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The Americans With Disabilities Act (ADA): An Overview of Selected Major Legal Issues

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THE AMERICANS WITH DISABILITIES ACT (ADA): AN OVERVIEW OF SELECTED MAJOR LEGAL ISSUES

SUMMARY

The Americans with Disabilities Act would provide broad based nondiscrimination protection for persons with disabilities in the private sector. It uses many of the key concepts from existing law concerning the civil rights of persons with disabilities, section 504 of the Rehabilitation Act of 1973, and would cover employment, public services, public accommodations, transportation, and telecommunications. The protection from discrimination would apply unless a particular standard or practice is "both necessary and substantially related to the ability of an individual to perform or participate" in a program or job and the essential components of the job or program cannot be met by reasonable accommodation or with the provision of auxiliary aids or services. Reasonable accommodation generally would not be required if it would place an undue burden on an entity.

Several legal issues have been posed by this legislation. There have been questions raised concerning the coverage of drug addicts, alcoholics and persons with contagious diseases or infections, and questions concerning the remedies provided for by the bill, especially the provisions which allow suit by persons who believe that they are "about to be subjected to discrimination." In addition, there have been issues raised concerning the scope of public accommodations coverage in the legislation, the coverage of transportation, church-state issues, and the meaning of certain references to section 504 in the ADA.

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I. Introduction

The Americans with Disabilities Act of 1989 (ADA), S. 933 and H.R. 2273, 101st Cong., lst Sess., was introduced on May 9, 1989. The legislation would provide broad based nondiscrimination protection for persons with disabilities in the private sector and would cover employment, public services, public accommodations, transportation, and telecommunications. This protection would apply unless a particular standard or practice is "both necessary and substantially related to the ability of an individual to perform or participate" in a program or job and the essential components of the job or program cannot be met by reasonable accommodation or with the provision of auxiliary aids or services.

As stated in section 2 of the ADA, its purpose is fourfold: (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against persons with disabilities, (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities, (3) to assure that the federal government plays a central role in enforcing the standards established in the Act, and (4) to invoke the sweep of congressional authority to address discrimination against persons with disabilities. The ADA originated with a proposal from the National Council on Disabilities[1] and similar legislation was introduced in the 100th Congress.[2] Hearings were held in the fall of 1988 and three days of hearings were held in May and June of 1989.[3]

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[1] The National Council on Disabilities is an independent federal agency. Its statutory functions include providing recommendations to the Congress regarding individuals with disabilities. 29 U.S.C. sec. 781.

[2] S. 2345 and H.R. 4498, 100th Cong. For an analysis of these bills see "The Americans with Disabilities Act (ADA): Legal Analysis of Proposed Legislation Prohibiting Discrimination on the Basis of Handicap," CRS Rep. 88-621A (Sept. 19, 1988).

[3] Senate Subcommittee on the Handicapped Hearings, May 10, 1989; Senate Labor and Human Resources Hearings, May 9, June 26, 1989. Senate mark-up scheduled August 2, 1989. House Subcommittee on Select Education Hearings, July 18, 1989.

There is an existing federal statute prohibiting discrimination against individuals with disabilities, section 504 of the Rehabilitation Act of 1973, 29 U.S.C. sec. 794.[4] Section 504 prohibits discrimination against an otherwise qualified individual with handicaps solely by reason of handicap in any program or activity that receives federal financial assistance or in the executive agencies or the U.S. Postal Service. Many of the concepts used in the ADA originated in section 504 jurisprudence although section 504 differs from the proposed legislation in several ways which will be discussed subsequently. The most significant difference is that section 504's prohibition of discrimination is generally tied to the receipt of federal financial assistance. The ADA would cover the private sector and contains a specific section stating that nothing in the act shall be construed to reduce the scope of coverage or apply a lesser standard than the coverage required or the standards applied under the nondiscrimination provisions of section 504.

This report will first provide a brief overview of the current proposed legislation and will compare the bills in the 101st Congress with the legislation from the 100th Congress. Finally, selected controversial legal issues will be analyzed.

