

THE ADA AMENDMENTS ACT OF 2008

By: Chai R. Feldblum, Kevin Barry, & Emily A. Benfer*

I. INTRODUCTION

One of us, Chai Feldblum, was actively involved in the drafting and negotiation of the Americans with Disabilities Act (ADA) from 1988 to 1990, and has remained involved in disability rights since that time. Two of us, Kevin Barry and Emily Benfer, are part of the new generation of lawyers who are seeking to implement and carry out the promise of the ADA.

The goal of the ADA was to create a civil rights law protecting people with disabilities from discrimination on the basis of their disabilities. Disability rights advocates in 1990 were victorious in their efforts to open doors for people with disabilities and to change the country's outlook and acceptance of people with disabilities. These advocates believed that the terms of the ADA, based as they were on

* This submission to the symposium is truly a team effort. Chai Feldblum is a Professor of Law at Georgetown Law in Washington, D.C. She is the Director of the Federal Legislation and Administrative Clinic ("the Clinic"), which provides pro bono legislative lawyering services to Epilepsy Foundation and Workplace Flexibility 2010. *See* <http://www.law.georgetown.edu/clinics/flc/index.html>. In her presentation at this Symposium, Professor Feldblum drew on her then-ongoing negotiations on the ADA Restoration Act to reflect on the possibilities and limitations in achieving normative workplace changes through a disability anti-discrimination law. The editors of the Symposium have been gracious enough to permit the substitution of this piece, reprinting two testimonies that capture the evolution of the ADA Amendments Act, which may serve as a useful historical record of a remarkable legislative effort.

Kevin Barry is an Assistant Professor of Law at Quinnipiac Law School and was a Teaching Fellow in the Clinic from fall 2006 through spring 2008, supervising students working for Epilepsy Foundation. Emily Benfer is the current Teaching Fellow in the Clinic, supervising students who are working for Epilepsy Foundation in fall 2008. The testimony that Chai Feldblum delivered at a hearing of the Senate HELP Committee on November 15, 2007, reprinted in this article, was drafted largely by Ben Rubinstein, a student in the Clinic in fall 2007, under Kevin Barry's supervision. Chai Feldblum edited the testimony and delivered it. Chai Feldblum and Kevin Barry wrote the testimony that Feldblum delivered at a roundtable of the Senate HELP Committee on July 15, 2008, also reprinted in this article. Emily Benfer wrote the narrative that accompanies the testimony in this article, based on interviews with Chai Feldblum and Sandy Finucane, Vice President of Legal and Government Affairs for the Epilepsy Foundation, and Feldblum edited the narrative.

In order to assist future researchers who may be interested in the passage of the ADA Amendments Act of 2008, we have created a website that includes many of the primary materials connected to that bill, many of which are cited in this narrative. *See* www.archiveADA.org. Many thanks to Betsy Gwin for research assistance on the website.

Please note that the annotations to the November 15, 2007 and July 15, 2008 testimonies have been modified to maintain the consecutive order of footnotes throughout this article. The testimonies with original footnotes are available at www.archiveADA.org, as are all the primary materials cited in this article.

Section 504 of the Rehabilitation Act, combined with the legislative history of the ADA, would provide clear instructions to the courts that the ADA was intended to provide broad coverage prohibiting discrimination against people with a wide range of physical and mental impairments.¹

Unfortunately, the Supreme Court—with lower courts following in its lead, barricaded the door that the ADA had opened by interpreting the definition of “disability” in the ADA to create an overly demanding standard for coverage under the law.² This article provides an overview of the advocacy effort that has resulted in restoring the original intent of the ADA and destroying the barriers of discrimination that prevent people with disabilities from fully participating in society.

II. THE PREQUEL: 1988–1990

After decades of fighting the inferior social and economic status of people with disabilities through litigation, including litigation under Section 504 of the Rehabilitation Act, and through state legislation to provide greater protection against discrimination,³ the efforts of the disability rights community turned to Congress to achieve uniform, national protection for people with disabilities.

In 1988, Senators Lowell Weicker, Tom Harkin and twelve other cosponsors in the Senate, and Congressman Tony Coelho and 45 cosponsors in the House of Representatives, introduced the Americans with Disabilities Act (ADA), S. 2345 and H.R. 4498, respectively.⁴ This version of the ADA was based on a bill drafted by Robert Burgdorf, then a staff attorney with the National Council on Disability (NCD), an independent federal agency charged with making recommendations to the President and Congress.⁵ Burgdorf’s draft was modeled generally on

1. See Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 92 (2000) (hereinafter “*Definition of Disability*”).

2. *Id.* at 139–160. See also, Claudia Center and Andrew J. Imparato, *Development in Disability Rights: Redefining “Disability” Discrimination: A Proposal to Restore Civil Rights Protections for All Workers*, 14 STAN. L. & POL’Y REV. 321 (2003); Robert Burgdorf, “Substantially Limited” Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409 (1997).

3. Feldblum, *Definition of Disability*, *supra* note 1, at 94–114. See also, Arlene Mayerson, *A History of the ADA: A Movement Perspective*, http://www.dredf.org/publications/ada_history.shtml.

4. S. 2345, 100th Cong. (1988), 100th Cong. 2d Sess., 134 CONG. REC. 9375 (April 28, 1988); H.R. 4498, 100th Cong. (1988), 100th Cong. 2d Sess., 134 CONG. REC. 9600 (April 29, 1988). See www.archiveADA.org for full text of S. 2345 and H.R. 4498.

5. 29 U.S.C. § 780 (1978) (Establishment of the National Council on Disability). NATIONAL COUNCIL ON DISABILITY, *The Americans with Disabilities Act of 1988: A Draft Bill in Progress on Legislative Recommendations From Toward Independence 28* (1988), <http://www.ncd.gov/newsroom/publications/1988/threshold.htm#9a2>; see also NATIONAL COUNCIL ON THE HANDICAPPED, *TOWARD INDEPENDENCE* (1986). See Robert Burgdorf Biography, <http://www.law.udc.edu/faculty/rburgdorf.html> (last visited Sept. 7, 2008). See also Chai R.

Section 504 of the Rehabilitation Act, albeit with some important differences. For example, Burgdorf proposed providing protection to any person who had experienced discrimination “because of a physical or mental impairment, perceived impairment, or record of impairment.”⁶

An unusual joint Senate and House hearing was held on S. 2345,⁷ but otherwise, there was no legislative activity on the bill. Hence, the bill died at the adjournment of the 100th Congress. Nevertheless, the bill represented a critical first step in the enactment of the ADA since its introduction prompted subsequent activity on the part of both the business and disability communities.⁸

The effort to pass the subsequent version of the ADA in the 101st Congress was guided by a sophisticated, organized, and coherent strategic effort.⁹ Between 1989 and 1990, thirty to forty members of the disability community, under the umbrella of the Consortium for Citizens with Disabilities (CCD) Rights Task Force, worked tirelessly to pass the ADA.¹⁰ Various individuals took on different roles: a lead strategist, a lobby manager working with many dedicated lobbyists, a legislative lawyer team, grassroots activists, and communications and media people.¹¹

In 1989, during the first five months of the 101st Congress, staff members for Senators Tom Harkin and Edward Kennedy drafted a new version of the ADA, in consultation with members of the disability rights community.¹² With respect to the definition of disability under the new

Feldblum, *Medical Examinations and Inquiries Under the Americans with Disabilities Act: A View from the Inside*, 64 TEMP. L. REV. 521, 523–527 (1991); Feldblum, *Definition of Disability*, *supra* note 1, at 126.

6. NATIONAL COUNCIL ON THE HANDICAPPED, ON THE THRESHOLD OF INDEPENDENCE 28 (1988); *see also* NATIONAL COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE 19 (1986). Feldblum, *Definition of Disability*, *supra* note 1, at 127.

7. Joint Hearing before the Subcomm. on the Handicapped, the Senate Comm. on Labor and Human Resources, and the Subcomm. on Select Education of the House Committee on Education and Labor, S. Hrg. 100th Cong., 2d Sess. 926 (September 27, 1988).

8. Feldblum, *Medical Examinations and Inquiries*, *supra* note 5, at 524–526.

9. For a description of the strategic effort behind the passage of the ADA, which subsequently served as the basis for the Six Circles Theory of Advocacy developed by Chai Feldblum, *see* Chai R. Feldblum, *The Art of Legislative Lawyering and the Six Circles Theory of Advocacy*, 34 MCGEORGE L. REV. 785 (2003).

10. The Consortium of Citizens with Disabilities (CCD) was established in 1973 and advocates on behalf of people with physical and mental disabilities. *See* <http://www.c-c-d.org/about/about.htm> (last visited Sept. 7, 2008). During the ADA drafting process, the CCD Rights Task Force was responsible for the strategy and lobbying. The CCD Rights Task Force was headed by Patricia Wright of the Disability Rights Education and Defense Fund, Elizabeth Savage, then of the Epilepsy Foundation and Curt Decker of the National Association of Protection and Advocacy Systems. For current information about the CCD Rights Task Force, visit http://www.c-c-d.org/task_forces/rights/tf-rights-ada.htm.

11. Feldblum, *The Art of Legislative Lawyering*, *supra* note 9, at 787–790. Chai Feldblum coined the term “legislative lawyer” to describe the work she did during the drafting and negotiating of the ADA. A legislative lawyer combines a sophisticated understanding of both law and politics in the drafting and negotiation of policy ideas, legislation, and regulations. *Id.* at 797–798.

12. *See* Feldblum, *Medical Examinations and Inquiries*, *supra* note 5, at 526–527 (describing development of the ADA during the 101st Congress).

bill, Senators Harkin and Kennedy chose to use the definition of handicap that governed Section 504 of the Rehabilitation Act at the time because a new definition seemed both politically infeasible and legally unnecessary.¹³

On May 9, 1989, Senators Harkin and Kennedy and thirty-two cosponsors introduced a new version of the ADA, S. 933, in the Senate, and Congressman Steny Hoyer and forty-five cosponsors in the House of Representatives introduced an identical bill in the House, H.R. 2273.¹⁴ Given the political landscape, the decision was made to move forward first in the Senate.

During Senate hearings on S. 933, it became clear that the business community still had concerns and reservations about the bill. These concerns were discussed in greater detail during a series of private meetings between representatives of the business and disability communities. Ultimately, a series of negotiations were held between the offices of Senators Kennedy and Harkin and the offices of Senators Hatch and Dole and the White House. Over a period of two months, a negotiated deal with the Administration and Senate Republicans was reached on new language for the ADA, with agreement on the final provisions coming the evening before the Senate Labor and Human Resources Committee met to vote on the ADA.¹⁵ After the Senate returned from its August recess, it passed S. 933 by a vote of 76-8.¹⁶

Attention then turned to passing the ADA in the House of Representatives. It was a delicate situation. On one hand, Republican members of the House were not pleased that they had not been included in the negotiations that had resulted in the new language for the compromise ADA. On the other hand, Republican members in the House did not wish to jeopardize unnecessarily the balance that had been struck, given that the Bush Administration was supporting the compromise bill.

Four House committees considered, engaged in negotiations, and ultimately affirmatively voted on H.R. 2273 over the course of seven months.¹⁷ Congressman Steny Hoyer was the consistent leader and negotiator throughout this effort.

In the ADA's early journey through the House of Representatives, starting with the House Education and Labor Committee, staff members from Representative Hoyer's and Representative Steve Bartlett's offices, together with representatives of the disability and business communities,

13. *Id.*

14. H.R. 2273, 101st Cong., 1st Sess., 135 CONG. REC. H1791 (daily ed. May 9, 1989); S. 933, 101st Cong., 1st Sess., 135 CONG. REC. S4984-98 (daily ed. May 9, 1989).

15. Feldblum, *Medical Examinations and Inquiries*, *supra* note 5, at 528 n.52.

16. 135 CONG. REC. S10803 (Sept. 7, 1989). *See also*, Feldblum, *Medical Examinations and Inquiries*, *supra* note 5, at 529.

17. Feldblum, *Medical Examinations and Inquiries*, *supra* note 5, at 529-530. *See also* Feldblum, *Definition of Disability*, *supra* note 1, at 132-134.

went through each section of the bill carefully. Although the general contours of the negotiated bill from the Senate side were retained, numerous clarifications and modifications were made.¹⁸ In May 1990, the House of Representatives passed H.R. 2273 by a vote of 403-20.¹⁹

A few legislative crises remained to be resolved, but ultimately a final conference report was agreed upon and passed by the House of Representatives by a vote of 377-28 and by the Senate by a vote of 91-6.²⁰ As President Bush signed the ADA into law on July 26, 1990, thousands of members of the disability community and their allies, blissfully unaware of the impending erosion of the new civil rights law, celebrated the promise of liberation from discrimination and the prospect of social and employment opportunities.²¹

Unfortunately, it would soon become painfully clear that the efforts of Congress, without appropriate interpretation by the courts, would not be enough to fully tear down the “wall of exclusion.”²²

III. THE SEEDS OF DESTRUCTION: 1990–1999

Pursuant to the provisions of the ADA, the Department of Justice (DOJ) and the Equal Employment Opportunity Commission (EEOC) issued implementing regulations within one year of the law’s passage.²³

John Wodatch and his team of lawyers in the Disability Rights Section of DOJ were in charge of writing the DOJ regulations.²⁴ John Wodatch had begun his career at the then-Department of Health, Education and Welfare and was part of the team that drafted the regulations implementing Section 504 of the Rehabilitation Act.²⁵ The DOJ regulations with regard to the definition of disability thus largely paralleled the existing Section 504 regulations and did not spend

18. Feldblum, *Medical Examinations and Inquiries*, *supra* note 5, at 529–530. Randy Johnson was the House Education and Labor Committee staff person who took the lead in the negotiations on behalf of Congressman Bartlett and the Republican leadership in the House. Eighteen years later, as the chief lobbyist for the Chamber of Commerce, Randy Johnson again was critical in the negotiations that resulted in the ADA Amendments Act of 2008.

19. 136 CONG. REC. H2638-39 (daily ed. May 22, 1990).

20. 136 CONG. REC. H4629-30 (daily ed. July 12, 1990); *Id.* at S9695 (daily ed. July 13, 1990). Feldblum, *Medical Examinations and Inquiries*, *supra* note 5, at 531.

21. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101–12213 (West Supp. 1991) and 47 U.S.C. §§ 225, 611 (West 1991)). Feldblum, *Medical Examinations and Inquiries*, *supra* note 5, at 531.

22. George H. W. Bush, Remarks on Signing the Americans with Disabilities Act of 1990 (July 26, 1990), *available at* http://bushlibrary.tamu.edu/research/public_papers.php?id=2109&year=1990&month=7 (last visited Sept. 7, 2008).

23. See 56 Fed. Reg. 35726 (July 26, 1991) (codified at 29 C.F.R. pt. 1630) (EEOC regulations); 56 Fed. Reg. 35544 (July 26, 1991) (codified at 28 C.F.R. pt. 36) (DOJ regulations).

24. See Chai R. Feldblum, *The (R)evolution of Physical Disability Antidiscrimination Law: 1976–1996*, 20 MENTAL & PHYSICAL DISABILITY L. REP. 613 (1996).

25. *Id.* at 613. John Wodatch still serves as Chief of the Disability Rights Section at DOJ.

exhaustive detail on such definition. The regulations did note that mitigating measures were not to be taken into account in determining whether an individual's impairment substantially limited him or her in a major life activity.²⁶ But the DOJ regulations simply did not make a big deal out of the definition of disability.

By contrast, the regulations issued by the EEOC went into great detail about the definition of disability. Both in regulations, and in accompanying guidance, the EEOC extensively defined the term "substantially limits" and introduced a completely new and complex analysis for impairments that might limit only the major life activity of "working."²⁷ The EEOC regulations also emphasized the idea that careful individual assessments had to be made in every case as to whether a person had a disability under the ADA.²⁸

Disability rights advocates were uncomfortable with the extreme degree of complexity introduced by the EEOC's regulations into the disability coverage analysis. At bottom, however, most advocates believed that the EEOC regulations could not cause much harm in the long run for coverage of people with a range of physical and mental impairments, given that the case law under Section 504 of the Rehabilitation Act was so clear in its broad and inclusive coverage.²⁹

How wrong we were. As has been extensively documented elsewhere,³⁰ and as captured in the testimony reprinted in this article,³¹ an individual's ability to prove that he or she had a covered disability under the ADA soon became a central point in almost every employment case brought under the ADA. Physical and mental impairments as wide-ranging as epilepsy, multiple sclerosis, diabetes, cancer and schizophrenia were all held by courts not to meet the statutory definition of "disability."³²

IV. THE DARK BEFORE THE DAWN: 1999–2006

In 1999, in what became known as the *Sutton* trilogy, the Supreme Court held that mitigating measures should be considered in the

26. 28 C.F.R. pt. 36, App. B, at 620 (1999) ("Persons with impairments, such as epilepsy or diabetes, that substantially limit a major life activity, are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.")

