

MEMORANDUM

Date: December 30, 1994  
To: Senator Dole  
From: Alec Vachon *AV*  
Re: PERSPECTIVE/IS ADA AN UNFUNDED MANDATE? WHO SAYS? LIFE WITHOUT 504 AND ADA COULD BE A LOT TOUGHER FOR STATES AND CITIES IF THE COURTS STARTED FINDING CONSTITUTIONAL RIGHTS TO EQUAL ACCESS FOR PEOPLE WITH DISABILITIES. AND CONGRESS PROVIDES SUBSTANTIAL ACCESSIBILITY FUNDS.

OR

WHY ADA AND 504 MIGHT BE CALLED: "THE STATE & LOCAL GOVERNMENT DISABILITY RELIEF AND FLEXIBILITY ACT."

SUMMARY OF KEY POINTS

- \* Some complain that ADA (and its predecessor, section 504 of the 1973 Rehabilitation Act) is an "unfunded mandate" on State & local governments. As described below, few people seem to realize that ADA and 504 provide real protections to State & local governments from excessive burdens of making accommodations for people with disabilities that Federal courts might otherwise impose under the U.S. Constitution. State & local governments would be well advised to think carefully before asking for any changes in these laws.
- \* Also, "unfunded" is a bum rap--Congress provides substantial funds for accessibility. The U.S. Conference of Mayors estimates 5-year ADA implementation costs (1993-98) at \$1.4 billion. However, in FY 1994 Congress appropriated \$4.4 billion for Community Development Block Grants (CDBG)--which can be used for ADA purposes. If cities believe ADA is a burden, maybe Congress should earmark the CDBG appropriation for accessibility.
- \* Both the Kempthorne unfunded mandates bill (S. 993) and CONTRACT WITH AMERICA's unfunded mandate provisions exempt disability rights laws from their provisions--including any future disability rights legislation. DAVID TAYLOR INDICATES THIS EXEMPTION WILL LIKELY TO CONTINUE IN ANY NEW BILLS. (However, the Senate report to Kempthorne called ADA an "unfunded mandate.")

HOW 504 AND ADA PROTECT STATE AND LOCAL GOVERNMENTS

- \* In the late 1960's and early 1970's, Federal district courts found a constitutional right to education for students with disabilities under the 14th Amendment ("equal protection of the laws") and the 5th Amendment ("due process of law"). Basically, the courts said that no State or local government had to educate any child under the Constitution, but if it chose to provide education, then it must provide it equally to all children, including those with disabilities. (These

decisions were never appealed, so the Supreme Court never ruled on these claims.) By extension, if a state or local government provides a service, then it must be equally available to all citizens, including those disabled.

\* Litigation asserting constitutional rights to equal access to State & local government services by disabled persons were generally abandoned as lawyers found it easier to make their cases under Federal disability rights laws (or in some cases, State laws)--section 504 of the 1973 Rehabilitation Act, the 1975 special education law, etc.

\* 504 and ADA contain 2 big, big protections for State & local governments:

1. Both 504 AND ADA ARE PROGRAM ACCESSIBILITY LAWS, NOT ARCHITECTURAL ACCESSIBILITY LAWS. State & local governments are only required to make their services accessible, not every public building. In fact, architectural changes in existing buildings are only required where there is no other feasible way of making a service accessible. (Of course, a public meetings must be held in an accessible building.) THIS GIVES STATE & LOCAL GOVERNMENTS TREMENDOUS FLEXIBILITY (WHICH SOME PEOPLE MISINTERPRET AS VAGUENESS.)

(KANSAS EXAMPLE: In Scott County, the commissioners moved the courtroom from the inaccessible second floor to the accessible first floor, so people in wheelchairs could attend court sessions and other public meetings. County offices were moved to the second floor. There is a buzzer on the first floor, and when pressed a clerk comes downstairs to handle any business on the second floor for anyone who can't make it upstairs.)

2. BOTH LAWS CONTAIN AN "UNDUE BURDEN" DEFENSE. The regs to 504 and ADA specifically exempt any "public entity" from having to take any action that would result in "undue financial and administrative burdens."

WHAT MIGHT HAPPEN IF ADA AND 504 WERE REPEALED? POSSIBLE BAD NEWS FOR STATE & LOCAL GOVERNMENTS.

\* People with disabilities would litigate under the U.S. Constitution. It seems inconceivable that any court would not require States or cities to make accessible voting, public meetings, public transportation, etc.

\* In fact, Federal courts tend to be unsympathetic about costs of civil rights enforcement--SOME MIGHT REQUIRE STATE & LOCAL GOVERNMENTS TO MAKE THEIR BUILDINGS ARCHITECTURALLY ACCESSIBLE, FAR MORE EXPENSIVE THAN "PROGRAM ACCESSIBILITY." STATES AND CITIES WOULD NOT HAVE AN "UNDUE BURDEN" DEFENSE.

WHAT DOES ADA COST CITIES? WHAT KIND OF FINANCIAL ASSISTANCE DOES CONGRESS PROVIDE?

- \* The U.S. Conference of Mayors estimates that total cost of ADA implementation for the five years, 1993-1998, will be \$1.4 billion. The Mayors do not specify how much of these cost are only one time--for building alterations, curb cuts, etc.--but we should assume a big percentage.
  
- \* CONGRESS PROVIDES SUBSTANTIAL FINANCIAL HELP TO PAY FOR ACCESSIBILITY COSTS. The Community Development Block Grant (CDBG) program, created in 1974, has provided over \$29 billion in aid to State & local governments since 1985. This money can be used for a variety of purposes, including removal of architectural barriers and other disability-related activities. Between 1985 and 1992, \$136 million was spent to remove architectural barriers.
  
- \* N.B. ADA costs for the next 5 years are less than one-fourth of the CDBG appropriation of \$4.4 billion in 1994. MAYBE CONGRESS SHOULD EARMARK CDBG MONEY FOR ADA PURPOSES -- AND SEE WHAT STATE & LOCAL GOVERNMENTS SAY.

CONCLUSION: IS ADA REALLY AN UNFUNDED MANDATE?

- \* Although ADA does result in financial costs on state & local governments, on the flipside it protects them. Congress would be unable to turn back the clock by passing a 504 or ADA-type law if there had been adverse court decisions establishing more demanding Constitutional claims to accessibility. THIS IS WHY ADA AND 504 MIGHT BE CALLED: "THE STATE & LOCAL GOVERNMENT DISABILITY RELIEF AND FLEXIBILITY ACT."
  
- \* State & local governments would be well advised to be cautious about asking for changes to 504 or ADA. I HAVE HEARD NO SUCH REQUESTS BY STATE OR LOCAL GOVERNMENTS--IN KANSAS OR ELSEWHERE. IN FACT, ACCORDING TO PRESS REPORTS, THE U.S. CONFERENCE OF MAYORS HAS SPECIFICALLY ASKED ADA BE EXCLUDED FROM ANY UNFUNDED MANDATE RELIEF.
  
- \* For private businesses, ADA is an unfunded mandate, and requires defense on other grounds.

ATTACHED ARE TALKING POINTS FOR "FACE THE NATION" FOR JANUARY 1, 1995 ON ADA--THESE HAVE BEEN INCLUDED IN YOUR PRESS BRIEFING BOOK.