II. Overview of S. 933 and H.R. 2273, 101st Cong.

Section 1 is the short title and table of contents for the bill. Section 2 sets out congressional findings and purposes while section 3 provides definitions of "auxiliary aids and services," "disability," "reasonable accommodation," and "state." The term disability is defined as meaning with respect to an individual "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such indivdiual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." Reasonable accommodation is defined as including "(A) making existing facilities used by employees readily accessible to and useable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations and training materials, adoption or modification of procedures or protocols, the provision of qualified readers or interpreters, and other similar accommodations."

Title I sets forth the general prohibitions against discrimination, many of which are drawn from the section 504 regulations.[5] It also provides that it shall be a defense to a charge of discrimination that an application of certain qualification standards is necessary and substantially related to the ability of an individual to perform or participate in the essential components

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[4] Other sections in the Rehabilitation Act concern affirmative action for handicapped employees in the federal government, 29 U.S.C. sec. 791, and affirmative action for employees of federal contractors, 29 U.S.C. sec. 793.

[5] 28 C.F.R. secs. 41.51 et seq.

of the job or program. The term "qualification standards" may include requiring that the current use of alcohol or drugs by an alcoholic or drug abuser not pose a direct threat to property or the safety of others in the work place or program and requiring that an individual with a currently contagious disease or infection not pose a direct threat to the health or safety of other individuals in the work place or program.

Title II provides that an employer, employment agency, labor organization, or joint labor-management committee may not discriminate against a qualified individual with a disability with regard to any term, condition or privilege of employment. The term employer is defined as a person engaged in an industry affecting commerce who has 15 or more employees. The remedies of title VII of the Civil Rights Act of 1964, 42 U.S. C. secs. 2000e-5, 2000e-8, and 2000e-9, are incorporated by reference as are the remedies of section 1981, 42 U.S.C. sec. 1981, with respect to any individual who believes that he or she is being or is about to be subjected to discrimination on the basis of disability in violation of the Act.

Title III concerns public services and provides that no qualified individual with a disability may be discriminated against by a State or agency or political subdivision of a State. This title also contains several detailed provisions relating to public transportation. The remedies of section 505 of the Rehabilitation Act of 1973, 29 U.S.C. sec. 794a, are incorporated by reference.

Title IV concerns public accommodations and services operated by private entities. It provides that no individual shall be discriminated against in the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation on the basis of disability. Places of public accommodation are seen as including among others, auditoriums, convention centers, theaters, restaurants, professional offices of health care providers, sales establishments, parks, private schools, and recreation facilities. Specific provisions are included regarding discrimination in public transportation services provided by private entities. The remedies of the Fair Housing Act, 42 U.S.C. secs. 3602(i), 3613, and 3614(a) and (d), are incorporated by reference.

Title V sets forth the nondiscrimination provisions relating to telecommunications relay services and specifies that telephone services offered to the general public must include interstate and intrastate telecommunication relay services so that such services provide individuals who use nonvoice terminal devices equal opportunities for communications. The remedies of the Fair Housing Act, 42 U.S.C. secs. 3602(i), 3613, and 3614(a) and (d), and the remedies of the Communications Act of 1934, 47 U.S.C. secs. 206, 207, 208, 209, and 401 et seq., are incorporated by reference.

Title VI contains miscellaneous provisions including a section discussing the relationship between the ADA and section 504 and the relationship between various titles in the ADA, a section prohibiting retaliation, a section abrogating state immunity under the Eleventh Amendment, a section requiring that the Architectural and Transportation Barriers Compliance Board

(ATBCB) issue certain guidelines, and a section allowing attorneys' fees in administrative or judicial actions.

III. Comparison of Major Differences Between the ADA in the 100th and 101st Congresses

Substantial changes were made in the ADA prior to its reintroduction in the 101st Congress. The 100th Congress version (hereafter referred to as the "old ADA") had a different structure and varies from the 101st Congress version (hereafter referred to as the ADA or S. 933) in several substantive ways. Five of the most significant of these distinctions will be discussed here.