27. 29 C.F.R. pt. 1630, App. at 349 (1999). See Feldblum, *Definition of Disability*, *supra* note 1, at 135–136

28. See Feldblum, *Definition of Disability*, *supra* note 1, at 136.

29. *Id.* at 136–137.

30. *Id.* at 139–160; Center and Imperato, *supra* note 2; Burgdorf, *supra* note 2.

31. See *infra*, Hearing on Restoring Congressional Intent and Protections Under the Americans with Disabilities Act Before the Committee on Health, Education, Labor & Pensions, Nov. 15, 2007 (Testimony of Chai R. Feldblum, Part III) p. 206.

32. See *id.*, at Part IV pp. 206–211 (discussing cases). See sources cited, *supra* note 30.

determination of whether an individual has a disability under the ADA.³³ These decisions had the effect of reducing coverage for individuals with impairments that can be well-controlled or alleviated by medication or other measures, such as behavioral modifications or devices. It became yet more difficult for people with epilepsy, diabetes, psychiatric disabilities, multiple sclerosis, muscular dystrophy, arthritis, hypertension, and other disabilities to prevail in court.³⁴

The *Sutton* trilogy, combined with unfavorable cases in the lower courts, caused disability groups such as Epilepsy Foundation (Sandy Finucane), the American Diabetes Association (Shereen Arent) and the National Multiple Sclerosis Society (Aaron Miller) to begin meeting to talk about the adverse case law. These groups met with representatives from the EEOC immediately after the *Sutton* trilogy to see if any relief could be found through the EEOC. But the disability community overall, including the CCD Task Force, agreed that any effort to change the law at that time might result in adverse consequences for the law. Thus, the focus shifted instead to continuing public education and trying to change the definition of disability in state laws.

In 2002, the Supreme Court decided the case of *Williams v. Toyota*.³⁵ In that case, the Supreme Court defined “major life activities” as “activities that are of central importance to most people’s daily lives” and defined “substantially limits” as “prevents or severely restricts.”³⁶ The *Williams* decision thus created a new demanding standard for the term “substantially limits,” and whittled away at what was left of the ADA’s protection for plaintiffs attempting to secure protection against discrimination.

The *Williams* case was a turning point for many individuals in the disability community, as well as their Congressional allies. In January 2002, the Washington Post published an op-ed by Representative Steny Hoyer, critiquing the Supreme Court decisions in both *Williams* and the *Sutton* trilogy.³⁷ Of key significance, Congressman Hoyer stated the following in his editorial: “Our responsibility now is to revisit both our words and our intent in passing the ADA. In matters of statutory

33. *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

34. *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720 (8th Cir. 2002) (diabetes); *Todd v. Academy Corp.*, 57 F. Supp. 2d 448 (S.D. Tex. 1999) (epilepsy); *McClure v. General Motors Corp.*, 75 Fed. Appx. 983, 2003 WL 21766539 (5th Cir. 2003) (muscular dystrophy); *Schriner v. Sysco Food Serv.*, No. Civ. 1CV032122, 2005 WL 1498497 (M.D. Pa. June 23, 2005) (post traumatic stress disorder); *McMullin v. Ashcroft*, 337 F. Supp. 2d 1281 (D. Wyo. 2004) (clinical depression); *Sutton v. New Mexico Dept. of Children, Youth and Families*, 922 F. Supp. 516 (D.N.M. 1996) (arthritis); *Sorensen v. University of Utah Hosp.*, 194 F.3d 1084, 1085 (10th Cir. 1999) (multiple sclerosis).

35. *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).

36. *Id.* at 197, 201–02.

37. Congressman Steny Hoyer, Op-Ed., *Not Exactly What We Intended Justice O’Connor*, WASH. POST, Jan. 20 2002, at B01. Chai Feldblum worked with Congressman Hoyer’s office in the development of that editorial.

interpretation, unlike constitutional matters, Congress has the last word.”³⁸

Although, by 2002, many advocates with the disability community believed that it was important to revisit the ADA—as called for by Congressman Hoyer in his editorial—there was still significant groundwork that needed to be done. Again, the NCD and Robert Burgdorf (by then a law professor in Washington, D.C.) played a key role. The NCD held hearings and meetings to investigate the outcome of the Supreme Court’s ADA decisions and to develop a proposal for addressing the problems. In 2004, the NCD published an important report entitled *Righting the ADA*, detailing various ways in which the courts had misinterpreted congressional intent under the ADA and had inappropriately limited the reach of the law.³⁹

The NCD report dealt with a variety of issues beyond the definition of disability.⁴⁰ With regard to the definition, the report contained proposed legislative language to fix the courts’ interpretation—primarily by using the same approach suggested by the NCD in 1988 of defining a disability as any physical or mental impairment.⁴¹ The report also included a secondary option for the definition of disability, if the primary option was deemed not politically feasible, that relied on a broad “regarded as” prong and defined “substantially limits” as “limits an individual’s performance of an activity in more than a minor way compared with the average person in the general population, including by restricting the conditions under which, or the manner or duration in which, the individual can perform the activity.”⁴²

38. *Id.*

39. NATIONAL COUNCIL ON DISABILITY, *RIGHTING THE ADA* (2004), available at http://www.ncd.gov/newsroom/publications/2004/righting_ada.htm (last visited Sept. 7, 2008).

40. These issues included the expansion of the “direct threat” defense by the Supreme Court in *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002), the limitation of the reasonable accommodation announced by the Supreme Court in *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); and the limitation of remedies for violations of the ADA in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001) and *Barnes v. Gorman*, 536 U.S. 181 (2002). See NCD, *RIGHTING THE ADA*, *supra* note 39, at 14, 79, 81–84, 85–92.

41. *Id.* at 100.

42. *Id.* at 114. Some of the individuals actively involved in discussions around the NCD Report included Robert Burgdorf, author of *Righting the ADA* and Professor at University of the District of Columbia, David A. Clark School of Law; Bobby Silverstein, Director of the Center for the Study and Advancement of Disability Policy; Arlene Mayerson, Directing Attorney of DREDF; Shereen Arent, Managing Director of Legal Advocacy at the American Diabetes Association; Jennifer Mathis, Deputy Legal Director of the Bazelon Center for Mental Health Law; Claudia Center, Staff Attorney, Legal Aid Society-Employment Law Center; Sharon Masling, Director of Legal Services, National Association of Protection and Advocacy Systems, Inc.; Peter Blanck, Syracuse University professor and chair of the Burton Blatt Institute; Steve Gold, disability rights attorney; Harriet McBryde Johnson, disability and civil rights attorney; Andy Imparato, President of the American Association of People with Disabilities; Gina Fiss, Legal Advocacy Coordinator for the Epilepsy Foundation; Elaine Gardner, Project Director, Disability Rights Project; Eddie Correia, Latham & Watkins, LLP; Jeff Rosen, General Counsel and Director of Policy for the National Council on Disability (NCD); and Julie Carroll, Senior Attorney Adviser for NCD. Sharon Masling

The issuance of the NCD Report in 2004 helped jumpstart significant activity in Washington, within the CCD Rights Task Force and outside of it. By 2005, the co-chairs of that CCD Rights Task Force were holding meetings in which various drafting possibilities for amending the ADA were being floated.⁴³ The group developed a statement of principles for amending the ADA, as well as some initial language ideas. In addition, Sandy Finucane from Epilepsy Foundation and Andy Imparato from the American Association of People with Disabilities (AAPD) began reaching out to Republican offices to see if they might be interested in looking at the NCD recommendations.

In late spring 2005, there was a flurry of activity when it appeared that a few business groups might be interested in a negotiated deal on the ADA.⁴⁴ An ADA Restoration Drafting Group was convened within the CCD Rights Task Force to develop language for a range of fixes to the ADA, including the definition of disability.⁴⁵ Although an opportunity for a negotiated compromise with those business groups did not ultimately materialize, efforts continued apace in Washington.

In spring 2006, Senator Tom Harkin—one of the original sponsors of the ADA in the Senate—met with members of the CCD Rights Task Force and other members of the disability community to reaffirm his commitment to an ADA Restoration bill. He urged the organizations to reach consensus on the substance of a bill that the full disability community could support. Through a series of meetings, the CCD Rights Task Force members, and other members of the disability community, agreed that the focus of an ADA Restoration Act should be on fixing the definition of disability.⁴⁶

V. STARTING OUT ON THE REAL JOURNEY: 2006–2007

The first serious breakthrough for the ADA Restoration Act happened in the summer of 2006. Congressman Jim Sensenbrenner (R-WI), then Chair of the House Judiciary Committee, conveyed his interest in sponsoring a bill that would restore the broad coverage of disability under the ADA. Congressman Sensenbrenner's wife, Cheryl Sensenbrenner, had been on the board of the AAPD since 2003 and was

also drafted a precursor to the 2004 report for NCD entitled, *The Impact of the Supreme Court's ADA Decisions on the Rights of Persons With Disabilities* (February 25, 2003).

43. The co-chairs of the Rights Task Force at that time were: Janna Starr, Sandy Finucane, Mark Richert, Bob Herman, and Day Al-Mohamed.

44. Individuals involved in those initial conversations included Curt Decker, Paul Marchand, Andy Imparato, Jana Starr, and Bobby Silverstein.

45. Individuals involved in discussions at that time included Jana Starr, Sandy Finucane, Shereen Arent, Jennifer Mathis, Arlene Mayerson, Claudia Center, Joan Magagna, Lee Page, Kenneth Shiotani, Curt Decker and Pat Wright. Although not representing member organizations of CCD, Bobby Silverstein and Robert Burgdorf were also involved.

46. Some of the disability groups involved in these discussions, which are not members of CCD, include the National Council on Independent Living (NCIL), ADA Watch, and ADAPT.

an enthusiastic supporter of the ADA Restoration Act. Her eloquence in support of the need to fix the definition of disability under the ADA, expressed both in public and in private, was a critical factor both in the introduction of the first ADA Restoration Act and in its ultimate successful passage through the House of Representatives.⁴⁷

Having a senior Republican Member of Congress and Chair of the House Judiciary Committee express his interest in sponsoring an ADA Restoration Act significantly changed the political dynamics around the possible success of such a bill. Based on that changed political dynamic, Chai Feldblum decided that students at the Georgetown Law Federal Legislation and Administrative Clinic (“the Clinic”) would have an excellent opportunity to learn legislative lawyering by providing pro bono legal services in the effort to pass the ADA Restoration Act.⁴⁸

In fall 2006, the Clinic began representing the Epilepsy Foundation in its effort to restore the rights guaranteed by the ADA.⁴⁹ Heather Sawyer, who had begun a two-year term as Acting Director of the Clinic the previous year, took up the challenge of being the chief legislative lawyer for Epilepsy Foundation, with Kevin Barry—a new Teaching Fellow in the Clinic—about to set off for the legislative ride of his life.

True to his word, Congressman Sensenbrenner held a hearing in the House Judiciary Committee in the fall of 2006 on “The Americans with Disabilities Act: Sixteen Years Later.”⁵⁰ The witnesses at the hearing were: former Congressman Tony Coelho (former Representative, California; Chair, Epilepsy Foundation), Professor Robert Burgdorf (University of District of Columbia Law), Harry Horner (small business owner), and Naomi Earp (Chair, EEOC).

Tony Coelho testified on behalf of Epilepsy Foundation and, as Epilepsy Foundation’s lawyers, Clinic staff and students helped provide background information for Coelho’s written testimony and helped

47. Hearing on H.R. 3195 “ADA Restoration Act of 2007” Before the H. Comm. on the Judiciary Subcomm. on the Constitution, Civil Rights & Civil Liberties, 110th Cong. 21–84 (2007) (statement of Cheryl Sensenbrenner, Board Chair, Association of People with Disabilities); Hearing on H.R. 3195 “ADA Restoration Act of 2007” Before the H. Comm. on the Judiciary Subcomm. on the Constitution, Civil Rights & Civil Liberties, 110th Cong. 16–21 (2007) (statement of House Majority Leader Rep. Steny Hoyer); Statement of Jim Sensenbrenner, 154 CONG. REC. H6065 (June 25, 2008).

48. As a matter of serendipity, the Clinic was finishing up work for a different client at that point and was able to take on a new client and issue.

49. For legal retainer purposes, it was important to have just one group be the client for the Clinic. The two groups that made the most sense to represent, given their leadership role on the ADA Restoration efforts to date, were the American Association of People with Disabilities (AAPD) and Epilepsy Foundation. Former Congressman Tony Coelho, who served on the board of both organizations, had been providing strategic advice on passing an ADA Restoration since 2002 and he continued to play a crucial role throughout the development of the bill and its movement through Congress. See statement of Steny Hoyer, 154 CONG. REC. H 6058 (June 25, 2008). Ultimately, Epilepsy Foundation made the most sense to take on as a client, given its leadership role on the CCD Rights Task Force and given Sandy Finucane’s commitment and availability to meet with the students on a regular basis.

50. Americans with Disabilities Act: Sixteen Years Later: Hearing Before the Subcomm. on the Constitution of H. Comm. on the Judiciary, 109th Cong. (Sept. 13, 2006).

prepare his responses to follow-up questions from the hearing.⁵¹

In the meantime, Clinic staff and students began preparing a host of materials that would support an eventual ADA Restoration Act. These materials were prepared for use by the CCD Rights Task Force, and as each new document was approved by the Task Force, it appeared on the web page hosted by CCD.⁵²

During this time period, the office of Congressman Steny Hoyer was involved in all conversations around the effort to develop an ADA Restoration Act. At the time, Congressman Hoyer was the Minority Leader of the House of Representatives and, as he had done with the original ADA, he was committed to bringing a restoration of the law to a successful conclusion.

In late September 2006, Congressman Sensenbrenner presented some members of the disability community with an ADA Restoration Act that he wished to introduce before Congress adjourned. Although most members of the disability community had not expected a bill to be introduced until the following Congress, Congressman Sensenbrenner's enthusiasm and commitment presented an opportunity to begin the momentum for such a bill in the 109th Congress.

Thus, on September 29, 2006, the last day of the session for the 109th Congress, Congressman Steny Hoyer (D-MD) and Congressman John Conyers, then-ranking member of the House Judiciary Committee, joined Congressman Sensenbrenner in cosponsoring H.R. 6258, the first ADA Restoration Act to be introduced in Congress.⁵³

In November 2006, the Democratic Party regained control of both the House of Representatives and the Senate. While there was some effort to pass H.R. 6258 during the lame-duck session that followed, that was not ultimately feasible.

With the start of the new Congress, efforts to develop an ADA Restoration Act—with input from lawyers across the disability community—began in earnest. The CCD Rights Task Force ADA Working Group was divided into several subcommittees dedicated to grassroots efforts, lobbying, and communications. In addition, a drafting group was convened that met, by phone and in person, consistently from January 2007 through June 2007. With materials developed by Heather

51. *Id.* at 26 (statement of Tony Coelho, Chair of the Epilepsy Foundation and Former Representative in Congress from the Central Valley District of California). For copies, see http://commdocs.house.gov/committees/judiciary/hju29870.000/hju29870_0f.htm (last visited Sept. 7, 2008). The Clinic students who worked on these materials were Erin McGrain and Gabe Lerner, supervised by Kevin Barry and Heather Sawyer.

52. Examples of documents prepared during this time include: *Talking Points on ADA Restoration*; *Real Case Stories*; and *Overview of the ADA Restoration Act*. The Clinic students who worked on these documents were Erin McGrain, Gabe Rottman, and Karla Gilbride, supervised by Kevin Barry and Heather Sawyer.

53. See H.R. 6258, 109th Cong. (2006). The text of the bill and press releases from Representatives Sensenbrenner and Hoyer are available at www.archiveADA.org. The substance of the bill was patterned largely on the language available from the NCD Report.

Sawyer, Kevin Barry, and students at the Clinic, the group systematically reviewed, drafted and redrafted a proposed bill. Memos were written, approaches discussed, and consensus ultimately achieved.⁵⁴ Constant communications were maintained with the offices of Representatives Hoyer and Sensenbrenner and with the offices of Senators Harkin and Kennedy during this time period.⁵⁵

On July 26, 2007, the 17th anniversary of the ADA's passage, Majority Leader Hoyer and Congressman Sensenbrenner, and Senator Harkin and Senator Arlen Specter (R-PA), introduced companion ADA Restoration bills (H.R. 3195 and S. 1881) that closely reflected the draft bill that had been developed by the disability community lawyers. On the day of its introduction, H.R. 3195 had 143 co-sponsors in the House of Representatives.⁵⁶

Fall 2007 was an active period of time for gathering support for the ADA Restoration Act and for continuing to refine various legal aspects of the bill. The drafting group became known as the Drafting and Analysis ("DA") Group, with Chai Feldblum, Kevin Barry, and Clinic students preparing materials for the group to consider.

