

Temple Law Review
Summer, 1991

***521 MEDICAL EXAMINATIONS AND INQUIRIES UNDER THE AMERICANS WITH
DISABILITIES ACT: A VIEW FROM THE INSIDE**

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I. INTRODUCTION

The Americans with Disabilities Act ("ADA") [\[FN1\]](#) is one of the most sweeping pieces of civil rights legislation passed by Congress in the past decade. The law will have a significant impact on the employment and social opportunities open to people with disabilities; and will have a substantial effect on how employers and businesses operate across this country.

The ADA was derived, in large part, from two previous civil rights laws: the Rehabilitation Act of 1973 [\[FN2\]](#) and Title VII of the Civil Rights Act of 1964. [\[FN3\]](#) The substantive provisions of the ADA stem from the Rehabilitation Act of 1973. [\[FN4\]](#) The Rehabilitation Act prohibits all forms of discrimination on the basis of handicap by the federal government, federal contractors, and entities that receive federal funds. [\[FN5\]](#) Federal fund recipients covered under section 504 of the Rehabilitation Act include a range of private businesses and institutions, such as hospitals, schools, and prisons. [\[FN6\]](#) Federal contractors covered under section 503 ***522** of the Rehabilitation Act include many large companies that do business with the federal government. [\[FN7\]](#) Under section 504, the discrimination prohibited runs the gamut of services or programs offered by federal fund recipients, including employment, housing, social service benefits, and transportation. [\[FN8\]](#) Under sections 501 and 503 of the Rehabilitation Act, only employment discrimination is prohibited. [\[FN9\]](#)

The substantive provisions in the ADA's employment title are derived from equivalent substantive provisions under the Rehabilitation Act. Decisions such as who is a person with a "disability," what constitutes "discrimination" on the basis of disability, or what is required as a "reasonable accommodation," are derived from similar substantive requirements established under the Rehabilitation Act. [\[FN10\]](#) The ADA drafters sought

to draw as much as possible on the fifteen years of experience under the Rehabilitation Act in order to create a workable law that could extend to the private sector.

The procedural requirements of the ADA's employment title, by contrast, are drawn from Title VII of the Civil Rights Act of 1964. [FN11] Title VII prohibits discrimination on the basis of race, sex, religion, or national origin by employers who employ fifteen or more employees. [FN12] One of the purposes of the ADA was to finally establish parity in federal civil rights laws among people with disabilities, other minorities, and women. [FN13] Thus, the procedural requirements of the *523 ADA--defining the employers covered and the remedies provided by the law--are drawn from, and are essentially equal to those in Title VII.

But in order to truly understand the ADA, one must also appreciate that the law was the product of negotiations, settlements, and compromises. While the Rehabilitation Act of 1973 and the Civil Rights Act of 1964 set forth the substantive and procedural framework of the ADA, the law itself is the product of two years of debate, analysis, politics, and compromise. Those efforts shaped everything from the words used in the statute, to the structure of committee reports, to the statements made on the floors of Congress. An analysis of that process can help explain the structure and approach of various legal requirements within the ADA.

II. DEVELOPMENT OF THE ADA

The process by which the ADA became law has been explicated in some detail earlier in this symposium volume. [FN14] A brief overview of that chronology is repeated here, however, because it sets forth the framework in which various compromises were reached during passage of the law.

In October 1987, a small group of individuals gathered to review a draft of the first "Americans with Disabilities Act." [FN15] The draft was written by Robert L. Burgdorf Jr., then a staff person for the National Council on the Handicapped ("Council"). [FN16] The Council had held numerous hearings over the previous years and had developed two consecutive reports regarding discrimination *524 against people with disabilities. [FN17] In the second report, the Council called upon Congress to pass a comprehensive antidiscrimination statute for people with disabilities and Burgdorf had produced a model of such a statute in the report. [FN18]

The group met numerous times from October 1987 to January 1988, refining the model statute that Burgdorf had developed. [FN19] The model bill's structure was taken substantially from regulations that had been issued in 1977 by the Department of Health, Education, and Welfare ("HEW") to implement section 504 of the Rehabilitation Act. [FN20] Those regulations, the first substantive regulations to be issued under section 504, were the basis for every set of regulations subsequently issued by federal agencies to implement their section 504 responsibilities, [FN21] and they were the basis for almost every court decision interpreting section 504.