The old ADA had broad definitions of "on the basis of handicap" and "physical or mental impairment." Although much of this language was based on regulations promulgated pursuant to section 504, the definition of "disability" in S. 933 is closer to the definition applicable to section 504. The present version of the ADA defines disability as meaning in part a physical or mental impairment that "**substantially limits**" one or more of an individual's major life activities. The absence of the substantially limits language in the predecessor legislation could have given rise to coverage of minor impairments such as left-handedness which have not been found to be covered under section 504.[6]

Another area of difference between the two versions of the ADA is in the area of reasonable accommodations. Generally, the Supreme Court has found that section 504 does not require a "fundamental alteration in the nature of a program."[7] The Court has viewed section 504 requirements as striking "a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones."[8] The old ADA contained somewhat similar language, referred to as the "bankruptcy clause", which stated that the failure or refusal to remove barriers and make reasonable accommodations shall not be an unlawful act of discrimination if such action would fundamentally alter the essential nature, or **threaten the existence of**, the program or business.[9] This language arguably provided a stricter standard than that under section 504. The present version of the ADA uses a standard like that of section 504 and provides that discrimination is not

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[6] *de la Torres v. Bolger,* 610 F. Supp. 593 (D. Tex. 1985).

[7] *Southeastern Community College v. Davis,* 442 U.S. 397, 410 (1979).

[8] *Alexander v. Choate,* 469 U.S. 287 (1985).

[9] H.R. 4498, 100th Cong., 2d Sess., sec. 7. (Emphasis added).

present if an entity can demonstrate that the accommodation would impose an undue hardship.

The coverage of public accommodations differs between the two versions of the ADA. The 100th Congress version prohibited discrimination in any public accommodation covered by title II of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000a. S. 933, on the other hand, is more comprehensive and has a title which discusses public accommodations and includes various places, such as the professional offices of health care providers and shopping centers, which are not covered by title II of the Civil Rights Act.

The 100th Congress version of the ADA would have required some retrofitting of existing transportation vehicles to render them accessible to and usable by persons with physical and mental impairments. S. 933 does not require retrofitting but does contain more detailed requirements relating to transportation services. These requirements differ depending on whether the entity providing them is public or private.

Another major distinction between the two versions of the ADA is in their treatment of remedies. The old ADA had one remedies section which covered all different aspects of discrimination on the basis of disability. The new version contains specific remedies sections for titles II, III, IV and V. These sections parallel the remedies which would be provided under similar civil rights statutes. For example, title II on employment references the remedies and procedures set forth in title VII of the Civil Rights Act of 1964. This type of reference has the advantage of being more certain since it incorporates an already existing body of law; however, it has been criticized as expanding remedies to possibly allow punitive damages or damages for pain and suffering.[10]

IV. Major Legal Issues Concerning the ADA

A. Introduction

Although the ADA has enjoyed broad based support and the concept of the legislation was endorsed by President Bush during the election campaign,[11] several of the specifics of the legislation have proven to be controversial. Some of these major legal issues will be analyzed here.[12]

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[10] For a detailed discussion of the remedies sections of S. 933 see "Remedies and Standing to Sue Under S. 933, the 'Americans with Disabilities Act of 1989'", CRS Rep. No. 89-336A (May 26, 1989).

[11] 19 ARC Government Report 3 (May 18, 1989).

[12] Since the ADA is a civil rights bill, most of the issues have been legal ones. The major exception to this has been the question of cost. The cost factor of reasonable accommodations was discussed at Senate hearings on May

B. Drug Addicts, Alcoholics and Persons with Contagious Diseases

As described above, the ADA allows a defense to a charge of discrimination if certain qualification standards are necessary to perform the job or participate in the program. Such qualification standards may include providing that the current use of alcohol or drugs by an alcoholic or drug abuser not pose a direct threat to property or the safety of others in the work place or program and providing that an individual with a currently contagious disease or infection not pose a direct threat to the health or safety of other individuals in the work place or program. In other words, if the use of alcohol or drugs or the presence of a contagious disease or infection would pose a direct threat, an individual could be denied employment or participation in a program without a violation of the act. If there was no such threat posed and the individual was able to meet the general qualification standards, such an individual would be covered by the nondiscrimination provisions of the legislation.