Like the original ADA, the ADA Restoration bill was referred to one committee in the Senate (Health, Education, Labor & Pensions or "HELP"), and four committees in the House (Education & Labor; Judiciary; Energy & Commerce; and Transportation & Infrastructure).

In October 2007, the House Judiciary Committee Subcommittee on the Constitution, Civil Rights, and Civil Liberties held a hearing on H.R. 3195, the ADA Restoration Act. The individuals who testified were: Steny H. Hoyer, Majority Leader, U.S. House of Representatives; Cheryl Sensenbrenner, Chair, American Association of People with Disabilities; Stephen Orr, Pharmacist (Plaintiff in *Orr v. Wal-Mart*); Michael Collins, Executive Director, National Council on Disability; Chai Feldblum, Professor, Georgetown Law; and Lawrence Lorber, U.S. Chamber of Commerce.⁵⁷

54. The members of this group were usually Arlene Mayerson, Jennifer Mathis, Joan Magagna; Shereen Arent; Sandy Finucane; Claudia Center; Denise Rozell, Easter Seals, and Bobby Silverstein. *See supra*, note 42 for group affiliations. This was the legislative drafting subgroup of the CCD Rights Taskforce ADA Working Group. Chai Feldblum reviewed most materials, but did not participate actively in meetings during this time period. In September 2007, Feldblum took over the reins of the Clinic again, and began chairing this group, which evolved into the Drafting and Analysis subgroup.

55. There was no Republican Senator at the time taking the lead in the Senate as Congressman Sensenbrenner was doing in the House.

56. H.R. 3195, 110th Cong. (July 26, 2007). By the time of passage, there were 245 co-sponsors on the bill.

57. Hearing on H.R. 3195, the "ADA Restoration Act of 2007" (Oct. 4, 2007) before the H. Comm. on the Judiciary Subcomm. on the Constitution, Civil Rights & Civil Liberties, 110th Cong. 21-84 (Oct. 4, 2007) available at http://judiciary.house.gov/hearings/hear_100407_3.html (last visited Sept. 9, 2008). In summer 2007, Heather Sawyer became counsel for the House Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Civil Liberties and Chai Feldblum took over the job of directing the Clinic and, hence, serving as Epilepsy Foundation's chief legislative lawyer. Kevin Barry continued in the second year of his fellowship at the Clinic as

One month later, November 2007, the Senate HELP Committee held a hearing on S. 1881. The individuals who testified were: John D. Kemp, President, United States International Council on Disabilities; Dick Thornburgh, Former United States Attorney General and Counsel, Kirkpatrick & Lockhart; Steven Orr, Pharmacist (Plaintiff in *Orr v. Wal-Mart*),⁵⁸ Camille Olson, Labor and Employment Attorney, Seyfarth & Shaw; and Chai Feldblum, Director, Federal Legislation Clinic and Professor of Law, Georgetown Law Center.⁵⁹

In January 2008, the House Education and Labor Committee held a hearing on the ADA Restoration Act. The individuals who testified were: Congressman Steny Hoyer; Andrew Imparato, President and CEO, AAPD; Carey McClure, Electrician (Plaintiff in *McClure v. General Motors Corp.*⁶⁰); Professor Robert Burgdorf; and David Fram, Director, National Employment Law Institute.

The following testimony was delivered by Chai Feldblum before the Senate HELP Committee on November 15, 2007.

Epilepsy Foundation's legislative lawyer.

58. See *Orr v. Wal-Mart Stores*, 297 F.3d 720 (8th Cir. 2002).

59. *Restoring Congressional Intent and Protections Under the Americans with Disabilities Act Before the Comm. on Health, Education, Labor, & Pensions*, 110th Cong. (2007) available at http://help.senate.gov/Hearings/2007_11_15_b/2007_11_15_b.html.

60. See *McClure v. General Motors Corp.*, 75 Fed. Appx. 983, 2003 WL 21766539, at *1-2 (5th Cir. 2003).

HEARING ON: RESTORING CONGRESSIONAL INTENT AND PROTECTIONS UNDER THE AMERICANS WITH DISABILITIES ACT

Testimony of Chai R. Feldblum Before the Senate
Committee on Health, Education, Labor, & Pensions

November 15, 2007

Mr. Chairman and Members of the Committee, I am pleased to testify before you today. My name is Chai Feldblum, and I am a Professor of Law and Director of the Federal Legislation Clinic at Georgetown University Law Center. The lawyers and students at the Federal Legislation Clinic provide *pro bono* legislative lawyering services to the Epilepsy Foundation in support of its efforts to advance the ADA Restoration Act.

Today, however, I am testifying on my own behalf as an expert on the Americans with Disabilities Act of 1990 (ADA). During passage of the ADA, I served as one of the lead legal advisors to the disability and civil rights communities in the drafting and negotiating of that legislation.

In this testimony, I provide a brief overview of the bipartisan support that propelled passage of the ADA in 1990 and describe how Congress intended the ADA's definition of disability to be consistent with the definition of "handicap" that had been applied by the courts for fifteen years under Sections 501, 503, and 504 of the Rehabilitation Act of 1973. I then explain how the courts have narrowed the definition of disability under the ADA in a manner that is inconsistent with Congressional intent and I offer some observations on why the courts may have acted in such a manner. Finally, I explain how the current status quo should be considered unacceptable to any Congress that cares about providing substantive and real protection for people with disabilities and how the only way to fix this problem is to fix the language of the ADA itself.

I. THE BI-PARTISAN ENACTMENT OF THE ADA

A first version of the ADA was introduced in April 1988 by Senators Lowell Weicker and Tom Harkin and twelve other cosponsors in the Senate, and by Congressman Tony Coelho and 45 cosponsors in

the House of Representatives.⁶¹ This version of the ADA was based on a draft from the National Council on Disability (NCD), an independent federal agency composed of 15 members appointed by President George H.W. Bush which was established by Congress to advise the President and Congress on issues concerning people with disabilities.⁶²

In May 1989, a second version of the ADA was introduced by Senators Tom Harkin, Edward Kennedy, Robert Dole, Orrin Hatch and 30 cosponsors in the Senate, and by Congressman Steny Hoyer and 45 cosponsors in the House of Representatives.⁶³ This version of the bill was the result of extensive discussions with a wide range of interested parties, including members of the disability community, the business community, and the first Bush Administration.⁶⁴

Negotiations on the ADA continued within each committee that reviewed the bill and, in each case, the negotiations resulted in broad, bipartisan support of the legislation. The Senate Committee on Labor and Human Resources favorably reported the bill by a vote of 16-0;⁶⁵ the House Committee on Education and Labor favorably reported the bill by a vote of 35-0;⁶⁶ the House Committee on Energy and Commerce favorably reported the bill by a vote of 40-3;⁶⁷ the House Committee on Public Works and Transportation favorably reported the bill by a vote of 45-5;⁶⁸ and the House Committee on the Judiciary favorably reported the bill by a vote of 32-3.⁶⁹

After being reported out of the various committees, the ADA passed the Senate by a vote of 76-8 in September 1989 and the House of Representatives by a vote of 403-20 in May 1990.⁷⁰ Both Houses of Congress subsequently passed the conference report by large margins as

61. H.R. 4498, 100th Cong., 2d Sess., 134 CONG. REC. H2757 (daily ed. Apr. 29, 1988) (introduction of H.R. 4498); S. 2345, 100th Cong., 2d Sess., 134 CONG. REC. S5089 (daily ed. Apr. 28, 1988) (introduction of S. 2345).

62. NATIONAL COUNCIL ON DISABILITIES, ON THE THRESHOLD OF INDEPENDENCE (1988), available at <http://www.ncd.gov/newsroom/publications/1988/threshold.htm>. Lowell Weicker, at that time, the Republican Senator from Connecticut and the ranking minority member of the Subcommittee on the Handicapped, was approached by the National Council on Disability to take the lead on the ADA because of his longstanding interest in the area of disability rights. Senator Tom Harkin, a Democratic Senator from Iowa and Chairman of the Subcommittee on the Handicapped, worked closely with Senator Weicker in this endeavor. In the House of Representatives, Congressman Tony Coelho, a Democrat from California and third-ranking Member in the House Democratic Leadership, was the key leader in the development of the ADA.

63. H.R. 2273, 101st Cong., 1st Sess., 135 CONG. REC. H1791 (daily ed. May 9, 1989); S. 933, 101st Cong., 1st Sess., 135 CONG. REC. S4984-98 (daily ed. May 9, 1989).

64. See Feldblum, *Medical Examinations and Inquiries*, *supra* note 5, at 521-532 (providing a brief overview of passage of the ADA, including a brief description of the various stages of negotiation on the bill).

65. S. REP. NO. 101-116 at 1 (1989).

66. H.R. REP. NO. 101-485, pt. 2, at 50 (1990).

67. H.R. REP. NO. 101-485, pt. 4, at 29 (1990).

68. H.R. REP. NO. 101-485, pt. 1, at 52 (1990).

69. H.R. REP. NO. 101-485, pt. 3, at 25 (1990).

70. 135 CONG. REC. S10803 (daily ed. Sept. 7, 1989); 136 CONG. REC. H2638 (daily ed. May 22, 1990).

well: 91-6 in the Senate and 377-28 in the House of Representatives.⁷¹

On July 26, 1990, President George H.W. Bush signed the ADA into law, stating:

[N]ow I sign legislation which takes a sledgehammer to [a] . . . wall, one which has for too many generations separated Americans with disabilities from the freedom they could glimpse, but not grasp. Once again, we rejoice as this barrier falls for claiming together we will not accept, we will not excuse, we will not tolerate discrimination in America.⁷²

Standing together, leaders from both parties described the ADA as “historic,” “landmark,” and an “emancipation proclamation for people with disabilities.”⁷³

The purpose of the original legislation was to “provide a clear and comprehensive national mandate for the elimination of discrimination” on the basis of disability, and “to provide clear, strong, consistent, enforceable standards” for addressing such discrimination.⁷⁴ It was Congress’ hope and intention that people with disabilities would be protected from discrimination in the same manner as those who had experienced discrimination on the basis of race, color, sex, national origin, religion, or age.⁷⁵

But that did not happen. In recent years, the Supreme Court has restricted the reach of the ADA’s protections by narrowly construing the definition of disability contrary to Congressional intent. As a result, people with a wide range of impairments whom Congress intended to protect, including people with cancer, epilepsy, diabetes, hearing loss, multiple sclerosis, HIV infection, intellectual disabilities, post-traumatic stress disorder (PTSD), and many other impairments, are routinely found not to be “disabled” and therefore not covered by the ADA.

The difficulty with this scope of coverage under the ADA is *significant*—studies show that plaintiffs lose 97% of ADA employment discrimination claims, frequently on the grounds that they do not meet

71. 136 CONG. REC. S9695 (daily ed. July 13, 1990); 136 CONG. REC. H4629 (daily ed. July 12, 1990).

72. Remarks of President George H.W. Bush at the Signing of the Americans with Disabilities Act of 1990 (July 26, 1990), *available at* <http://www.eeoc.gov/ada/bushspeech.html>.

73. According to President George H.W. Bush, the ADA was a “landmark” law, an “historic new civil rights Act . . . the world’s first comprehensive declaration of equality for people with disabilities.” *See id.* Senator Orrin G. Hatch declared that the ADA was “historic legislation” demonstrating that “in this great country of freedom, . . . we will go to the farthest lengths to make sure that everyone has equality and that everyone has a chance in this society.” Senator Edward M. Kennedy called the ADA a “bill of rights” and “emancipation proclamation” for people with disabilities. *See* National Council on Disability, *The Americans with Disabilities Act Policy Brief Series: Righting the ADA, No. 1: Introductory Paper* (October 16, 2002), *available at* <http://www.ncd.gov/newsroom/publications/2002/rightingtheada.htm>.

74. *See* Americans with Disabilities Act § 2(b), 42 U.S.C. § 12101(b) (2007).

75. 42 U.S.C. § 12101 (a), (b).

the definition of “disability.”⁷⁶ The National Council on Disability has stated that Supreme Court decisions narrowing the definition of disability “ha[ve] significantly diminished the civil rights of people with disabilities,” “blunt[ing] the Act’s impact in significant ways,” and “dramatic[ally] narrowing and weakening . . . the protection provided by the ADA.”⁷⁷

As demonstrated by the legislative history of the ADA, Congress never intended the law’s definition to be interpreted in such a restrictive fashion.

II. CONGRESSIONAL INTENT BEHIND THE ADA’S DEFINITION OF DISABILITY

When writing the ADA that was introduced in 1989, Congress borrowed the definition of “disability” from Sections 501, 503, and 504 of the Rehabilitation Act of 1973, a predecessor civil rights statute for people with disabilities that covered the federal government, federal contractors, and recipients of federal financial assistance. For purposes of Title V of the Rehabilitation Act, “handicap” was defined as: (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment.⁷⁸

For fifteen years, the courts had interpreted this definition to cover a wide range of physical and mental impairments, including epilepsy, diabetes, intellectual and developmental disabilities, multiple sclerosis,

76. Amy L. Allbright, *2006 Employment Decisions Under the ADA Title I—Survey Update*, 31 MENTAL & PHYSICAL DISABILITY L. REP. 328, 328 (July/August 2007) (stating that in 2006, “[o]f the 218 [employment discrimination] decisions that resolved the claim (and have not yet changed on appeal), 97.2 percent resulted in employer wins and 2.8 percent in employee wins”); see also Amy L. Allbright, *2003 Employment Decisions Under the ADA Title I—Survey Update*, 28 MENTAL & PHYSICAL DISABILITY L. REP. 319, 319–20 (May/June 2003) (“One such obstacle [for plaintiffs to overcome] is satisfying the requirements that the plaintiff meet the ADA’s restrictive definition of disability—a physical or mental impairment that substantially limits a major life activity, a record of such an impairment, or being regarded as having such an impairment—and still be qualified to perform essential job functions with or without reasonable accommodation. *A clear majority of the employer wins in this survey were due to employees’ failure to show that they had a protected disability.*”) (emphasis added); see also Ruth Colker, *Winning and Losing Under the ADA*, 62 OHIO ST. L.J. 239, 246 (2001) (“[A]ppellate litigation outcomes under the ADA are more pro-defendant than under other civil rights statutes.”); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100–01 (“[C]ontrary to popular media accounts, defendants prevail in more than ninety-three percent of reported ADA employment discrimination cases decided on the merits at the trial court level. Of those cases that are appealed, defendants prevail in eighty-four percent of reported cases. These results are worse than results found in comparable areas of the law; only prisoner rights cases fare as poorly.”).

77. NATIONAL COUNCIL ON DISABILITIES, *RIGHTING THE ADA*, pt. I (2004), available at http://www.ncd.gov/newsroom/publications/2004/righting_ada.htm.

78. 29 U.S.C. § 705(20)(B) (2007); see *Americans with Disabilities Act*, 42 U.S.C. § 12101(2) (2007). At the time the ADA was being drafted, Section 504 used the term “handicap” rather than “disability.” Section 504 has since been amended to use the term “disability.” The definition of “handicap” under Section 504 and of “disability” under the ADA is identical.

PTSD, and HIV infection.⁷⁹ Indeed, in *School Board of Nassau County v. Arline*, the Supreme Court explicitly acknowledged that Section 504's "definition of handicap is broad," and that by extending the definition to cover those "regarded as" handicapped, Congress intended to cover those who are not limited by an actual impairment but are instead limited by "society's accumulated myths and fears about disability and disease."⁸⁰

When the ADA was enacted, Congress consistently referred to court interpretations of "handicap" under Section 504 as its model for the scope of "disability" under the ADA. For example, the Senate Committee on Labor and Human Resources noted that: "the analysis of the term 'individual with handicaps' by the Department of Health, Education and Welfare in the regulations implementing section 504 . . . apply to the definition of the term 'disability' included in this legislation."⁸¹ Similarly, the House Committee on the Judiciary observed that: "The ADA uses the same basic definition of 'disability' first used in the Rehabilitation Act of 1973 and in the Fair Housing Amendments Act of 1988. . . . [I]t has worked well since it was adopted in 1973."⁸²

Second, the committee reports explicitly stated that mitigating measures should not be taken into account in determining whether a person has a "disability" for purposes of the ADA. As the Senate Committee on Labor and Human Resources put it:

A person is considered an individual with a disability for purposes of the first prong of the definition when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people. . . . [W]hether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids.⁸³

Finally, the Committee reports specifically referenced the breadth of the interpretation offered by the Supreme Court in the *Arline* decision with regard to the third prong of the definition of disability, the

79. See, e.g., *Local 1812, Am. Fed'n. of Gov't Employees v. U.S.*, 662 F. Supp. 50, 54 (D.D.C. 1987) (person with HIV disabled); *Reynolds v. Brock*, 815 F.2d 571, 573 (9th Cir. 1987) (person with epilepsy disabled); *Flowers v. Webb*, 575 F. Supp. 1450, 1456 (E.D.N.Y. 1983) (person with intellectual and developmental disabilities disabled); *Schmidt v. Bell*, No. 82-1758, 1983 WL 631, at *10 (E.D. Pa. Sept. 9, 1983) (person with PTSD disabled); *Bentivegna v. U.S. Dep't of Labor*, 694 F.2d 619, 621 (9th Cir. 1982) (person with diabetes disabled); *Pushkin v. Regents of Univ. of Colo.*, 658 F.2d 1372, 1376 (10th Cir. 1981) (person with multiple sclerosis disabled). See generally Feldblum, *Definition of Disability*, *supra* note 1, at 128 ("[A]lthough there had been . . . a few adverse judicial opinions under Section 504 that had rejected coverage for plaintiffs with some impairments, those opinions were the exception, rather than the rule, in litigation under the Rehabilitation Act.").