The decision by the advocates to fashion the model ADA based on the section 504 regulations was quite deliberate. Section 504 itself is no more than forty words, providing simply the general proscription that no "otherwise qualified individual with handicaps" should, solely on the basis of that handicap, "be excluded from the participation in, be denied the benefits of, or be subjected to discrimination" under any program or activity receiving federal financial assistance. [\[FN22\]](#) The section 504 regulations, which explains the forms of prohibited discrimination in greater detail, had been issued only after extensive efforts and activism on the part of the disability community. [\[FN23\]](#) Burgdorf, and other advocates drafting the first ADA, did not wish to start the battle for a comprehensive antidiscrimination law at "ground zero"-- that is, they rejected the idea of drafting a general law that would, like the Rehabilitation Act, be dependent on the issuance of new regulations for its substantive content. Rather, the decision was made to incorporate the best of what had been developed through regulations and case law under section 504 into the ADA itself. [\[FN24\]](#)

Of course, proposals drafted by advocates are simply items that are proffered to interested members of Congress who may consider using the material as the basis for legislation. In the case of the ADA, there were a number of congressional members who were interested in using the model bill drafted by the *525 advocates to press forward with a law to prohibit discrimination on the basis of disability. [\[FN25\]](#) On April 28, 1988, the first ADA--a product of the drafting sessions that had begun in October 1987--was introduced in the Senate as S. 2345 by Senators Lowell Weicker, Tom Harkin, and twelve other cosponsors; [\[FN26\]](#) and in the House as H.R. 4498 by Representative Tony Coelho and 45 cosponsors. [\[FN27\]](#)

While S. 2345 was substantially based on section 504 regulations and case law, it also went beyond what had been required under section 504 in certain respects. For example, the S. 2345 standard for whether an employer was relieved of his or her obligation to provide a "reasonable accommodation" for a person with a disability was not whether the accommodation would impose an "undue hardship," as was the case under the section 504 regulations. [\[FN28\]](#) Instead, the standard was whether the accommodation "would fundamentally alter the essential nature, or threaten the existence of" the business. [\[FN29\]](#) In the area of physical access, the draft legislation also went well beyond the section 504 requirements, as they were then interpreted by the courts. For example, the legislation not only required that all new vehicles and new buildings be designed and built in a manner that was fully accessible to people with disabilities, but it also required that existing buildings and vehicles be retrofitted to ensure accessibility in certain circumstances. [\[FN30\]](#)

The introduction of S. 2345 was a useful, and indeed a critical, first step towards the enactment of the ADA. It was not a bill that enjoyed a great deal of legislative activity--only one hearing was held on the bill. [\[FN31\]](#) However, it was a bill that received a great deal of scrutiny by both the business and disability communities. Advocates for the business community lost no time in informing their members about the various problems they perceived in the bill. [\[FN32\]](#) Advocates for the disability community, in turn, had the

opportunity to study the bill at some length and to determine what essential elements had to be maintained at *526 all costs, and what could be modified during the course of negotiations. [\[FN33\]](#)

The 100th Congress ended on October 22, 1988. As with all bills that have not been passed by a particular Congress before final adjournment, S. 2345 officially died on the 100th Congress's final day of session. The 101st Congress commenced on January 3, 1989, and took up business as usual with no apparent outward activity on the ADA.

In fact, however, the period of January 1989 to May 1989--the early months of the 101st Congress--was one of the busiest periods in the evolution of the ADA. During that time, staff members for Senators Tom Harkin and Edward Kennedy were hard at work developing a new version of the ADA. [\[FN34\]](#) Moreover, although the bill was being drafted by Senate staff, advocates for both the disability and business communities were busy analyzing the various issues presented by the draft bill. These groups were making determinations and recommendations regarding the substance of the new bill, and conveying their respective points of view to interested staff members. [\[FN35\]](#)

The second ADA was introduced in the Senate by Senators Harkin, Kennedy, and 32 other cosponsors on May 9, 1989 as S. 933; [\[FN36\]](#) and in the House as H.R. 2273 by Congressman Steny Hoyer and 45 cosponsors. [\[FN37\]](#) The bill was similar to the first ADA in its reliance on the section 504 regulations, but unlike the first ADA, it drew even more directly from those regulations. For example, the structure of the new ADA exactly paralleled the structure of the section 504 regulations. Just as the regulations begin with a general overview of the prohibition of discrimination, [\[FN38\]](#) the second ADA bill included a general "Title I" that set forth prohibited forms of discrimination that applied to all areas covered in the bill. [\[FN39\]](#) Just as the section 504 regulations never define the term "reasonable *527 accommodation," but simply set forth examples of such accommodations, [\[FN40\]](#) the second ADA bill, S. 933, deleted the definition of reasonable accommodation that had been used in the earlier version of the ADA bill, [\[FN41\]](#) and simply returned to giving examples of accommodations. [\[FN42\]](#) Of key importance, S. 933 returned to the established standards of section 504, such as the limitation of "undue hardship" for the provision of reasonable accommodations. [\[FN43\]](#)