The definitional section applicable to section 504 contains similar provisions relating to drug addicts, alcoholics and persons with contagious diseases or infections. The provision on contagious diseases or infections would cover persons with AIDS or who are positive for antibodies to HIV.[13] Similarly, the ADA is intended to cover such individuals.[14] However, the greatest controversy around this provision of the ADA has centered around the coverage of drug addicts and alcoholics. It has been argued that this

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9, 10 and 16, 1989 and has been addressed by the National Council on Disability. See Memorandum to the National Council on the Handicapped, from Robert L. Burgdorf, Jr., entitled "Cost Data Regarding the Americans with Disabilities Act" (July 28, 1988). The costs of the legislation are difficult to determine since the type of accommodations required would vary greatly from individual to individual. Also, some accommodations may not be required if they would result in an "undue burden" and exactly what is an "undue burden" would be determined on a case-by-case basis. In addition, it has been argued that the legislation would actually be a revenue generator since it would bring more individuals into the work force and would create more consumer spending by providing accessible shopping areas, restaurants, and places of entertainment. A more detailed discussion of cost is beyond the scope of this report.

[13] Even prior to the amendment of the Rehabilitation Act discussing contagious diseases and infections (contained in the Civil Rights Restoration Act, P.L. 100-259), the Supreme Court had interpreted section 504 to cover persons with contagious diseases and most commentators and subsequent judicial decisions have applied the Court's reasoning to HIV infected persons. See *School Board of Nassau County v. Arline*, 107 S.Ct. 1123 (1987).

[14] See 135 Cong. Rec. S 4985 (May 9, 1989) (Comments of Senator Harkin).

coverage is in conflict with the drug-free work place statute, P.L. 100-690, 102 Stat. 4304, since it may protect drug addicts or alcoholics from discrimination in certain circumstances. However, it could be argued that the ADA is consistent with the drug-free work place law since the ADA does not grant protection for the use of drugs on the job and since it requires that individuals must be able to perform a particular job. The more difficult issue is the extent to which the ADA's prohibition of discrimination would cover discriminatory acts against persons who use drugs in a non work place environment. If such use did not pose a direct threat and the individual performed or took advantage of the essential components of the job or program, a strong argument could be made that discrimination against such individuals would be prohibited by the legislation.

C. Remedies and Damages

The ADA contains differing remedies provisions for various substantive titles in the legislation and to some extent provides for differences in the scope of coverage. These sections draw upon the remedies and procedures found in other civil rights statutes, for example, the title II employment remedies section references the remedies and procedures of title VII of the Civil Rights Act of 1964. Several issues have arisen concerning these sections: (1) what exactly do these references encompass, (2) how does this differ, if it does, from present remedies coverage of persons with disabilities under section 504, (3) are punitive damages or damages for pain and suffering covered, and (4) what are the ramifications of the language in these provisions allowing suit when an individual feels that they are "about to be discriminated against?" This last issue will be addressed in a separate section.

Title II of the ADA bans discrimination in employment against otherwise qualified persons with disabilities and incorporates by reference the remedies and procedures set forth in sections 706, 709, and 710 of the Civil Rights Act of 1964, 42 U.S.C. secs. 2000e-5, 2000e-8, 2000e-9, and the remedies and procedures available under section 1981, 42 U.S.C. sec. 1981. Title VII provides for administrative enforcement by the Equal Employment Opportunity Commission (EEOC). The EEOC is to attempt voluntary conciliation but where this fails, the Commission is authorized to bring a civil action against certain employers. However, there is also a private right of action where the EEOC has either dismissed a charge or has not reached a conciliation agreement or filed a suit within 180 days. Under section 1981 there would be a private right of action; however, recently the Supreme Court has limited coverage of 1981 to situations involving hiring decisions or promotion decisions where such decisions would constitute a new and distinct relationship between the employer and employee.[15] Thus, generally section 1981 would not be applicable to discrimination on the job. One question presented by this case is whether the reference in the ADA to inclusion of section 1981 remedies would mean that these remedies would be similarly limited in application to certain situations as they were by the Supreme Court

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[15] *Patterson v. McLean Credit Union,* No. 87-107 (June 15, 1989).

in *Patterson*. In other words, would *Patterson* essentially have no effect on ADA interpretation since the ADA refers only to the remedies of section 1981 or would the limitations of application in *Patterson* also be applicable in the ADA? It would appear that reading of the plain language of the bill would indicate that the remedies of section 1981 are to be applicable in situations where there is discrimination as defined in the ADA. Report language may assist in resolving this issue.