80. See *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 284 (1987).

81. S. REP. NO. 101-116 at 21 (1989).

82. H.R. REP. NO. 101-485, pt. 3, at 27 (1990).

83. S. REP. NO. 101-116 at 121 (1989).

“regarded as” prong. During oral argument in the *Arline* case, the Solicitor General had sought to reject an interpretation of the “regarded as” prong that would have established coverage for any individual with an impairment, as long as the impairment was proven by the individual to have been the *basis* of an adverse decision. As the Solicitor General argued, such an approach would allow plaintiffs to make “a totally circular argument which lifts itself by its bootstraps.”⁸⁴

But the Supreme Court had responded that “[t]he argument is not circular, however, but direct.”⁸⁵ As the Court explained: “Congress plainly intended the Act to cover persons with a physical or mental impairment (whether actual, past, or perceived) that substantially limited one’s ability to work.”⁸⁶ And, as the Court went on to explain: “Such an impairment might not diminish a person’s physical or mental capabilities, but could nevertheless substantially limit that person’s ability to work as a result of the negative reactions of others to the impairment.”⁸⁷ That was the situation in the *Arline* case, where a school board regarded an individual with tuberculosis that was no longer limiting any of her major life activities as nonetheless limited in her *one job* of being a schoolteacher.

The Committee reports to the ADA endorsed this view of the third prong of the definition. As the Senate Committee on Labor and Human Resources Report summarized the coverage under the third prong: “A person who is excluded from any activity covered under this Act or is otherwise discriminated against because of a covered entity’s negative attitudes toward disability is being treated as having a disability which affects a major life activity. For example, if a public accommodation, such as a restaurant, refused entry to a person with cerebral palsy because of that person’s physical appearance, that person would be covered under the third prong of the definition. Similarly, if an employer refuses to hire someone because of a fear of the ‘negative reactions’ of others to the individual, or because of the employer’s perception that the applicant had a disability which prevented that person from working, that person would be covered under the third prong.”⁸⁸

Because coverage under the third prong relies on a discriminatory action by one entity (e.g., an employer or a business), the fact that other entities may not hold the same adverse perception of the individual with the actual or perceived impairment is irrelevant. As the House Committee on the Judiciary Report put it: “[A] person who is rejected from a job because of the myths, fears and stereotypes associated with

84. *Arline*, 480 U.S. at 283 n.10 (1987).

85. *Id.*

86. *Id.*

87. *Id.* at 283; see Feldblum, *Definition of Disability*, *supra* note 1, at 116–118 for a full analysis of the *Arline* opinion.

88. S. REP. NO. 101-116 at 24 (1989); *see also* H.R. REP. NO. 101-485, pt. 2, at 53 (1990) (discussing *Arline*).

disabilities would be covered under this third test, whether or not the employer's perception was shared by others in the field, and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition."⁸⁹

As evident from the ADA's legislative history, Congress' decision to adopt Section 504's definition of disability was a deliberate decision to cover the same wide group of individuals who had been covered under that law. Congress expected that the definition of "disability" would be interpreted as broadly under the ADA as it had been interpreted under the existing disability rights law for over fifteen years.

Disability rights advocates like myself—blissfully unaware of what the future would hold for the definition of disability—fully supported Congress' incorporation of the Section 504 definition into the ADA. We agreed with Congress' legal judgment that the fifteen-year-old definition would cover people with a wide range of physical and mental impairments, based on the record in the case law under Section 504. In addition, we were particularly reassured by the reasoning of the Supreme Court just two years earlier in the *Arline* case—the case so consistently referred to in the various committee reports. Under the Court's interpretation, the third prong of the definition was sufficiently broad to capture *any individual who had been explicitly discriminated against because of an actual or perceived impairment*, regardless of how minor that impairment was if it existed (e.g., a cosmetic disfigurement or a burn) or even if no impairment existed at all.

We were soon to be rudely surprised by new interpretations of the definition of disability by various courts, including the Supreme Court.

III. JUDICIAL NARROWING OF COVERAGE UNDER THE ADA

Over the past several years, the Supreme Court and lower courts have narrowed coverage under the ADA by interpreting *each and every component* of the ADA's definition of disability in a *strict and constrained fashion*. This has resulted in the exclusion of many persons that Congress intended to protect.⁹⁰

The Supreme Court has narrowed coverage under the ADA in three primary ways:

(A) In 1999, by requiring that courts take into account mitigating measures when determining whether a person is "substantially limited in a major life activity";

(B) Also in 1999, by requiring people who allege that they are regarded as being substantially limited in the major life activity of

89. H.R. REP. NO. 101-485, pt. 3, at 30 (1990).

90. See Appendix A for coverage of people under Section 504 as compared to the ADA; see Appendix B for case stories of people denied coverage under the ADA.

working (because an employer has refused to hire them for a job based on an actual or perceived impairment) show that the discriminating employer believed them incapable of performing not just the one job they had been denied, but also a *broad range of jobs*; and

(C) In 2002, by requiring that the term “substantially limited” be applied in a very strict manner and that the term “major life activity” be understood as covering only activities that are of “central importance” to most people’s lives.

IV. MITIGATING MEASURES

The Supreme Court, in a trio of cases decided in June 1999, ruled that mitigating measures—medication, prosthetics, hearing aids, other auxiliary devices, diet and exercise, or any other treatment—must be considered in determining whether an individual’s impairment substantially limits a major life activity.⁹¹

A. *Sutton v. United Airlines*

In *Sutton v. United Airlines*, twin sisters, Karen Sutton and Kimberly Hinton, applied to United Airlines for jobs as commercial airline pilots. While they met United’s age, education, and experience requirements, and had obtained all the appropriate pilot certifications, they did not meet United’s minimum vision requirement of uncorrected vision of 20/100 or better. Ms. Sutton and Ms. Hinton were severely nearsighted (myopia), with uncorrected vision of 20/200 in the right eye and 20/400 in the left eye. But with glasses or contact lenses, they could see as well as people without myopia. When United terminated their job interviews and refused to offer them pilot positions, Ms. Sutton and Ms. Hinton filed a claim under the ADA, alleging that United had discriminated against them on the basis of disability in violation of the ADA.⁹²

The *Sutton* case raised the question whether individuals who mitigate their impairments should be considered persons with disabilities under the ADA. The eight federal Courts of Appeals that had addressed this issue prior to the *Sutton* case had agreed with guidance issued by the Equal Employment Opportunity Commission (EEOC) and the Department of Justice (DOJ), which explicitly stated that that the mitigating effects of medication or devices on an impairment should *not* be taken into account in determining whether an individual’s impairment

91. *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

92. *Sutton*, 527 U.S. at 475–76.

substantially limits the individual in a major life activity.⁹³ In *Sutton*, however, the Tenth Circuit (affirming the district court) concluded to the contrary, creating a split in the circuits. The Supreme Court resolved this split by affirming the Tenth Circuit's determination that mitigating measures *should* be taken into account in determining disability under the ADA.⁹⁴

Relying exclusively on a plain reading of the statute, the Supreme Court reasoned that three provisions of the ADA required it to conclude that plaintiffs should be viewed in their "corrected state" in determining whether their impairments substantially limited their major life activities. First, because "the phrase 'substantially limits' appears in the Act in the present indicative verb form," it was proper to read that language as "requiring that a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability."⁹⁵ Second, because the Act defines disability "with respect to an individual" and requires that an impairment substantially limit "the major life activities of such individual," the Court concluded that the law necessarily requires an "individualized inquiry."⁹⁶ Indeed, the Court explained, the EEOC had emphasized the need for such an individualized assessment, and yet its "directive that persons be judged in their uncorrected or unmitigated state runs directly counter to the individualized inquiry mandated by the ADA."⁹⁷ Finally, since Congress had stated in its findings that there were 43 million people with disabilities, it was logically inconsistent to presume that Congress intended to cover the 100 million people estimated to have vision impairments. Thus, the finding regarding the number of people covered under the law "is evidence that the ADA's coverage is restricted to only those whose impairments are not mitigated by corrective measures."⁹⁸

The Court concluded that the "[EEOC's and DOJ's] guidelines—that persons are to be evaluated in their hypothetical uncorrected state—is an *impermissible interpretation* of the ADA."⁹⁹ The fact that the Senate Labor and Human Resources Committee Report, the House Judiciary Committee Report, and the House Education and Labor Committee Report had all offered the same interpretation as the agencies was irrelevant to the Court based on the following reasoning:

Because we decide that, *by its terms*, the ADA cannot be read in this manner, we have no reason to consider the ADA's

93. *Id.* at 496–97 (Stevens, J., dissenting) (listing cases).

94. *Id.* at 477, 495–96.

95. *Id.* at 482.

96. *Id.* at 483.

97. *Id.*

98. *Id.* at 487.

99. *Id.* at 482 (emphasis added).

legislative history.¹⁰⁰

Having concluded that three congressional committees, eight circuit courts, and two agencies had impermissibly interpreted the ADA by not considering mitigating measures, the Supreme Court held that Karen Sutton and Kimberly Hinton were not substantially limited in any major life activity and therefore were not covered by the ADA. Because Ms. Sutton and Ms. Hinton were found not to be “disabled,” the Court never reached the question whether they were qualified to perform the job or whether United’s vision requirement was discriminatory.¹⁰¹

B. Murphy v. United Parcel Service

In *Murphy v. United Parcel Service*, the United Parcel Service (UPS) hired Vaughn L. Murphy as a mechanic. The job required Mr. Murphy to drive commercial motor vehicles. According to Department of Transportation (DOT) health requirements, drivers of commercial motor vehicles in interstate commerce must have “no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial vehicle safely.” Mr. Murphy has had hypertension (high blood pressure) since he was ten years old. With medication, however, “he can function normally and can engage in activities that other persons normally do.”¹⁰²

At the time UPS hired him, Mr. Murphy’s blood pressure was too high for Mr. Murphy to qualify for a DOT health certification. However, due to an error, he was erroneously granted certification and he started working for UPS. About a month later, a UPS medical supervisor discovered the error while reviewing Mr. Murphy’s medical files and requested that he have his blood pressure retested. Upon retesting, Mr. Murphy’s blood pressure, at 160/102 and 164/104, was not low enough to qualify him for the 1-year certification that he had incorrectly been issued, but it was sufficient to qualify him for an optional temporary DOT health certification. UPS fired Mr. Murphy on the grounds that his blood pressure exceeded DOT’s requirement and refused to allow him to attempt to obtain the optional temporary certification.¹⁰³

Believing UPS had discriminated against him based on disability, Mr. Murphy brought a claim under the ADA. Both the district court and the Tenth Circuit Court of Appeals determined that since Mr. Murphy functioned normally with medication, his high blood pressure did not substantially limit him in any major life activity and thus was not covered by the ADA. The Supreme Court agreed, citing its holding in

100. *Id.* (emphasis added).

101. *Id.* at 493–94.

102. *Murphy*, 527 U.S. at 519–20.

103. *Id.*

Sutton that the determination of disability should be made with reference to mitigating measures. Because Mr. Murphy was found not to be “disabled” for purposes of the ADA, the Court never reached the question whether Mr. Murphy was qualified to perform the job or whether UPS had discriminated against him by refusing to allow him to obtain a temporary DOT health certification.¹⁰⁴

C. *Albertson’s, Inc. v. Kirkingburg*

In August 1990, Albertson’s, Inc., a grocery-store chain, hired Hallie Kirkingburg as a truckdriver. Mr. Kirkingburg had more than ten years’ driving experience and performed well on his road test for the job. Mr. Kirkingburg has an uncorrectable vision condition that involves weakened vision in one eye, so that he has in effect “monocular” vision, or vision in only one eye. Over time, Mr. Kirkingburg had learned to compensate for the weakened vision in his left eye by making subconscious adjustments to the manner in which he senses depth and perceived peripheral objects in his right eye.¹⁰⁵

Before he started working, Albertson’s required Kirkingburg to be examined by a doctor to see if he met federal DOT vision standards for commercial truck drivers. Despite Kirkingburg’s weakened vision in his left eye, the examining doctor erroneously certified that Kirkingburg met the DOT’s basic vision standards. In December 1991, Mr. Kirkingburg took a leave of absence after injuring himself when he fell from the cab of his truck. Albertson’s required returning employees to undergo a physical examination, which Mr. Kirkingburg did in November 1992. This time, the examining physician correctly assessed Kirkingburg’s vision and found that his eyesight did not meet the basic DOT standards. Mr. Kirkingburg was told that he would have to obtain a waiver of the DOT’s basic vision standards in order to be qualified to drive. DOT had a process for giving certification to applicants with deficient vision who had three years of recent experience driving a commercial vehicle with a clean driving record.¹⁰⁶

Mr. Kirkingburg applied for a waiver, but while his application was pending, Albertson’s fired him because he could not meet the basic DOT vision standard. Although Mr. Kirkingburg ultimately received a DOT waiver, Albertson’s still refused to rehire him.¹⁰⁷

Mr. Kirkingburg brought suit alleging that Albertson’s violated the ADA by firing him. The district court ruled that Mr. Kirkingburg was not qualified for the job, and that Albertson’s was not required, as a

104. *Id.* at 520–22, 525.

105. *Albertson’s*, 527 U.S. at 558–59, 565.

106. *Id.* at 559–60.

107. *Id.* at 560.

reasonable accommodation, to give him time to get a DOT waiver. The Ninth Circuit Court of Appeals reversed the district court's decision, holding that Albertson's could not use the DOT vision standard as the justification for its vision requirement and yet disregard the waiver program that was a legitimate part of the DOT program. Albertson's also argued for the first time before the Ninth Circuit that Mr. Kirkingburg did not have a disability within the meaning of ADA. The Ninth Circuit rejected this argument, concluding that Mr. Kirkingburg had presented evidence that his vision was effectively monocular, and thus "the manner in which he sees differs significantly from the manner in which most people see."¹⁰⁸

The Supreme Court reversed the Ninth Circuit, concluding that it had been "too quick to find a disability."¹⁰⁹ According to the Court, the Ninth Circuit's determination that Mr. Kirkingburg's manner of seeing was "different" from others was insufficient to show disability. Instead, Mr. Kirkingburg's sight must be "significantly restricted." Second, the Court determined that *Sutton's* mandate that courts consider mitigating measures includes "measures undertaken, whether consciously or not, with the body's own systems."¹¹⁰ Thus, the Ninth Circuit should have considered the ability of Mr. Kirkingburg's brain to compensate for his monocular vision in determining whether he had a disability.¹¹¹ Third, contrary to the individualized assessment required under the ADA, the Ninth Circuit failed to identify the *extent* of Mr. Kirkingburg's visual restrictions.¹¹²

The Supreme Court's requirement that courts consider mitigating measures creates an unintended paradox: people with serious health conditions like epilepsy and diabetes, who are fortunate enough to find treatment that makes them more capable and independent, and thus more able to work, find they are not protected by the ADA because the limitations arising from their impairments are not considered substantial enough. Ironically, the better a person manages his or her medical condition, the less likely that person will be protected from discrimination, even if an employer admits that he or she dismissed the person *because of* that person's (mitigated) condition.¹¹³

108. *Id.* at 561.

109. *Id.* at 564.

110. *Id.* at 565–66.

111. *Id.*

112. As for Albertson's primary contention—that Mr. Kirkingburg was not qualified—the Court declared that Albertson's had both a "right" and an "unconditional obligation" to follow the DOT commercial truck driver regulations. *Id.* at 570. The Supreme Court ruled that "[t]he waiver program was simply an experiment with safety" and "did not modify the general visual acuity standards." *Id.* at 574. Since the DOT regulation did not require employers of commercial drivers to participate in the experimental waiver program, Albertson's was free to decline to do so. *Id.* at 577.

