflict between this provision and that of the recently enacted Drug Free Workplace Act which requires government contractors and suggests to all employers to establish a drug-free workplace. While hopefully unintended, § 101(b)(2) negates that requirement by requiring an adverse causal relationship be established between drug and alcohol use in the workplace before employers can prohibit such use.

Finally, we would strongly suggest that the Committee reconsider its decision to make undue hardship the test for determining the efficacy of the reasonable accommodation. In the employment context, such a standard will prove unworkable and create significant disincentives to employers. Notwithstanding the reference to § 504, we would reiterate that this legislation covers private employers who are not receiving federal contracts or grants and who must therefore bear the entire financial burde.

of compliance. Section 504 is thus an imperfect model at best for private employers.

The concerns outlined above essentially relate to technical legal issues, burdens of proof and administrative structures applied to the workplace. The legislation seems to pick and chose among the most expansive provisions of Title VII, Sections 503 and 504 of the Rehabilitation Act and Section 1981 to provide a statutory scheme for resolving employment concerns of disabled Americans. Such a weighting of the scales is unnecessary and unwise. ASPA therefore respectfully urges this Committee to review the employment requirements and structure a system designed to provide rapid and fair relief to disabled individuals, and to create understandable and feasible obligations for employers.

Work life

PEOPLE WITH DISABILITIES

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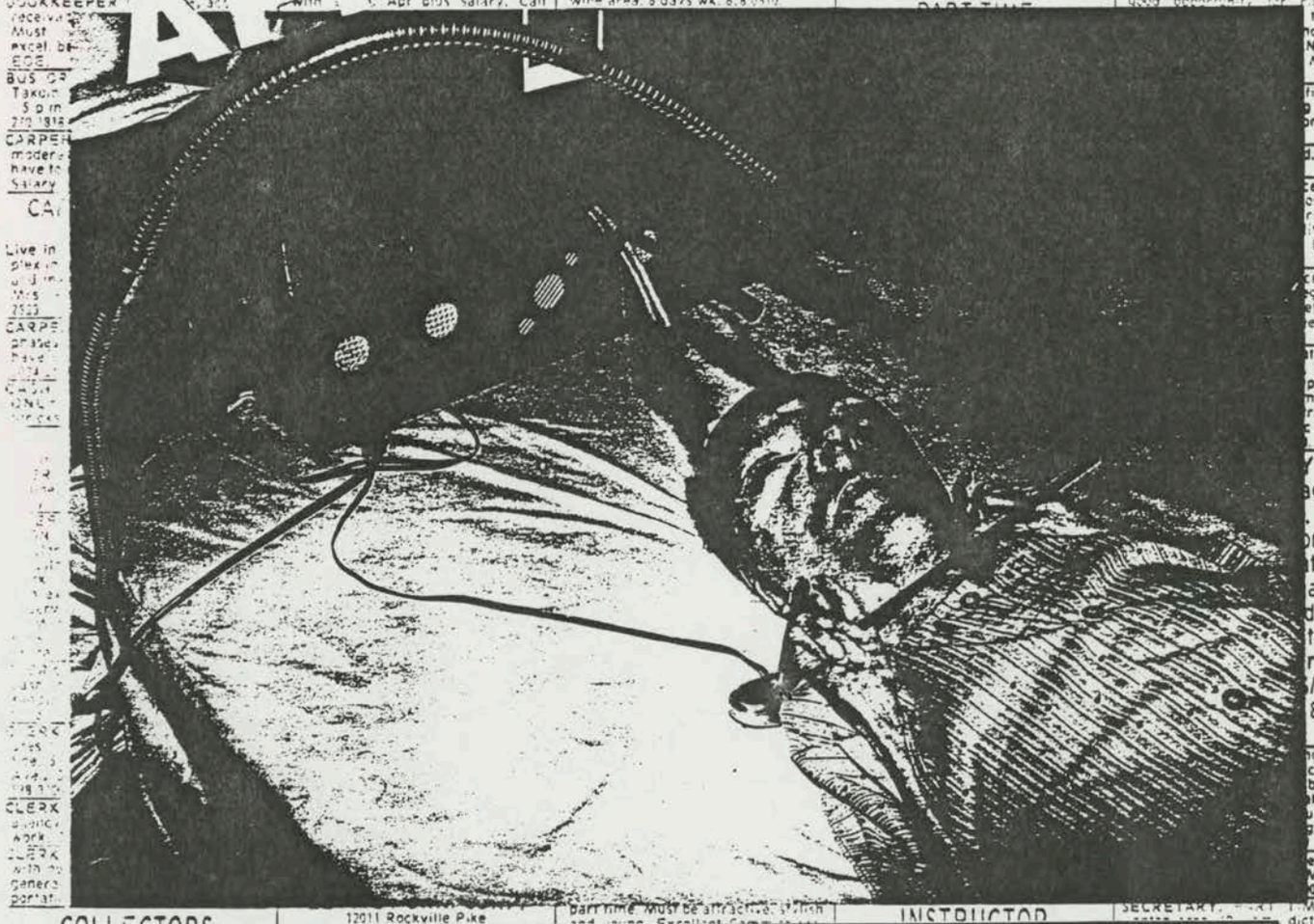

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The President's Committee on Employment of People With Disabilities

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Dignity, Equality, Independence Through Employment

Dear ASPA Member:

The President's Committee on Employment of People With Disabilities takes pleasure in introducing you to our new quarterly magazine, Worklife: A Publication on Employment and People With Disabilities.

Worklife is a magazine aimed at employers across this nation, at people with disabilities and at rehabilitation professionals who work with both constituencies. Our goal is to make our readers more aware of the skills and abilities of individuals with disabilities, a vast resource of people who remain ready for employment ... people who are disabled, but able to work.

We hope that you will find the magazine an appealing addition to your read list. You may obtain a free subscription by tearing off the perforated card on the back cover, filling in your name and address (or attaching your business card) and mailing it to the Worklife editor.

Our mission, at the President's Committee, is to make companies aware of the employment potential of people with disabilities. The incentive for your company is an alternative labor pool resource and for the worker with a disability it brings independence, life where a salary is earned and taxes are paid. That is the bottom line.

Reading Worklife can create a new awareness in a movement that shows a profit for business, people with disabilities and the nation.

That is our bottom line. Keeping you informed.

Sincerely,

Harold Russell

Harold Russell
Chairman