The specific remedies under title VII would include injunctive relief and affirmative action including reinstatement or hiring, with or without back pay.[16] Back pay liability is limited to two years under title VII; however, there is no time limit under section 1981. Also, compensatory and punitive damages may be awarded under section 1981 although these are not generally available under title VII.[17] Section 1981 would allow jury trials while title VII does not provide for jury trials and whether jury trial are appropriate under the ADA has generated considerable discussion. Attorneys' fees are available under both title VII and section 1981.

Title III of the ADA prohibits discrimination in public services and applies the remedies, procedures and rights set forth in section 505 of the Rehabilitation Act of 1973, 29 U.S.C. sec. 794, to such acts of discrimination. Section 505 sets forth the enforcement procedures for section 504 of the Rehabilitation Act and provides that the remedies for section 504 are those available under title VI of the Civil Rights Act. Generally, the Rehabilitation Act has been interpreted to allow a private right of action and to allow money damages and equitable actions for back pay.[18] However, the exact extent of these remedies is uncertain. It would appear likely that intentional discrimination is required[19] but there is no settled line of cases regarding damages for pain and suffering and punitive damages.[20]

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[16] 42 U.S.C. sec. 2000e-5(g).

[17] *Johnson v. Railway Express Agency,* 421 U.S. 454 (1975).

[18] *Consolidated Rail Corporation v. Darrone,* 465 U.S. 624 (1984).

[19] *Carter v. Orleans Parish Public Schools,* 725 F.2d 261 (5th Cir. 1984); *Marvin H. v. Austin Independent School District,* 714 F.2d 1348 (5th Cir. 1983).

[20] See *Recanzone v.Washoe County School District,* 696 F. Supp. 1372 (D. Nev. 1988)(allowing damages for pain and suffering); *Shuttleworth v. Broward County,* 649 F.Supp. 35 (S.D.Fla. 1986)(damages for mental suffering or humiliation would not be allowed under section 504); *Gelman v. Department of Education,* 544 F. Supp 651 (D.Col. 1982)(punitive damages not available); *Fitzgerald v. Green Valley Area Education Agency*, 589 F. Supp. 1130 (S.D. Iowa 1984) (punitive damages presumably available but were not justified in the particular factual situation raised).

Public accommodations and services operated by private entities are covered by title IV of the ADA. The enforcement section of this title is based on the Fair Housing Act and references the sections authorizing private civil action by aggrieved persons and judicial actions by the Attorney General. The bill does not reference the Fair Housing Act sections relating to administrative complaints, investigations and adjudication procedures.

Title VI of the bill requires common carriers of telephone services to provide telecommunication relay services. The sections of the Fair Housing Act used for public accommodation in title IV of the ADA are referenced here and in addition, administrative enforcement is provided by reference to provisions of the Communications Act of 1934, 47 U.S.C. secs. 206, 207, 208, and 209. The referenced Federal Communications Commission (FCC) provisions authorize the filing of complaints and investigations by the FCC, provide that the FCC may hold hearings, make determinations as to liability and damages and make an order directing payment. In addition, the FCC would have cease and desist authority and could impose fines of $10,000.

The remedies available under the ADA do differ in scope of coverage from those available for section 504 violations. For example, the administrative scheme applicable under title VII differs from those available under section 504. Also, the referencing of the Fair Housing Act would authorize judicial actions by the Attorney General which are not specifically authorized for section 504. The reference to the Federal Communications Act of 1934 would also provide for broad cease and desist authority and fines which have no parallel under sections 504 or 505. One of the major differences is one of scope -- the availability of judicial remedies if an individual feels that he or she is "about to be subjected to discrimination."

The extent of the availability of punitive damages or damages for pain and suffering under the ADA is not certain. There is no settled line of cases on these issues regarding section 504. Punitive damages may be awarded under section 1981 but it is possible that the application of section 1981 may be limited by the Supreme Court's decision in *Patterson* as discussed above.

D. Remedies for Persons "About to be Subjected to Discrimination"

The various remedies sections in the ADA would apply if an individual believes he or she "is being or **about to be** subjected to discrimination on the basis of disability." (emphasis added). The "about to be subjected to discrimination" language is not contained in the remedies provisions applicable to section 504[21] or under title VII of the Civil Rights Act of 1964. The closest

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[21] 29 U.S.C. sec. 794a, which contains the remedies provisions for section 504, provides for remedies "to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title."

statutory parallel is found in the Fair Housing Act, as amended by the Fair Housing Amendments Act of 1988, P.L. 100-430.[22]

The original definition of "person aggrieved" under the Fair Housing Act enforcement provisions was "[a]ny person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur."[23] The Fair Housing Amendments Act of 1988 added a definition of "aggrieved person" to the definitions section which defined such a term as including "any person who -- (1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur."