113. See examples below in Section IV.

V. BROAD RANGE OF JOBS UNDER “REGARDED AS” PRONG

In *Sutton*, the sisters had also argued that United “regarded” them as substantially limited in the major life activity of working and, therefore, that they should be covered under the third prong of the definition of disability. They contended that United’s vision requirement “substantially limited their ability to engage in the major life activity of working by precluding them from obtaining the job of global airline pilot.”¹¹⁴

The Supreme Court rejected that analysis by applying the EEOC’s regulations concerning the major life activity of “working” to the third prong of the definition—despite EEOC’s explicit guidance to the contrary.

The Court ruled that “[w]hen the major life activity under consideration is that of working, the statutory phrase ‘substantially limits’ requires, at a minimum, that plaintiffs allege they are unable to work in a *broad class of jobs*.”¹¹⁵ As support for this ruling, the Court quoted a sentence from the regulation interpreting the phrase “substantially limits”: “[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.”¹¹⁶ The Court thus concluded that because the sisters had failed to show that United regarded them as incapable of performing a *broad range of jobs*—beyond the single job of “global airline pilot”—they were not regarded as being substantially limited in the major life activity of working.¹¹⁷

In reaching its conclusion, the Court ignored the EEOC’s guidance on how the major life activity of working was to be understood *differently* for purposes of the first and third prongs of the definition of disability. The EEOC had noted in its guidance that the major life activity of working should be considered under the first prong of the definition only in the rare situation in which an individual was not limited in any *other* major life activity.¹¹⁸ As noted above, in most cases decided under the Rehabilitation Act, individuals with a range of impairments had been held by the courts (without significant analysis) to

114. *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 490 (1999).

115. *Id.* at 491.

116. *Id.* (quoting 29 C.F.R. § 1630.2(j)(3)(i)). The regulation states:

(3) With respect to the major life activity of working—

(i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

117. *Id.* at 493.

118. See 29 C.F.R. pt. 1630, App. §1630.2(j) (“If an individual is not substantially limited with respect to any other major life activity, the individual’s ability to perform the major life activity of working should be considered. *If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working.*”) (emphasis added).

be substantially limited in such major life activities as standing, lifting, breathing, walking, bending, seeing or hearing. Thus, according to the EEOC, the only time an individual should argue that he or she was limited in the major life activity of working under the first prong of the definition was when the person was not experiencing a limitation in any other life activity. In such circumstances, the EEOC regulations provided, the individual would have to prove that he or she was limited in a broad class of jobs, and not just in one job.¹¹⁹

By contrast, the EEOC's guidance for "*Regarded as Substantially Limited in a Major Life Activity*" was quite different.¹²⁰ In that section of the guidance, the EEOC explained as follows:

The rationale for the "regarded as" part of the definition of disability was articulated by the Supreme Court in the context of the Rehabilitation Act of 1973 in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987). The Court noted that, although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling. "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." 480 U.S. at 283

An individual rejected from a job because of the "myths, fears and stereotypes" associated with disabilities would be covered under this part of the definition of disability, *whether or not the employer's or other covered entity's perception were shared by others in the field* and whether or not the individual's actual physical or mental condition would be considered a disability under the first or second part of this definition

Therefore, if an individual can show that an employer or other covered entity made an employment decision because of a perception of disability based on "myth, fear or stereotype," the individual will satisfy the "regarded as" part of the definition of disability. If the employer cannot articulate a non-discriminatory reason for the employment action, an inference that the employer is acting on the basis of "myth, fear or stereotype" can be drawn.¹²¹

119. *Id.*

120. See 29 C.F.R. pt. 1630, App. § 1630.2(l) (emphasis added).

121. *Id.* (emphasis added).

Unfortunately, the Supreme Court ignored the logic of the EEOC's guidance and imported to the third prong of the definition a restriction that had made sense under the first prong of the definition, but made no sense at all under the third prong. The formulation enunciated by the Supreme Court now erects an almost impossible threshold for any individual seeking coverage under the third prong. The Court's approach requires that an individual essentially both divine and prove an employer's subjective state of mind. Not only must an individual demonstrate that the employer believed the individual had an impairment that prevented him or her from working for that employer in that job, the individual must also show that the employer thought that the impairment would prevent the individual from performing a broad class of jobs for other employers. As it is safe to assume that employers do not regularly consider the panoply of other jobs that prospective or current employees could or could not perform—and certainly do not often create direct evidence of such considerations—the individual's burden becomes essentially insurmountable.

While the “one-two punch” of the *Sutton* trilogy—requiring consideration of mitigating measures under the first prong of the definition and requiring proof of being regarded as substantially limited in a range of jobs under the third prong of the definition—began the slide toward non-coverage under the ADA for people with a range of physical and mental impairments, the Court made the situation worse three years later in another decision regarding the definition of disability.

VI. DEMANDING STANDARD: SUBSTANTIALLY LIMITS A MAJOR LIFE ACTIVITY

In 2002, the Supreme Court considered the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.¹²² In that case, Toyota Motor Manufacturing, Kentucky, Inc., hired Ella Williams to work on an engine assembly line at its car manufacturing plant in Georgetown, Kentucky. Soon after she began to work with pneumatic tools (tools using pressurized air), Ms. Williams developed carpal tunnel syndrome and tendonitis that caused pain in both of her hands, wrists, and arms. Williams' personal physician placed her on permanent work restrictions that precluded her from lifting more than twenty pounds, from frequent lifting of even lighter objects, from constant repetitive motions of her wrists or elbows, from performing overhead work, and from using vibratory or pneumatic tools.¹²³

As a result, Toyota assigned Ms. Williams to various modified

122. 534 U.S. 184 (2002).

123. *Id.* at 187–88.

duty jobs. Eventually she was assigned to work as part of a Quality Control Inspection Operations team, where she routinely performed two of the four tasks of the team, both of which involved solely visual inspections. Ms. Williams satisfactorily performed these tasks for a period of two years.

Toyota then decided that all members of the teams should rotate through all four of the Quality Control Inspection tasks. Ms. Williams was therefore ordered to apply highlight oil to several parts of cars as they passed on the assembly line, requiring her to hold her hands and arms up around her shoulder level for several hours at a time. As a result, she began experiencing pain in her neck and shoulders, and was diagnosed as having several medical conditions that cause inflammation and pain in the arms and shoulders.¹²⁴ Toyota refused to make an exception to its policy and permit Williams to continue performing only the visual inspection tasks.

Ms. Williams filed an ADA claim, alleging that Toyota had failed to accommodate her disability. The district court ruled that Ms. Williams was not “disabled” under the ADA because her impairments did not substantially limit her in a major life activity. The Sixth Circuit Court of Appeals reversed, holding that Ms. Williams’ impairments did substantially limit her in the major life activity of performing manual tasks. The Supreme Court reversed, holding that the Sixth Circuit had failed to apply the proper standard in determining whether Ms. Williams was disabled “because it analyzed only a limited class of manual tasks and failed to ask whether [Ms. Williams’] impairments prevented or restricted her from performing tasks that are of central importance to most people’s daily lives.”¹²⁵

The full adverse import of the Supreme Court’s ruling, however, lay in its broad pronouncements regarding the proper interpretation of the words “substantially limits” and “major life activities.” The Court stated that, given the finding in the ADA that forty-three million people have disabilities, these terms “need to be interpreted strictly to create a demanding standard for qualifying as disabled.”¹²⁶ Indeed, “[i]f Congress intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled, the number would surely have been much higher.”¹²⁷

According to the Court, “[s]ubstantially’ in the phrase ‘substantially limits’ suggests ‘considerable’ or ‘to a large degree.’”¹²⁸ Therefore, the Court reasoned, “the word ‘substantial’ clearly precludes

124. *Id.* at 188–90.

125. *Id.* at 187.

126. *Id.* at 197.

127. *Id.*

128. *Id.* at 196.

impairments that interfere in only a minor way with the performance of manual tasks from constituting disabilities” under the ADA.¹²⁹ The Court also stated that “[m]ajor’ in the phrase ‘major life activities’ means important,” and so “major life activities” refers to “those activities that are of central importance to daily life,” including “household chores, bathing, and brushing one’s teeth.”¹³⁰

As a result of this ruling, people alleging discrimination under the ADA must now show that their impairments *prevent or severely restrict* them from doing activities that are of *central importance* to most people’s daily lives.¹³¹

Through these three aspects of interpretation, the Supreme Court and the lower courts have dramatically changed the meaning of “disability” under the ADA over the past number of years so as to make it almost unrecognizable. Many of the people whom Congress intended to protect find that they are no longer “disabled” under the ADA; they are never even given the opportunity to show they can do the job and were treated unfairly because of their medical condition.

The Supreme Court’s narrow reading is in marked contrast to the cases that had been decided under the Rehabilitation Act, which Congress had before it as precedent when it enacted the ADA. In these cases, the courts had tended to decide questions of coverage easily and without extensive analysis.¹³² This narrow reading is likewise inconsistent with other civil rights statutes, such as the Civil Rights Act of 1964, upon which the ADA was modeled¹³³ and which courts have also interpreted broadly.¹³⁴ Indeed, under the Rehabilitation Act and Title VII of the Civil Rights Act, courts rarely tarried long on the question of whether the plaintiff in a case was “really a handicapped individual,” or “really a woman,” or “really black.” Instead, these cases tended to focus on the essential causation requirement: i.e., had the individual proven that the alleged discriminatory action had been taken *because of* his or her handicap, race, or gender?¹³⁵

129. *Id.* at 197.

130. *Id.* at 197, 201–02. Because Ms. Williams was able to brush her teeth and do laundry, she was therefore *not* substantially limited in the activities of central importance to the daily lives of most people. *Id.* at 202.

131. *Id.* at 197.

132. Feldblum, *Definition of Disability*, *supra* note 1, at 128; see also Appendix A, for coverage of people under Section 504 as compared to the ADA.

133. 42 U.S.C. § 12101 (2007) (“[U]nlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination.”).

134. *See, e.g.*, *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 381 (1977) (Marshall and Brennan, JJ., concurring in part and dissenting in part) (“Title VII is a remedial statute designed to eradicate certain invidious employment practices . . . [and], under longstanding principles of statutory construction, the Act should be given a liberal interpretation.” (internal quotation marks and citation omitted)).

135. Feldblum, *Definition of Disability*, *supra* note 1, at 106.

But how did this happen? How did a statutory definition that Members of Congress and disability rights advocates felt would ensure protection for a broad range of individuals end up becoming the principal means of restricting coverage under the ADA?

There is a range of academic literature on this question, including some to which I have contributed. But let me point out here simply one observation. From my reading of the cases, it seems to me that the instinctive understanding by many courts of the term “disability” is that it is synonymous with an “inability to work or function,” and concomitantly, that people with disabilities are thus necessarily viewed as significantly different from “the rest of us.”

This view of disability may have been influenced by the fact that most disability cases heard by courts prior to the ADA regarded claims for disability payments under Social Security. In those cases, an individual was required to demonstrate that he or she had a “medically determinable physical or mental impairment” that made him or her unable “to engage in any substantial gainful activity”—i.e., that he or she was unable to work.¹³⁶ Hence, it may have been difficult for courts to grasp that the Congressional intent under the ADA was to capture a much broader range of individuals with physical and mental impairments than those intended to be covered under Social Security disability law.¹³⁷

But a civil rights law is not a disability payment law. The goal of the ADA is to prohibit *discrimination* against a person because of his or her disability. A person does not have to be unable to work in order to face discrimination based on his or her impairment. On the contrary, people who are perfectly able to perform their jobs—sometimes thanks to the very medications or devices they use—are precisely the ones who may face discrimination because of myths, fears, ignorance, or stereotypes about their medical conditions.

Similarly, in a civil rights context, requiring a person to meet an extremely high standard for qualifying as “disabled” is counter-intuitive if an employer has taken an adverse action based on an individual’s physical or mental impairment. Requiring the person to reveal private, highly personal, and potentially embarrassing facts to employers and judges about the various ways the individual’s impairment impacts daily living, simply and only to demonstrate the severity of the impairment, is completely unnecessary to deciding whether unjust discrimination has occurred.¹³⁸

136. 42 U.S.C. § 423(d)(1)(A) (2007) (SSDI); 42 U.S.C. § 1382c(a)(3)(A) (2007) (SSI).

137. See Feldblum, *Definition of Disability*, *supra* note 1, at 97, 140.

138. As I also note in my academic article, there are other elements that are in play here. For example, “EEOC regulations that emphasize individualized assessments of the impact of impairments on particular individuals, a sophisticated management bar trained in seminars to carefully parse the statutory text of the definition, and finally, the terms of the definition itself, have all resulted in a reading of the ADA that has radically reduced the number of people who can claim coverage under the law.” Feldblum, *Definition of Disability*, *supra* note 1, at 140; *see also id.* at 152

Finally, it is inconsistent with a civil rights law to excuse an employer's behavior simply because other employers may not also act in a similar discriminatory fashion. As the court made clear in *Arline*, if an employer fires an individual expressly because of an impairment, that is sufficient to establish coverage for the individual under the "regarded as" prong of the definition of disability. Of course, an action of this nature would not suffice to qualify an individual for *disability payments*. But it certainly is sufficient to raise a viable claim of discrimination based on that impairment, regardless of whether other employers would have discriminated against the individual as well.

VII. THE REAL LIFE IMPACT OF SHRINKING COVERAGE UNDER THE ADA

Regardless of what one believes about the original intent of Congress in passing the ADA, the relevant question for Congress *today* is whether people with a range of physical and mental impairments are being treated fairly—*today*. Consider the following real-life impacts of the Supreme Court's ruling with regard to mitigating measures:

► Stephen Orr, a pharmacist in Nebraska, was fired from his job at Wal-Mart because he needed to take a half-hour uninterrupted lunch break to manage his diabetes. When Mr. Orr challenged his firing under the ADA, Wal-Mart argued that since Mr. Orr did so well managing his diabetes with insulin and diet, he was not "disabled" under the ADA. The courts agreed. Although Wal-Mart considered Mr. Orr "too disabled" to work for Wal-Mart, he was not disabled "enough" to challenge his firing under the ADA.¹³⁹

► James Todd, a shelf-stocking clerk at a sporting goods store in Texas, was fired from his job a few months after experiencing a seizure at work. Mr. Todd challenged his firing under the ADA, but the district court never reached the question of whether Mr. Todd had been fired because of his epilepsy. Instead, the court concluded that since Mr. Todd's epilepsy was otherwise well-managed with anti-seizure

("[W]hile individualized assessments are . . . critical in determining whether an individual with a disability is qualified for a job (including whether a reasonable accommodation is due to an individual in a particular case), the idea that an individualized assessment would be used to determine whether one person with epilepsy would be covered under the law, while another person with epilepsy would not, was completely foreign both to Section 504 jurisprudence and to the spirit of the ADA as envisioned by its advocates. The words of the ADA, however, can lend themselves to such an interpretation, and the fact that the EEOC's guidance expressly endorsed such an interpretation has cemented that approach in the courts.")

139. Orr v. Wal-Mart Stores, Inc., 297 F.3d 720 (8th Cir. 2002).

medication, he was not disabled “enough” to challenge his firing under the ADA.¹⁴⁰

► Allen Epstein, the CEO of an insurance brokerage firm, was demoted from his job after being hospitalized because of heart disease. He was later fired shortly after telling his employer he had diabetes. Mr. Epstein brought a claim under the ADA, alleging that his employer had discriminated against him because of disability. The court held that because his heart disease and diabetes were well-managed with medication, he was not disabled “enough” to challenge his firing under the ADA.¹⁴¹

► Ruth Eckhaus, a railroad employee who uses a hearing aid, was fired by her employer who told her that he “could not hire someone with a hearing aid because [the employer] had no way of knowing if she would remember to bring her hearing aid to work.” Ms. Eckhaus brought a claim under the ADA, alleging that she was discriminated against based on her hearing impairment. The court concluded that since her hearing aid helped correct her hearing impairment, Ms. Eckhaus was not disabled “enough” to challenge discrimination based on that impairment.¹⁴²

► Michael Schriener, a salesperson who developed major depression and PTSD after discovering that his minor children had been abused, was fired from his job for failing to attend a training session. Believing he was fired because of his depression and PTSD, Mr. Schriener brought a claim under the ADA. But the court never addressed whether his disability was the reason he was fired. Instead, that court concluded that because Mr. Schriener did so well managing his condition with medication, he was not disabled “enough” to be protected by the ADA.¹⁴³

► Michael McMullin, a career law enforcement officer from Wyoming, was fired from his job as a court security officer because an examining physician determined that his clinical depression and use of medication disqualified him from his

140. *Todd v. Academy Corp.*, 57 F. Supp. 2d 448 (S.D. Tex. 1999).

