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The ADA Amendments Act of 2008

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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, 1998); 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 Imparato, *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).