The House Report[24] discussed this change in the definition.

> *Aggrieved person.* Provides a definition of aggrieved person to be used under this act. In *Gladstone Realtors v. Village of Bellwood,* the Supreme Court affirmed that standing requirements for judicial and administrative review are identical under title VIII. In *Havens Realty Corp. v. Coleman,* the Court held that "testers" have standing to sue under title VIII, because Section 804(d) prohibits the representation "to any person because of race, color, religion, sex or national origin that any dwelling is not available for inspection, sale or rental when such dwelling is in fact so available." The bill adopts as its definition language similar to that contained in Section 810 of existing law, as modified to reaffirm the broad holdings of these cases.

The report correctly states the holding in *Gladstone* but the part of the definition at issue there was the first category -- a person who claims to have been injured by a discriminatory housing practice -- not the second category of persons who believe they will be injured. In addition, the Court in

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[22] Title II of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000a-3, allows a civil action "[w]henever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 203 [42 U.S.C. sec. 2000a-2]." The ADA, it should be emphasized, contains no requirement for "reasonable grounds" and in addition, title II provides only injunctive relief. Title II does not provide for a damage remedy.

[23] 42 U.S.C. sec. 3610, P.L. 90-284, sec. 810.

[24] H.Rep. No 711, 100th Cong. 2d Sess., *reprinted in [1988] U.S. Code Cong. & Ad. News* 2173, 2184. There were no Senate or Conference Reports on P.L. 100-430. The congressional debate also did not center around this provision and there were only a few references to enforcement. For example, see 134 Cong. Rec. S 10556 (daily edition Aug. 2, 1988) (statement of Senator Cranston) discussing the strengthening of enforcement provisions.

Gladstone emphasized that although Congress may expand standing to the full extent permitted by Article III of the Constitution, Congress cannot abrogate the essential constitutional requirement that a plaintiff must always have suffered "'a distinct and palpable injury to himself' that is likely to be redressed if the requested relief if granted."[25] Certainly the Court in *Gladstone* and *Havens Realty Corporation* indicated that a "tester" for housing discrimination purposes has standing to sue but the application of the language to other purposes is not as clear and will probably await further judicial action.

In the apparent absence of prior interpretation or legislative history, the question then becomes what is the meaning of this phrase in the ADA? It could be argued that such language is necessary to allow for immediate remedies. For example, if construction of a building were being planned and it was determined not to be accessible for persons with disabilities, it could be argued that the "about to be discriminated against" language would be necessary in order to assure that the building was planned to be accessible. In other words, the language could mean that it was not necessary to wait until the building was complete until remedies were pursued. However, even without this language it could be argued that drafting blueprints or obtaining permits for an inaccessible building are actual acts of discrimination, thus allowing the use of remedies without waiting for completed construction. It could also be argued that the "about to be discriminated against" language could create a serious potential for nuisance suits, especially in areas such as employment. For example, in the area of employment it might be possible to argue that such language would allow suit prior to the instituting of any adverse action against an employee and that such suits could be premised on erroneous interpretations of casual conversations.

This type of language could also raise constitutional questions under Article III of the Constitution. As was noted by the Court in *Gladstone,* Congress may expand standing to sue, but there must be the constitutional minimum of a plaintiff who has suffered a distinct and palpable injury to himself. To the extent that the about to be discriminated against language could be interpreted to allow suit without such a distinct injury, it could face constitutional challenge.

E. Public Accommodations in the ADA and Public Accommodations in Title II of the Civil Rights Act

Title IV of the ADA would prohibit discrimination in any place of public accommodation. Title II of the Civil Rights Act of 1964 also covers public accommodations and the major issues concerning this section of the ADA concern what the coverage is under the ADA and title II and whether there should be such a distinction.

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[25] *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 100 (1979)[citing *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976)].