141. *Epstein v. Calvin-Miller International, Inc.*, 100 F. Supp. 2d 222 (S.D.N.Y. 2000).

142. *Eckhaus v. Consolidated Rail Corp.*, No. Civ. 00-5748 (WGB), 2003 WL 23205042 (D.N.J. Dec. 24, 2003)

143. *Schriener v. Sysco Food Serv.*, No. Civ. 1CV032122, 2005 WL 1498497 (M.D. Pa. June 23, 2005).

job. When Mr. McMullin challenged his firing under the ADA, his employer argued that Mr. McMullin was not “disabled” under the ADA because he had successfully managed his condition with medication for over fifteen years. The court agreed. Even though Mr. McMullin’s employer had fired him because of his use of medication, the court ruled that he was not disabled “enough” to challenge the discrimination under the ADA. According to the court, “[t]his is one of the rare, but not unheard of, cases in which many of the plaintiff’s claims are favored by equity, but foreclosed by the law.”¹⁴⁴

Is this what Congress believes the law should be today?

Or consider the impact of the Supreme Court’s ruling that to be covered under the third prong of the definition, an individual must prove that his or her employer thought that he or she was incapable of performing a *broad range of jobs*:

► Rhua Dale Williams, an offshore crane operator with twenty years’ experience, was refused a crane operator job because of his two prior back surgeries. Believing the company had regarded him as disabled, Mr. Williams filed a claim under the ADA. The court held that because Mr. Williams had shown that the company believed him incapable of performing only the job of *offshore* crane operator—and not the job of crane operator more generally—he was not regarded as incapable of performing a broad range of jobs. As a result, Mr. Williams was not covered by the ADA.¹⁴⁵

► Hundreds of applicants for truck-driving positions were refused jobs at a motor carrier company solely because of a blanket exclusionary policy that prohibited the hiring of people who used certain prescription medications. The applicants alleged that the company had regarded them as disabled. The courts disagreed, holding that since the applicants had shown only that the company believed them incapable of working as truck drivers *for the company*—and not as truck drivers *in general*—they were not regarded as incapable of performing a broad range of jobs. As a result, the applicants were not covered by the ADA.¹⁴⁶

144. McMullin v. Ashcroft, 337 F. Supp. 2d 1281 (D. Wyo. 2004).

145. E.E.O.C. v. HBH Inc., No. Civ.A. 98-2632, 1999 WL 1138533 (E.D. La. Dec. 9, 1999).

146. E.E.O.C. v. J.B. Hunt Transport, Inc., 321 F.3d 69 (2d Cir. 2003).

Is this what Congress believes the law should be today?

Finally, consider the following real-life impacts of the Supreme Court's ruling that the terms "substantially limits" and "major life activity" must be interpreted strictly:

► Carey McClure, an electrician with twenty years of experience, was offered a job at a General Motors' (GM) assembly plant pending completion of a pre-employment physical exam. When the examining physician saw that Mr. McClure could only lift his arms to shoulder level, Mr. McClure explained that he had muscular dystrophy, and that he could do overhead work by using a ladder, as electricians often do. The physician revoked the job offer, and Mr. McClure brought a claim under the ADA. Even though GM revoked Mr. McClure's job offer because of limitations resulting from his muscular dystrophy, GM argued in court that Mr. McClure did not have a "disability" and was not protected by the ADA. The courts agreed. According to the Fifth Circuit Court of Appeals:

[Mr. McClure] has adapted how he bathes, combs his hair, brushes his teeth, dresses, eats, and performs manual tasks by supporting one arm with the other, repositioning his body, or using a step-stool or ladder. . . . [Mr. McClure's] ability to overcome the obstacles that life has placed in his path is admirable. In light of this ability, however, we cannot say that the record supports the conclusion that his impairment substantially limits his ability to engage in one or more major life activities.¹⁴⁷

► Vanessa Turpin, an auto packaging machine operator with epilepsy, resigned after her employer required her to take a work-shift that would have worsened her seizures. Ms. Turpin challenged her employer's actions by filing a claim under the ADA, but the court never decided whether these actions were discriminatory. The court held that even though Vanessa Turpin experienced nighttime seizures characterized by "shaking, kicking, salivating and, on at least one occasion, bedwetting," which caused her to "wake up with bruises on her arms and legs," Vanessa was not "disabled" because "[m]any individuals fail to receive a full night sleep." The court further held that Vanessa's daytime seizures, which

147. *McClure v. General Motors Corp.*, 75 Fed. Appx. 983, 2003 WL 21766539 (5th Cir. 2003).

“normally lasted a couple of minutes” and which caused her to “bec[o]me unaware of and unresponsive to her surroundings” and “to suffer memory loss,” did not render her “disabled” because “many other adults in the general population suffer from a few incidents of forgetfulness a week.”¹⁴⁸

► Zelma Williams is a right-hand dominant person whose right arm was amputated below the elbow. Despite an exemplary work record, Ms. Williams was not among those rehired after the company for which she worked was sold. Ms. Williams brought a claim under the ADA, but the court never decided whether her employer discriminated against her because of disability. Instead, the court held that Ms. Williams was not “disabled” because she was not “prevented or severely restricted from doing activities that are of central importance to most people’s daily’s lives . . . [like] household chores, bathing oneself, and brushing one’s teeth.” According to the court, Ms. Williams’ amputated arm was only a “physical impairment, nothing more.”¹⁴⁹

► Christopher Phillips, a store maintenance worker with a traumatic brain injury, brought a claim under the ADA after he was fired from his job. Although Mr. Phillips’ brain injury caused a four-month coma, weeks of rehabilitation, an inability to work for fourteen years, blurred vision, dizziness, spasms in his arms and hands, slowed learning, headaches, poor coordination, and slowed speech, the court held that “this evidence does not establish that [Mr. Phillips] is substantially limited in the major life activities of learning, speaking, seeing performing manual tasks, eating or drinking.” Therefore, Mr. Phillips was not “disabled” under the ADA.¹⁵⁰

► Robert Tockes, a truck driver who had limited use of one hand as a result of an injury he sustained in the Army, was fired from his job and was told by his employer that “he was being fired because of his disability, he was crippled, and the company was at fault for having hired a handicapped person.” Mr. Tockes brought a claim under the ADA, but the court never addressed whether he had been discriminated

148. Equal Employment Opportunity Comm’n v. Sara Lee Corp., 237 F.3d 349 (4th Cir. 2001).

149. Williams v. Cars Collision Center, LLC, No. 06 C 2105 (N.D. Ill. July 9, 2007).

150. Phillips v. Wal-Mart Stores, Inc., 78 F. Supp. 2d 1274 (S.D. Ala. 1999).

against. Instead, the court concluded that he was not protected by the ADA because he was not “disabled.” While, “[o]bviously [the employer] knew [Mr. Tockes] had a disability,” the court stated, that “does not mean that it thought him so far disabled as to fall within the restrictive meaning the ADA assigns to the term.”¹⁵¹

► Mary Ann Pimental, a registered nurse with stage III breast cancer, took time from work to undergo a mastectomy, chemotherapy, and radiation therapy. While Mary Ann was hospitalized and receiving treatment for cancer, the hospital reorganized its management team and eliminated Mary Ann’s position. When the hospital refused to rehire her into an equivalent position, Ms. Pimental brought a claim under the ADA. But the court never decided whether Ms. Pimental’s breast cancer played a role in the hospital’s hiring decision. Instead, the court agreed with the hospital that “the most substantial side effects [of Ms. Pimental’s breast cancer and treatment] were (relatively speaking) short-lived” and therefore “they did not have a substantial and lasting effect on the major activities of her daily life.” Because Ms. Pimental failed to show she was limited by the breast cancer on a “permanent or long-term basis,” she was held to be not “disabled” and therefore not protected by the ADA. Sadly, Ms. Pimental died of breast cancer four months after the court issued its decision.¹⁵²

► Daniel Didier, a frozen food delivery manager with a permanently injured arm, was fired from his job because of limitations resulting from his injury. Believing he had been discriminated based on disability, Mr. Didier challenged his firing under the ADA. Despite firing Mr. Didier because of his physical limitations, his employer argued in court that his limitations did not rise to the level of “disability” under the ADA. The court agreed. Even though Mr. Didier “does have some medically imposed restrictions,” the court stated, “he has not met his burden of showing that the extent of his limitations due to his impairment are ‘substantial.’” According to the court, since Mr. Didier was able to perform activities of daily living, “such as shaving and brushing his teeth, with his left hand . . . he does not have a disability as

151. *Tockes v. Air-Land Transport Services, Inc.*, 343 F.3d 895 (7th Cir. 2003).

152. *Pimental v. Dartmouth-Hitchcock Clinic*, 236 F. Supp. 2d 177 (D.N.H. 2002).

defined under the first prong of the ADA.”¹⁵³

► Charles Littleton, a twenty-nine-year old man who was diagnosed with “mental retardation” as a young child, applied for a cart-pusher position at Wal-Mart. When he got to the interview, Wal-Mart refused to allow his job coach into the interview as previously agreed upon. The interview did not go well for Mr. Littleton and he did not get the job. Believing he had been discriminated against because of his disability, Mr. Littleton brought a claim under the ADA. But the courts never determined whether Wal-Mart discriminated against him because of his disability. Instead, the courts simply ruled that Mr. Littleton was not “disabled” under the ADA. While acknowledging that Mr. Littleton “is somewhat limited in his ability to learn because of his mental retardation,” the Eleventh Circuit Court of Appeals concluded that he was not *substantially* limited in his ability to learn because he could read. In addition, the court concluded that while “[i]t is unclear whether thinking, communicating, and social interaction are ‘major life activities’ under the ADA,” Mr. Littleton was not *substantially* limited in these activities because he was able to drive a car and communicate with words.¹⁵⁴

Is this what Congress thinks the law should be today?

Many of us believe the ADA today is not doing the job it was intended to do. We believe the technical words of the ADA have been misused and misapplied by the courts to exclude people who deserve coverage under the law.¹⁵⁵

The National Council on Disability, relying upon the expertise of a range of lawyers provided over a period of time, has suggested that the best way to fix the problems encountered in the courts is to change the language of the ADA so that it forces court to focus on the *reason* an

153. *Didier v. Schwan Food Co.*, 387 F. Supp. 2d 987 (W.D. Ark. 2005).

154. *Littleton v. Wal-Mart Stores, Inc.*, 231 Fed. Appx. 874 (11th Cir. 2007).

155. See Feldblum, *Definition of Disability*, *supra* note 1, at 93 (“That decision [*Sutton*] threw into question coverage for thousands of individuals with impairments whom I, and other advocates who worked on the ADA, presumed Congress had intended to cover when it passed the ADA.”); see also Claudia Center and Andrew J. Imparato, *Development in Disability Rights: Redefining “Disability” Discrimination: A Proposal to Restore Civil Rights Protections for All Workers*, 14 STAN. L. & POL’Y REV 321, 323 (2003) (“In light of the unwillingness of the U.S. Supreme Court and the lower federal courts to interpret the ADA’s definition of disability in an inclusive manner, consistent with the intent of the law’s drafters in Congress, it is time to rewrite the ADA’s definition of disability and restore civil rights protections to the millions of Americans who experience disability-based discrimination.”); Robert Burgdorf, “*Substantially Limited*” *Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 561(1997) (“The restrictive interpretations of statutory protection under the ADA and Rehabilitation Act, however, have engendered a situation in which many cases are decided solely by looking at the characteristics of the plaintiff.”).

adverse action has been taken, rather than on the specifics of a person's physical or mental condition.¹⁵⁶ In this way, litigation under the ADA would mirror litigation under Title VII of the Civil Rights Act—in which a plaintiff must prove that discrimination occurred *because of* race, sex, religion, or national origin, but is not required to get into the specifics of his or her race, sex, religion, or national origin.

One can achieve this result with two basic changes to the language of the ADA. First, the definition of “disability” should be a “physical or mental impairment,” with those terms defined as they have been for years by the regulatory agencies. While this obviously changes the *words* of the original ADA, it does not change the *intent* of Congress in terms of coverage under the law. As I explain above, it was understood and expected during passage of the ADA that a person with any type of impairment, even a minor one, would be covered under the third prong of the definition *if* the person could prove that he or she had been subjected to adverse action *because of* that physical or mental impairment. Indeed, it was *based* on this assumption of broad coverage that Congress chose to go with the long-standing definition of Section 504 of the Rehabilitation Act, rather than with the new definition offered by the National Council of Disability that had been incorporated into the first version of the ADA.¹⁵⁷ The rejection of that new definition was not because Congress thought the definition was too broad. Rather, it was because Congress *agreed* that such breadth was necessary—and believed it was *already encompassed* under the third prong of the definition.¹⁵⁸

Changing the ADA in this manner would bring it into conformity with Title VII of the Civil Rights Act of 1964. Under that law, *every* person in this country is covered, since every person has a race, a sex, a religion (or lack of a religion), and a national origin. And any individual may believe that he or she has been discriminated against because of his or her race, sex, religion, or national origin. But under our system of law, an individual claiming discrimination on any of these grounds must prove that the discrimination occurred *because of* the prohibited characteristic and could not be explained based on a legitimate non-discriminatory reason. This same body of law would apply to individuals arguing discrimination on the basis of disability.

Second, the ADA should be modified so that the employment section prohibits discrimination “on the basis of disability,” rather than the existing formulation that prohibits discrimination “against a qualified individual with a disability.” This change would again bring the ADA into conformity with Title VII of the Civil Rights Act of 1964, which similarly prohibits discrimination “on the basis of” race, sex, religion,

156. NATIONAL COUNCIL ON DISABILITIES, RIGHTING THE ADA, Executive Summary, 13 (2004), available at http://www.ncd.gov/newsroom/publications/2004/righting_ada.htm.

157. S. 2345, 100th Cong., 2d Sess., 134 CONG. REC. S5089 (daily ed. Apr. 28, 1988).

158. See Feldblum, *Definition of Disability*, *supra* note 1, at 126–129.

and national origin. This formulation ensures that courts will begin their analysis by focusing on whether a person has proven that a challenged discriminatory action was taken *because of* a personal characteristic—in this case, disability—and not on whether the person has proven the existence of various complicated elements of the characteristic.¹⁵⁹

S. 1881, the Americans with Disabilities Act Restoration Act, would make these changes in the law. I believe this bill is an appropriate and justified response by Congress to the judicial narrowing of coverage under the ADA and would provide the essential protection needed by those who experience discrimination in our country today.

Thank you.

* * *

At a hearing, one receives only five minutes to present the highlights of one's testimony. Here, then, were the five minutes of *oral testimony*:

Thank you, Senator Harkin, and Members of the Committee:

As I hope to demonstrate in my remarks, the promise of the ADA has *not* been kept because the courts have *not* been true to Congressional intent. But truly, regardless of intent, the status quo is simply unacceptable as a matter of sound public policy.

How has Congressional intent been undermined?

First, in the case of *Sutton v. United Airlines*, the Supreme Court decided that a court should take into account “mitigating measures” when deciding whether an individual’s impairment substantially limits him or her in a major life activity—despite the fact that every committee report to the ADA stated that mitigating measures should not be taken into account.

You’ve heard a lot about this case. But I want to draw your attention to two sentences in the opinion. Justice O’Connor, writing for the majority, was responding to the dissent’s concern that people who use prosthetic limbs, or who take medicine for epilepsy or high blood pressure, might be excluded based on the rule the Court was announcing.

159. Such a change would not change the right of an employer to defend a claimed discriminatory action on the grounds that a particular applicant or employee does not have the requisite qualifications for the job. The four-part test set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), for a plaintiff’s *prima facie* case of discrimination under Title VII would continue to apply to individuals bringing cases under the ADA. Under this test, a plaintiff must present evidence that he or she is a member of a class protected by the law; that he or she was subjected to an adverse employment action; that the employer treated similarly situated employees who were not members of the protected class more favorably; and that the plaintiff was qualified to perform the required functions of the job. *Id.* at 802. Thus, a basic level of qualification is already necessary to meet the threshold of establishing a *prima facie* case under Title VII and would apply as well under the ADA. To the extent that an employer wishes to impose affirmatively a qualification standard that will screen out, or will tend to screen out, persons with disabilities, the ADA permits an employer to do so if such standards are job-related and consistent with business necessity. See 42 U.S.C. § 12112(b)(6) and § 12113(a) (2007). This defense on the part of the employer would not be changed by the suggested changes to the general employment section.

Here was Justice O'Connor's response:

Individuals who use prosthetic limbs may be mobile and capable of functioning in society but still be disabled because of a substantial limitation on their ability to walk or run. The same may be true of individuals who take medicine to lessen the symptoms of an impairment [so that they can function] but nevertheless remain substantially limited.¹⁶⁰

Justice O'Connor was exactly right. If you come back from Iraq with an amputated leg and you're fitted with a prosthetic limb, but you don't adapt very well to that limb and you are still substantially limited (which, by the way, under current case law means that you are *severely* limited) in your ability to walk or run—you'll be covered under the ADA.

But if, God forbid, you are lucky enough to adapt *well* to your prosthetic limb—which, thankfully, hundreds of veterans have done—and you walk and run just fine—but you are not hired because an employer doesn't want someone with a prosthetic limb in the workplace—you won't be covered under the ADA.

The same goes for impairments that can be treated with medication. If you're unlucky enough to be the person in the case quoted by Ms. Olson on page twenty-two of her testimony: Here's the quote: "Despite his medication, Mr. Nawrot still suffered from 'unpredictable hypoglycemic episodes'"—that is, if your medication does not work particularly well so you're still substantially limited—then you will probably make it past the first hurdle of the ADA and be considered disabled. (Of course, you may then not be able to prove that you are qualified for the job—hence the Catch-22.)

But if the medication for your epilepsy or diabetes or post-traumatic stress disorder works well and you are not substantially limited in any way—but you are fired from a job because of that condition, or more likely, you are not provided an accommodation for that condition, then you're out of luck.

Is this a logical way to protect people with disabilities from employment discrimination? I think not.

Here is the second way in which Congressional intent has been undermined. Under the Rehabilitation Act, a person was covered under the "regarded as" prong of the definition of handicap if the person could prove that he or she was not hired, or was fired from, a particular job *because of* an impairment. It didn't matter how minor or temporary the impairment was—as long as the person could prove it was the basis for the discrimination. All the committee reports noted this same coverage would apply under the ADA.

160. *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 488 (1999).

In *Sutton*, the Supreme Court blew a hole in this prong. It announced a new rule that to establish coverage under the “regarded as” prong, an individual had to prove not only that the employer regarded the person as limited in the one job being offered by the employer, but also thought that lots of other employers, in a broad range of jobs, wouldn’t have hired the person either.

This makes no sense as a matter of sound public policy.

S. 1881 remedies the misinterpretations of the ADA in the *Sutton* case, and the stringent standard for coverage set forth by the Court in a later case, by deleting the requirement “substantially limits a major life activity” and extending coverage to those with “physical and mental impairments” who experience discrimination based on those impairments.

So, in conclusion, let me address a concern raised by Ms. Olson: that the approach of S. 1881 will undermine the cause of people with disabilities because the law will no longer cover just the “truly disabled.”

This room is filled with people with disabilities who want Congress to pass S. 1881. They don’t believe this bill sets back their cause. Why not? Because they understand there is no set of “truly disabled” people and then all the rest of us.

We all exist along a spectrum of abilities. It is true that many of us might never experience discrimination because of our physical or mental impairments, while others of us may experience significant discrimination. But that is not because some of us are truly disabled and others are not. It is because of the type of discrimination that some of us will suffer, and others of us will not.

There is no “us” and “them.” There is simply a vision of equality and justice. It is time for Congress to restore the ADA and have it fulfill its true promise. Thank you.

VI. THE FINAL STEPS TOWARDS A LAW: NINE MONTHS IN 2008

The lobbying efforts surrounding the ADA Restoration Act were truly remarkable. Led by a talented and enthusiastic team of lobbyists and grassroots leaders, the number of co-sponsors of H.R. 3195 had reached 247 by January 2008 and ultimately 255 co-sponsors in total.¹⁶¹

161. The ADA Working Group was led by Sandy Finucane from Epilepsy Foundation. The lobbying sub-group was led by Abby Bownas from the American Diabetes Foundation and included active members from the National Health Council (Nathan Vafaie), National Council on Independent Living (Deb Cotter), National Disability Rights Network (Curt Decker), The Arc (Paul Marchand, Erika Hagensen), United Spinal Association (Peggy Hathaway), Epilepsy Foundation (Sandy Finucane and Gloria Pearson), National Multiple Sclerosis Society (Shawn O’Neil), National Alliance on Mental Illness (Andrew Sperling), AARP (Dan Kohrman and Evelyn Morton), Asthma and Allergy Foundation of America (Charlotte Collins), National Kidney Foundation (Jayne Mardock), U.S. Chamber of Commerce (Marc Freedman and Jack Clark), Food Marketing Institute (Ty Kelley), Int’l Franchise Association (Jason Straczewski), McDonald’s (Bo Bryant), National

The increasing number of co-sponsors to H.R. 3195 caused the established business lobbying organizations in Washington some heartburn. Concerned that the bill might actually have some momentum, these organizations conveyed to Congress their opposition to the bill. As they explained in their communications, they were concerned with what they saw as the extreme breadth of coverage set forth in the bill.¹⁶² The Department of Justice, on behalf of the Bush Administration, also opposed the bill.¹⁶³

Majority Leader Steny Hoyer and Congressman Jim Sensenbrenner urged both the business community and the disability community to meet and see if they could work out their differences. The involvement and commitment of these two senior members of Congress was the critical factor in creating a framework within which both the disability and business representatives could negotiate.¹⁶⁴ In addition, the Democratic staff of both the House Education and Labor Committee and the House Judiciary Committee communicated their strong interest in seeing what compromises the disability community might be able to develop with the business community, and these staff members were kept actively up-to-date on the subsequent negotiations.¹⁶⁵

On February 19, 2008, the first negotiation session occurred between representatives of the disability community and of the business community.¹⁶⁶ At the first negotiation session, the group signed an

Association of Manufacturers (Keith Smith, Bob Shepler and Ryan Modlin), and the Religious Action Center (Jason Fenster). The grassroots sub-group was led by Denise Rozell from Easter Seals and included from United Spinal Association (Peggy Hathaway), Disability Rights Education and Defense Fund (Marilyn Golden), Epilepsy Foundation (Sandy Finucane and Nichelle Schoultz), National Disability Rights Network (Kaaryn Sanon), American Diabetes Foundation (Abby Bownas), The Disability Policy Consortium (Janna Starr), AARP (Dan Kohrman), Paralyzed Veterans of America (Lee Page), National Council on Independent Living (Deb Cotter), Association of University Centers on Disabilities (Kim Musheno), National Employment Lawyers Association, American Foundation of the Blind (Mark Richert).

162. See, e.g., Letter from R. Bruce Josten, Executive Vice President Government Affairs, Chamber of Commerce of the United States of America to Members of the U.S. House of Representatives (Aug. 22, 2007); Letter from Congressman Steny Hoyer, House Majority Leader and Congressman F. James Sensenbrenner to Thomas J. Donohue, President and CEO U.S. Chamber of Commerce (Sept. 27, 2007); Memorandum from Jeffrey C. McGuiness, President, HR Policy Association to HR Policy Prime Representatives (Sept. 28, 2007). These letters and the disability community responses are available at www.archiveADA.org.

163. Letter from Brian A. Benczkowski, Principal Deputy Assistant Attorney General, U.S. Department of Justice Office of Legislative Affairs to the Honorable George Miller, Chairman, Committee on Education and Labor United States House of Representatives (January 28, 2008) available at www.archiveADA.org.

164. Michele Stockwell and Keith Abouchar from Leader Hoyer's office and Mike Lenn from Congressman Sensenbrenner's office were the lead contacts for the disability community.

165. Sharon Lewis from the House Education and Labor Committee and Heather Sawyer from the House Judiciary Committee were the lead staff contacts for the disability community and received regular updates of work of the disability negotiating team. The staff of Representatives Hoyer and Sensenbrenner also participated in these regular updates. Staff from the offices of Senators Harkin and Kennedy were invited to the weekly updates from February 2008 through May 2008 and participated based on their availability and interest.

166. The ADA Disability Negotiating Team consisted of the following organizations: Sandy Finucane, Epilepsy Foundation; Andy Imperato, AAPD; Jennifer Mathis, Bazelon Center on

agreement that if the discussions resulted in acceptable compromise language, both parties to the discussion would defend the deal before members of Congress and, as changes were put forward during the legislative process—as presumably they would be—both sides would have to agree to such changes in order for “the deal” to hold.

After thirteen weeks of meetings between the disability and business negotiating teams, endless drafting and redrafting of legislative language (and agreement on a generic new name for the bill), and numerous meetings and calls for internal vetting within the separate communities (including lengthy meetings of the Drafting & Analysis Group, as well as numerous meetings with the larger disability community), a final compromise was reached on May 15, 2008.¹⁶⁷ The “deal” language formed the basis of the “ADA Amendments Act of 2008” (ADAAA). Offered as an amendment to H.R. 3195 in the nature of a substitute during House Committee markups, the ADAAA was voted out of the House Education and Labor Committee by a vote of 43-1, and out of the Judiciary Committee by a vote of 27-0, both on June 18, 2008.¹⁶⁸ On June 25, 2008, the House of Representatives passed the ADAAA by an overwhelming vote of 402-17.¹⁶⁹

The ADAAA then moved to the Senate for consideration.¹⁷⁰ In an interesting echo of history, a similar dynamic now occurred on the ADAAA as had occurred on the original ADA, but with the shoe on the

Mental Health Law; John Lancaster, National Council on Independent Living (NCIL); and Curt Decker, National Disability Rights Network (NDRN). Chai Feldblum, Kevin Barry, and James Flug from Georgetown Law served as the legislative lawyers for the disability negotiating team. The Business Negotiating Team consisted of: Randy Johnson, Mike Eastman, and Larry Lorber, U.S. Chamber of Commerce; Michael Peterson and Tim Bartl, HR Policy Association; Michael Aitken and Michael Layman, Society of Human Resource Management (SHRM), and Jeri Gillespie, National Association of Manufacturers (NAM). As a practical matter, the lawyers who focused most heavily on preparing materials for the group’s consideration were Chai Feldblum, Jennifer Mathis, and Kevin Barry (for the disability side) and Mike Eastman, Mike Peterson, and Larry Lorber (for the business side.)

167. For information on the various possible negotiated solutions, the timeframe for developing, vetting, and rejecting these various possibilities, and the development of the final negotiated language, see materials available at www.archiveADA.org. Once a final deal was reached, a new coalition was formed between the disability and business community advocates. See www.adabill.com. Tony Coelho continued to provide essential strategic advice and ongoing political acumen; Nancy Zirkin and Lisa Bornstein from the Leadership Conference on Civil Rights became active players in both strategy and implementation; and additional political and strategy support was provided by various business-side representatives.

168. CONG. REC. D763 (110th Cong., daily ed. June 18, 2008). See also *Full Committee Mark Ups, Roll Call No. 1*, <http://edlabor.house.gov/markups/fc20080618.shtml>

169. 154 CONG. REC. H6081 (110th Cong., June 25, 2008).

170. The House-passed bill, H.R. 3195, It was received and read for the first time in the Senate on June 26 and read a second time and held at the desk on June 27, 2008. 154 CONG. REC. S6282 (110th Cong. June 26, 2008); 154 CONG. REC. S6306 (110th Cong., June 26, 2008); 154 CONG. REC. S6326 (110th Cong., June 27, 2008). A bill that is “held at the desk” is placed on calendar. Through objection and after two readings a bill is prevented from being referred to committee and is placed on calendar. Senate Rule XIV, paragraph four states: “and every bill . . . which shall have received a first and second reading without being referred to a committee, shall, if objection be made to further proceeding thereon, be placed on the calendar.” (emphasis added) See also, F. Riddick and A. Frumin, RIDDICK’S SENATE PROCEDURE 243 (1992).

other foot. Democratic and Republican Senators wished to put their stamp on the bill, having not been part of the original negotiations. At the same time, they did not want to upset unnecessarily a compromise that had been reached among the relevant stakeholders and that had been endorsed by a ringing bipartisan vote in the House.

As with the original ADA, the committee process provided the means for placing that stamp on the bill. On July 15, 2008, the Senate HELP Committee held a Roundtable on “H.R. 3195 and Determining the Proper Scope of Coverage for the Americans with Disabilities Act.”¹⁷¹ Eight individuals gave testimony before the committee: Samuel R. Bagenstos, Professor of Law, Washington University School of Law; Carey McClure, Electrician, (Plaintiff in *McClure v. General Motors*); JoAnne Simon, Disability Rights Attorney; Sue Gamm, Elementary and Secondary Education Consultant; Terry Hartle, Senior Vice President, American Council on Education; Chai Feldblum, Professor, Federal Legislation Clinic, Georgetown University Law Center, Washington, DC; Michael Eastman, Executive Director of Labor Policy, U.S. Chamber of Commerce; and Andrew Grossman, Senior Legal Policy Analyst, Heritage Foundation.

What follows is the testimony from Chai Feldblum. It provides an overview of the compromise embodied in the House bill and urges the Senate’s approval of that compromise—without making too many changes.

171. *H.R. 3195 and Determining the Proper Scope of Coverage for the Americans with Disabilities Act Before the Comm. on Health, Education, Labor, & Pensions*, 110th Cong. (2008) available at http://help.senate.gov/Hearings/2008_07_15/2008_07_15.html.

ROUNDTABLE ON: THE AMERICANS WITH DISABILITIES ACT AND THE ADA AMENDMENTS ACT OF 2008

Testimony of Chai R. Feldblum Before the Senate
Committee on Health, Education, Labor & Pensions

July 15, 2008

[For the purpose of this article, I have omitted text from the following (July 15, 2008) testimony that was also discussed in the November 15, 2007 testimony. The omitted sections include the introductory paragraph, overview of the bipartisan support that propelled passage of the ADA in 1990, and the description of how Congress discussed the definition of disability in the ADA in its committee reports. The selected text of this testimony begins with a summary of how the Supreme Court narrowed that definition of disability. I then describe the ADA Amendments Act as passed by the House of Representatives in June 2008; the obligations of employers under the House-passed bill as compared to current law; and whether the standard for determining whether an individual is “disabled” should be more clearly defined than it is in the House-passed bill. The full text of the submitted testimony is available at www.archiveADA.org.]

I. JUDICIAL NARROWING OF COVERAGE UNDER THE ADA

The expectations of Congress with regard to the ADA have not been met. Over the past several years, the Supreme Court and lower courts have narrowed coverage by interpreting each and every component of the ADA’s definition of disability in a strict and constrained fashion. This has resulted in the exclusion of many persons that Congress intended to protect.¹⁷²

The Supreme Court first narrowed coverage in a trio of cases decided in June 1999, ruling that mitigating measures such as medication, prosthetics, hearing aids, other auxiliary devices, diet and exercise, or any other treatment must be considered in determining whether an individual’s impairment substantially limits a major life

172. See testimony and appendices submitted by Chai R. Feldblum to the Senate Health, Education, Labor and Pension Committee, *Hearing on Restoring Congressional Intent and Protections under the ADA*, Nov. 15, 2007.

activity.¹⁷³ Despite the fact that the committee reports from the Senate Labor and Human Resources Committee, the House Judiciary Committee, and the House Education and Labor Committee had all stated that mitigating measures were *not* to be taken into account; that both the EEOC and DOJ had issued guidance that mitigating measures were *not* to be taken into account; and that eight Circuit Courts of Appeal had *followed* that agency guidance, the Supreme Court concluded that evaluating individuals “in their hypothetical uncorrected state” would be “an impermissible interpretation of the ADA” based on the plain language of the statute.¹⁷⁴

The Supreme Court’s requirement that courts consider mitigating measures has created an unintended paradox: people with serious health conditions, like epilepsy and diabetes, who are fortunate enough to find treatment that make them more capable and independent and thus more able to work, are often not protected by the ADA because the limitations arising from their impairments are not considered substantial enough. Ironically, the better a person manages his or her medical condition, the less likely that person is to be protected from discrimination, even if an employer admits that he or she has dismissed the person *because of* that person’s (mitigated) condition.

The Supreme Court also narrowed coverage, in 1999, by changing the standard under the third prong of the definition of disability—the “regarded as” prong that was intended to cover individuals with impairments of any level of severity (or with no impairments at all) based on how such individuals were *treated* by an entity covered under the law. Again ignoring both committee reports and EEOC guidance, the Supreme Court formulated a new and almost impossible standard to meet for any individual seeking coverage under the third prong. The Court’s approach essentially required individuals to divine and prove an employer’s subjective state of mind. Not only did the individual have to demonstrate that the employer believed that the individual had an impairment that prevented him or her from working for that employer in that job, the individual also had to show that the employer thought that the impairment would prevent the individual from performing a broad class of jobs for other employers. As it is safe to assume that most employers do not regularly consider the panoply of other jobs that prospective or current employees could or could not perform—and certainly do not often create direct evidence of such considerations—the individual’s burden became essentially insurmountable except in rare cases.