Public accommodation is defined in the ADA as privately operated establishments that are used by the general public as customers, clients or visitors, or that are potential places of employment and whose operations affect commerce. Specific examples of covered entities are also listed including auditoriums, convention centers, stadiums, theaters, shopping centers, professional offices of health care providers, parks, and private schools but the list is illustrative, not exhaustive. Title II is more limited in coverage than the ADA. It prohibits discrimination in any place of public accommodation and defines public accommodation by exhaustively listing covered entities -- hotels, restaurants, places of entertainment and other establishments connected with the covered entities in certain ways. Unlike the ADA, this list defines the coverage and does not leave open the possibility of coverage of other entities. In addition, the illustrative list in the ADA is more comprehensive than title II and would cover entities like the professional offices of health care providers and private schools which are not covered under title II. Section 402 of the ADA does provide some limitations on its coverage of public accommodations. For example, a failure to remove architectural and communication barriers is not discriminatory where such removal is not "readily achievable." In addition, a failure to ensure individuals with disabilities are not excluded or denied services is discrimination unless the entity can demonstrate that taking such steps would result in an "undue burden."

It could be argued that the more extensive coverage under the ADA is necessary to cover places of crucial importance to persons with disabilities such as professional offices of health care providers and that limitations are provided by the concepts of "readily achievable" and "undue burden." However, it could also be argued that the ADA coverage goes beyond these specific needs and that if the intention of the legislation is to parallel existing civil rights legislation, this distinction does not fulfill this intention.

F. Church-State Implications of the ADA

The ADA does not specifically mention religious or religiously affiliated institutions; however, arguments have been made that several of its provisions have implications for such institutions. For example, William Bentley Ball testified before the Senate Subcommittee on the Handicapped that the ADA would violate the constitutional rights of churches and religious schools under the First Amendment. He argued that the bill would impose substantial economic costs on churches and religious schools, and that the bill would require these entities to hire admitted drug and alcohol users and individuals who are HIV positive in violation of religious principles. This, Mr. Ball argued, would be in violation of both the free exercise and the establishment of religion clauses of the First Amendment.

These arguments raise several issues: first, does the scope of the ADA cover religious or religiously affiliated institutions; second, assuming that it does would this coverage pose a constitutional violation? Although the issue is not without ambiguity, it would appear that the ADA would apply to these

institutions and its application to such entities most likely would not be unconstitutional.

The extent to which the ADA covers religious or religiously affiliated institutions is not entirely clear but certain observations may be made. The public accommodations provisions of the ADA specifically list private schools as covered entities and do not provide any exclusion for private religious schools. Thus, such institutions would appear to be covered by the ADA. Whether churches or other religious institutions are to be covered is more uncertain since they are not specifically listed but the broad general prohibition of discrimination in accommodations discussed previously would appear to allow coverage of such entities. However, the general provisions of the ADA do provide for flexibility in coverage by allowances for "undue hardship" and for qualification standards. Therefore, these exceptions could be used to argue that, for example, a church would not have to hire an alcoholic if this would violate its religious precepts. Legislative history on this issue would be helpful in providing clarity.

If the ADA's provisions are somewhat ambiguous on this coverage, the constitutional boundaries of government regulation of pervasively religious entities are even more unclear. With regard to the establishment clause, the Supreme Court has generally employed the tripartite or *Lemon* test:

> First, the statute must have a secular legislative purposes; second, its principal or primary effect must be one that neither advances nor inhibits religion...; finally, the statute must not foster "an excessive government entanglement with religion." *Lemon v. Kurtzman,* 403 U.S. 602, 612-13 (1971).

The free exercise clause has also been construed to protect religious practices from undue governmental interference and the Court has often required that to be constitutional a government action burdening religious exercise be shown to serve a compelling public interest and to be the least restrictive means available of achieving that interest.[26] Although there are certainly constitutional protections from governmental interference under both the establishment clause and the free exercise clause, such protections are not absolute. The Court has specifically upheld the imposition of a racial nondiscrimination requirement on the tax exemption afforded a religious school because of the government's compelling interest in eradicating racial discrimination.[27] Similarly, the lower courts have generally upheld the imposition of nondiscrimination requirements on religious entities except with

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[26] *Sherbert v. Verner,* 374 U.S. 398 (1963). But the Court's most recent free exercise decision held strict scrutiny inappropriate in the absence of actual coercion of religious practices. See *Lyng v. Northwest Indian Cemetery Protective Association,* 56 U.S.L.W. 4292 (1988).

[27] *Bob Jones University v. United States,* 461 U.S. 574 (1983).

respect to employment decisions regarding clergy.[28] These cases would suggest that to the extent the ADA is found to cover religious institutions, it would pass constitutional muster so long as the qualifications provisions or the undue burden language were seen as limiting interference with certain hiring decisions.

G. Transportation

Transportation issues regarding persons with disabilities have always been problematic and the subject of numerous judicial decisions. This area has posed some of the most difficult issues regarding balancing the rights of individuals with disabilities and the interests of federal grantees in preserving the integrity of their programs.[29] Recently, the third circuit court of appeals in *ADAPT v. Burnley,* Nos. 88-1139, 88-1177, and 88-1178 (Feb. 13, 1989), examined the transportation requirements of section 504 and held that they required that newly purchased buses be accessible to the mobility-disabled. In addition, the court struck down Department of Transportation regulations allowing the option of paratransit in place of accessibility and relieving certain statutory duties if transit authorities spend more than 3% of their budget on services to the handicapped. However, this decision was vacated on April 19, 1989.

The ADA contains detailed sections relating to transportation and requires that new vehicles be accessible and allows paratransit but only as a supplement to existing systems, not as an alternative. Thus, it parallels section 504 as such section was interpreted by the third circuit. One of the issues which has arisen is the extent to which the *ADAPT* decision should be written into a statute when it is not certain if the decision will be appealed to the Supreme Court.[30]

One of the other major issues regarding transportation was the question of whether existing vehicles should be required to be retrofitted. The 100th Congress version of the ADA would have required retrofitting but this requirement was dropped when the ADA was revised and reintroduced in the 101st Congress.

H. Relationship of the ADA with Section 504

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[28] See e.g., *McClure v. Salvation Army,* 460 F.2d 553 (5th Cir.), *cert. denied,* 409 U.S. 896 (1972).

[29] The Supreme Court in *Alexander v. Choate,* 469 U.S. 287 (1985), found that section 504 involves "a balance between the legitimate interests of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones."

[30] Another major issue which comes up most often in the transportation context is that of cost. See footnote 12 *supra.*

The ADA contains a specific section, section 601, which provides that "[n]othing in this Act shall be construed to reduce the scope of coverage or apply a lesser standard than the coverage required or the standards applied under title V of the Rehabilitation Act of 1973...or the regulations issued by Federal agencies pursuant to such title." Section 504 is also referenced several times in sections relating to transportation and such references generally provide that it shall be considered to be discrimination for the purposes of the ADA and section 504 to perform certain acts, such as the purchase of inaccessible buses.[31] The issue these latter references raise is whether such references are really amendments to section 504. This is not entirely clear-cut. It could be argued that these are in effect amendments to section 504 since they define how section 504 is to be interpreted with regard to transportation. However, it could also be argued that this is essentially a restatement of existing section 504 interpretation and that it is necessary to clarify coverage for providers of transportation who receive federal funds.

V. Summary

The Americans with Disabilities Act would provide broad based nondiscrimination protection for persons with disabilities in the private sector. It uses many of the key concepts from existing law concerning the civil rights of persons with disabilities, section 504 of the Rehabilitation Act of 1973, and would cover employment, public services, public accommodations, transportation, and telecommunications. The protection from discrimination would apply unless a particular standard or practice is "both necessary and substantially related to the ability of an individual to perform or participate" in a program or job and the essential components of the job or program cannot be met by reasonable accommodation or with the provision of auxiliary aids or services. Reasonable accommodation generally would not be required if it would place an undue burden on an entity.

Several legal issues have been posed by this legislation. There have been questions raised concerning the coverage of drug addicts, alcoholics and persons with contagious diseases or infections, and questions concerning the remedies provided for by the bill, especially the provisions which allow suit by persons who believe that they are "about to be subjected to discrimination." In addition, there have been issues raised concerning the scope of public accommodations coverage in the legislation, the coverage of transportation, church-state issues, and the meaning of certain references to section 504 in the ADA.

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[31] See e.g., S. 933, 101st Cong., sec. 303(b), 303(c), and 303(d).