Finally, the Court made the situation worse three years later in

173. *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

174. *Sutton*, 527 U.S. at 482. See Feldblum Testimony, *supra* note 172, at 10–15 for further description of the trio of Supreme Court cases and the Court’s reasoning.

another decision regarding the definition of disability. In 2002, the Supreme Court ruled in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* that the words “substantially limits” and “major life activities” were to be interpreted strictly to create a “demanding standard for qualifying as disabled.”¹⁷⁵ The Court also stated that “[m]ajor” in the phrase “major life activities” means important,” and so “major life activities” refers to “those activities that are of central importance to daily life,” including “household chores, bathing, and brushing one’s teeth.”¹⁷⁶ As a result of this ruling, lower courts now consistently require people alleging discrimination under the ADA to show that their impairments *prevent or severely restrict them* from doing activities that are of *central importance* to most people’s daily lives.

In earlier testimony delivered to this Committee, I described sixteen cases in which individuals who believed they had been discriminated against because of their physical or mental impairments were never given the chance to prove their cases because the courts had ruled they were not “disabled enough” to be covered under the ADA. These results occurred because the mitigating measures used by the individual meant that he or she was no longer substantially limited in a major life activity; or because the individual could not meet the new standard under the “regarded as” prong; or because the courts deemed the individual’s impairment not to be sufficiently severe.¹⁷⁷ These cases all dealt with individuals who should have been given an opportunity to make the case that their impairments had been the basis for a covered entity’s discriminatory acts and that they were otherwise qualified for the job.

II. THE ADA AMENDMENTS ACT OF 2008, AS PASSED BY THE HOUSE

In fall 2007, a number of major business associations opposed S. 1881 and H.R. 3195, bills that had been introduced to rectify the situation caused by the Supreme Court’s interpretation of the ADA’s definition of disability. These groups felt that the bills as introduced went beyond the original intent of the ADA by including too many people with impairments as people with disabilities. They were particularly concerned about the number of employees with impairments who might be eligible for reasonable accommodations by employers under the proposed amendments to the ADA.¹⁷⁸

For example, in testimony before this Committee on November 15,

175. 534 U.S. 184, 197 (2002).

176. *Id.* at 197, 201–02.

177. See Feldblum Testimony, *supra* note 172, at 22–29.

178. See, e.g., testimony of Camille A. Olson to the Senate Health, Education, Labor and Pension Committee, *Hearing on Restoring Congressional Intent and Protections under the ADA*, Nov. 15, 2007.

2007, Camille Olson, from the law firm of Seyfarth Shaw, articulated a number of concerns that were being voiced by various business associations at the time. These concerns fell into the following broad categories:

The language of S. 1881 would cover any impairment, no matter how minor or trivial, as a disability.¹⁷⁹

The fact that minor and trivial impairments would be eligible for reasonable accommodations could cause considerable difficulty for employers.¹⁸⁰

Congress had deliberately and carefully decided, in 1990, that an impairment should “substantially limit” a “major life activity” in order to be a disability.¹⁸¹

S. 1881 would make radical shifts with regard to the burden of proof on qualifications under the ADA.¹⁸²

At the November 15, 2007 hearing, there was an exchange between this witness, Camille Olson, and Senator Tom Harkin as to whether S. 1881 was the appropriate response to the Supreme Court cases and both this witness and Olson indicated a willingness to continue talking about how to best respond to such cases.¹⁸³

Overtures for such a conversation were made in January 2008 and official discussions between representatives of the disability community and the business community began in February 2008. The disability community was represented (in alphabetical order) by the American Association of People with Disabilities; Bazelon Center for Mental Health Law; Epilepsy Foundation; the National Council on Independent Living; and National Disability Rights Network. The business

179. See Olson Testimony, *supra* note 178, at 1–2 (“There can be no question that sponsors of S. 1881 have proposed changes to the ADA with the intent of benefiting individuals with disabilities. S. 1881’s proposed changes, however would unquestionably expand ADA coverage to encompass almost any physical or mental impairment—no matter how minor or short-lived. In essence, S. 1881 changes the focus of the ADA from whether an individual has a functional “disability” to whether the individual has an “impairment,” without regard to whether the impairment or ailment in any way limits the individual’s daily life.”)

180. *Id.* at 6. (“Moving the ADA’s focus away from individuals with disabilities to individuals with impairments, as S. 1881 would do, will give virtually every employee the right to claim reasonable accommodation for some impairment, no matter how minor, unless the employer can prove that doing so would be an undue hardship.”)

181. *Id.* at 10–11 (“The ADA’s inclusion of “substantially limits one or more of the major life activities of such individual” was the result of deliberate and careful consideration by Congress. In adopting the substantial limitation on a major life activity requirement, Congress (not the federal judiciary) made clear that covered disabilities do not include “minor, trivial impairments, such as a simple infected finger.”) (citation omitted).

182. *Id.* at 24–25 (“Third, in a clear departure from the current statutory scheme, S. 1881 shifts the burden of proof to the employer to demonstrate that an individual alleging discrimination “is not a qualified individual with a disability.” . . . The calculated balancing of the rights and obligations between disabled employees and employers is clear from the ADA’s legislative history. . . . S. 1881’s attempted reversal of Congress’s allocation of the burden of proof contravenes the fundamental tenet of law disfavoring proof of a negative proposition.”)(citations omitted).

183. See http://help.senate.gov/Hearings/2007_11_15_b/2007_11_15_b.html for video of hearing.

community was represented (in alphabetical order) by the HR Policy Association; National Association of Manufacturers; Society for Human Resource Management; and the U.S. Chamber of Commerce. Various other groups joined from time to time. In May 2008, the disability and business communities communicated to several Members of the House of Representatives and the Senate some of the agreements they had reached internally.

The ADA Amendments Act of 2008, passed by the House in June 2007 by a vote of 402-17, reflected some of these agreements. This bill makes the following changes to current law in order to respond to the adverse Supreme Court decisions of 1999 and 2002:

The statutory language overturns the mitigating measures analysis of *Sutton* and explicitly states that mitigating measures are not to be taken into account in determining whether an individual has a disability.

The findings in the bill disapprove of the *Sutton* trilogy and disapprove of several statements in *Toyota v. Williams*.

The statutory language clarifies that an individual is not excluded from coverage because of an ability to do many things, as long as the individual is substantially limited in one major life activity.

The statutory language clarifies that the fact that an otherwise substantially limiting impairment is in remission or episodic does not remove the individual from coverage.

To respond to the directive in *Williams* that the definition of disability was intended by Congress to be narrowly construed, the statutory language indicates that the definition is to be given a broad construction. (This construction, obviously, cannot go beyond the terms of the Act itself.)

The “regarded as” prong focuses on how an individual is treated, rather than on the difficult to prove perception of a covered entity.

There are also several changes in the ADA Amendments Act that respond to concerns raised by the business community:

The most major change in the ADA Amendments Act of 2008 is that it reinstates the current language of the ADA that requires an impairment to “substantially limit” a “major life activity” in order to be considered a disability that requires a reasonable accommodation or modification.

The term “substantially limits” is defined as “materially restricts” which is intended, on a severity spectrum, to refer to something that is less than “severely restricts,” and less than “significantly restricts,” but more serious than a moderate impairment which is in the middle of the spectrum.

The statutory language explicitly provides that ordinary eyeglasses and contact lenses are to be taken into account as mitigating measures.

The statutory language makes clear that reasonable accommodations need not be provided to an individual who is covered

solely under the “regarded as” prong of the definition of disability.

The statutory language clarifies that there are no changes to the burdens of proof with regard to proving qualifications for a job.

Although there is no general severity test required under the “regarded as” prong, transitory and minor impairments are not covered under that prong.

The Committee has specifically inquired whether the obligations of employers under the House-passed bill would be different than current law. The only difference for employers from the ADA (as enacted in 1990, not as subsequently interpreted by the Supreme Court) is that the statute now clearly establishes that reasonable accommodations need not be provided to an individual who has a disability solely under the “regarded as” prong of the definition.

This aspect of the language clarifies the current state of the law on whether reasonable accommodations are available to those covered under the “regarded as” prong of the definition of disability. Four circuit courts of appeal (the First, Third, Tenth and Eleventh Circuit Courts of Appeal) have held that plaintiffs who are not covered under the first prong of the definition may nonetheless seek reasonable accommodations under the “regarded as” prong.¹⁸⁴

It is perhaps no surprise that some courts—when faced with claims that appear to have merit but in which the case law (in light of *Sutton* and *Williams*) precludes coverage of the plaintiff under the first prong of the definition of disability—have concluded that the plain language of the ADA requires employers to provide reasonable accommodations to individuals who fall under the third prong of the definition. It is also probably not a surprise that other courts have concluded that reasonable accommodations are *not* required under the third prong.¹⁸⁵

However, when one reviews the facts of the cases in which

184. The following circuit courts have held that the ADA requires that reasonable accommodations be provided to individuals who are able to establish coverage under the ADA only under the “regarded as” prong of the definition of disability: *Kelly v. Metallica West, Inc.*, 410 F.3d 670 (10th Cir. 2005) (plaintiff needed oxygen device to breathe); *D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220 (11th Cir. 2005) (plaintiff had vertigo resulting in spinning and vomiting); *Williams v. Philadelphia Housing Auth. Police Dept.*, 380 F.3d 751 (3d Cir. 2004) (plaintiff had major depressive disorder); and *Katz v. City Metal Co., Inc.*, 87 F.3d 26, 33 (1st Cir. 1996) (plaintiff had heart attack). In addition, the following district courts have similarly held that reasonable accommodations may be available under the third prong: *Lorinz v. Turner Const. Co.*, 2004 WL 1196699, *8 n.7 (E.D.N.Y. May 25, 2004) (plaintiff had depressive disorder and anxiety); *Miller v. Heritage Prod., Inc.*, 2004 WL 1087370, *10 (S.D. Ind. Apr. 21, 2004) (plaintiff had back injury and could not lift more than 20 pounds, bend or twist); *Jacques v. DiMarzio, Inc.*, 200 F. Supp.2d 151 (E.D.N.Y. 2002) (plaintiff had bipolar disorder); and *Jewell v. Reid's Confectionary Co.*, 172 F. Supp.2d 212 (D. Me. 2001) (plaintiff had heart attack).

185. There is a circuit split on this issue. The Ninth, Eighth, Sixth, and Fifth Circuits have held that reasonable accommodations need not be provided to an employee who is merely regarded or perceived as disabled. See *Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 1231–33 (9th Cir. 2003); *Weber v. Strippit, Inc.*, 186 F.3d 907, 916–17 (8th Cir. 1999); *Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 467 (6th Cir. 1999); *Newberry v. E. Texas State Univ.*, 161 F.3d 276, 280 (5th Cir. 1998).

reasonable accommodations have been found to be required under the third prong, it seems clear that the plaintiffs in those cases should have been covered under the *first* prong of the definition of disability. Hopefully, that will be the case now under the ADA as amended by the ADA Amendments Act of 2008. For example, three of the impairments in those cases—heart attacks, bipolar disorder, and major depressive disorder—should be covered as material restrictions on major bodily functions—the first on the circulatory system and the second two on brain functioning. The particular facts in the cases regarding the severity of the other four impairments—a respiratory impairment requiring use of an oxygen device, vertigo, back injury, and depression, and anxiety—could be examples of impairments that materially restrict the major life activities of breathing; standing; bending and twisting; and concentrating, sleeping and thinking (respectively) when mitigating measures are not taken into account and when episodic impairments are considered in their active state.

The Committee has also inquired whether the standard for determining whether an individual is “disabled” should be more clearly defined than it is in the House-passed bill. Those of us engaged in the discussions on this bill believe that there is sufficient guidance for the courts to determine when an impairment “materially restricts” a major life activity. In particular, we believe the combination of the findings in the bill, and the direction for a broad construction of the definition of disability (within the limits of the terms of the statute) should provide additional and adequate guidance for the courts.

Thank you for your attention and I look forward to answering any questions.

* * *

For a Roundtable, however, witnesses are asked to limit their oral presentations to one minute so that there can be ample time for informal questioning from Committee members. What follows, therefore, is the *one-minute* presentation of Chai Feldblum:

Thank you, Senator Harkin and Members of the Committee.

Exactly eight months ago, I testified before this Committee in support of S. 1881, as originally introduced.

In both my written and oral testimony, and in exchanges during that hearing, I defended the broad terms of that bill—as reflecting Congressional intent during passage of the ADA and as appropriate public policy.

I continue to stand by those positions.

However, I also believe that the ADA Amendments Act of 2008, as passed by the House last month, represents a legitimate and fair compromise between the interests of people with disabilities and the

interests of entities covered under the law.

To meet the needs of entities covered under the law, an impairment must substantially limit a major life activity in order to be considered a disability under the first prong of the definition. To meet the needs of people with disabilities, mitigating measures are not to be taken into account in determining whether an impairment substantially limits a major life activity and the courts' strict reading of that critical term—"substantially limits"—is explicitly rejected.

While the cases that narrowed the definition of disability arose in the employment context, as a legal matter, those narrow standards obviously apply across the board. For that reason, any modifications to the definition must equally apply to and be workable for all entities covered under the law. I believe the ADA Amendments Act, before you today, does exactly that.

Thank you.

* * *

VII. THE ADA AMENDMENTS ACT OF 2008

Following the Roundtable, the committee process continued with negotiations occurring between Senators Hatch and Harkin, as well as Senators Kennedy and Enzi. After a few hiccups in the negotiations, a final compromise was agreed to by the key Senate offices and by the business and disability communities.¹⁸⁶

On July 31, 2008, a revised version of the ADAAA was introduced as S. 3406. The bill was introduced with a remarkable fifty-six original co-sponsors, largely a result of the extensive education that had taken place over the previous month through visits by an outstanding alliance of business and disability lobbyists and because of the personal work of Senators Harkin and Hatch as they talked with fellow Senators throughout the day on the Senate floor.¹⁸⁷ On September 11th, a week after the Senate reconvened after its August recess, the bill had seventy-seven cosponsors.¹⁸⁸

On September 11, 2008—eighteen years to the week that the

186. See Differences Between House and Senate Version of the ADAAA, available at www.archiveADA.org.

187. S. 3406, 110th Cong. (as introduced in Senate, July 31, 2008). The lobbying group was co-headed by Mike Layman from SHRM and Abby Bownas from American Diabetes Association. Individuals who regularly attended Congressional visits included: Mike Peterson, HR Policy, Lisa Bornstein, LCCR, Curt Decker, NDRN; Deb Cotter, National Council on Independent Living; Angela Ostrom, Epilepsy Foundation; Keith Smith, National Association of Manufacturers; Mike Eastman, Chamber of Commerce. See *supra*, note 160, for additional members of the lobbying group.

188. S. 3406, 110th Cong. (as introduced in Senate, July 31, 2008), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:SN03406:@@P> (last visited Sept. 11, 2008).

Senate passed the original ADA—the Senate unanimously passed the ADAAA.¹⁸⁹ Shortly after, Senators Hatch and Harkin and Representatives Hoyer and Sensenbrenner held a press conference during which Representatives Hoyer and Sensenbrenner confidently stated the intention of the House to pass the ADAAA on Wednesday, September 17, 2008, under rules of suspension. True to their word, Representatives Hoyer and Sensenbrenner led the House of Representatives in unanimously passing the ADA Amendments Act on September 17, 2008.¹⁹⁰ On the same day, President George W. Bush indicated to the public that he looked forward to signing the ADAAA into law¹⁹¹ and he did just that on September 25, 2008,—eighteen years and two months after his father signed the original ADA.¹⁹²

And now we can get down to the business of truly opening the doors of opportunity to *all* people with disabilities.

189. 154 CONG. REC. S8342 (Sept. 11, 2008).

190. 154 CONG. REC. H8286 (Sept. 17, 2008).

191. White House, Statement on the ADA Amendments Act of 2008, Sept. 17, 2008, <http://www.whitehouse.gov/news/releases/2008/09/20080917-9.html> (last visited Sept. 21, 2008) (“The Americans with Disabilities Act of 1990 is instrumental in allowing individuals with disabilities to fully participate in our economy and society, and the Administration supports efforts to enhance its protections. The Administration believes that the ADA Amendments Act of 2008, which has just passed Congress, is a step in that direction, and is encouraged by the improvements made to the bill during the legislative process. The President looks forward to signing the ADAAA into law.”).

192. We extend our deepest gratitude to the individuals who made up our group of committed people and changed the world for people with disabilities. Representatives Hoyer and Sensenbrenner formally recognized all of these advocates in their Joint Statement to the House of Representatives on September 17, 2008. 154 Cong. Rec. H8295 (Sept. 17, 2008).