The new ADA bill received a better initial response from the business community than the first ADA bill had received. Nevertheless, the business community still had a number of concerns with the bill that they articulated in a series of Senate hearings on the ADA. [\[FN44\]](#) In addition, representatives of the business community began to meet in a series of private sessions with advocates of the disability community to more clearly articulate the concerns that business owners had with the new bill. [\[FN45\]](#)

The new ADA bill also received a more positive response from the Bush Administration than S. 2345 had received from the Reagan Administration. On June 22, 1989, Attorney General Dick Thornburgh testified before the Senate Labor and Human Resources Committee to deliver the Bush Administration's position on S.933. [\[FN46\]](#) The bottom

line was clear: the Administration would support a bill along the lines of the ADA, which extended the requirements of section 504 of the Rehabilitation Act to the private sector, but would need further changes in the current ADA bill before the Administration could endorse it. [\[FN47\]](#)

Attorney General Thornburgh's June testimony set in motion a series of intense negotiations between representatives of the Administration and representatives of senators supporting the ADA. These negotiations took place during June and July of 1989. The concerns raised and debated during those negotiations were almost identical to concerns that had emerged during the private sessions between the business and disability communities. [\[FN48\]](#) This was no surprise. The representatives of the business community had voiced their concerns to Administration officials, and those officials apparently agreed that some of the concerns had merit.

The major principle guiding the Administration-Senate negotiations was the one articulated in Attorney General Thornburgh's June testimony the Administration would accept extending the requirements of section 504 to the private sector, but the ADA requirements had to closely track those existing *528 requirements. While some modifications and clarifications to section 504 requirements would be allowed, the Administration would examine closely any such changes.

That guiding principle resulted in the ADA's adopting even more of the exact flavor and language of the section 504 regulations--even if that did not necessarily further the bill's clarity. Changes from the structure of the section 504 regulations were made, at times, if doing so addressed a particular concern of the business or disability community. For example, the general "Title I" was deleted from the bill and its substantive requirements were folded into each respective title. [\[FN49\]](#) Definitions were added for the terms "undue hardship" in the employment title and "readily achievable" in the public accommodations title. [\[FN50\]](#) In the final key negotiation "trade," the Administration agreed that a broad list of businesses would be covered as "public accommodations" under the law, and the Senate sponsors agreed that private plaintiffs charging violations of the employment and public accommodation titles would be limited to the remedies available in Title II and Title VII of the Civil Rights Act of 1964. [\[FN51\]](#)

The final Administration-Senate negotiations were completed just in time for the Senate Labor and Human Resources Committee to consider, and unanimously pass, the revised ADA bill before the Senate left for its August recess. [\[FN52\]](#) Despite that unanimity, the business community still had various reservations *529 about the revised bill. Some of those concerns were addressed and resolved in the lengthy committee report to the bill which was prepared during August 1989. That report was reviewed extensively by the Administration negotiators and their comments and concerns were incorporated into the report. [\[FN53\]](#)

On September 7, 1989, the full Senate met to consider the ADA. While there was extensive discussion, debate, and rhetoric regarding the bill, the main substantive changes to the ADA were to remove selected categories of individuals from coverage.

Current users of illegal drugs were removed from coverage under the ADA, as were individuals with selected sexual or mental disorders. [\[FN54\]](#) The final bill passed by a vote of 76-8. [\[FN55\]](#)

The main substantive changes to the employment, public accommodation, and communication sections of the ADA thus took place from January 1989 to September 1989, in the context of Senate deliberation on the bill. Only one Senate committee, however, the Labor and Human Resources Committee, had been given jurisdiction over the bill. In the House of Representatives, by contrast, where the ADA was considered next as H.R. 2273, four different committees had jurisdiction over the bill. [\[FN56\]](#) The result of this four-way jurisdiction was a seven-month process during which each House committee took up and modified sections of the ADA. [\[FN57\]](#)

The first committee, the Education and Labor Committee, was the center for a series of intense negotiations that took place between House Democrats and House Republicans, led respectively by Representatives Steny Hoyer (D.Md.) and Steve Bartlett (R.Tex.), during October and November 1989. [\[FN58\]](#) *530 During these negotiations, every line of the employment and public accommodation titles of the ADA, as developed by the Senate, was reviewed in detail. The goal of the negotiations was not to achieve major substantive changes in a bill that the Administration had already endorsed, but rather to refine the bill to address remaining concerns regarding clarity sought by the business community. [\[FN59\]](#) In fact, seventeen statutory changes, and approximately thirty pages of committee report language addressing specific issues, were agreed to during these negotiations. [\[FN60\]](#)

The months of January 1990 to March 1990 represented the transportation era in the evolution of the ADA. The Energy and Commerce, and the Public Works and Transportation Committees brought their expertise and orientations to bear on the sections of the ADA relevant to their jurisdiction over Amtrak, commuter rail service, and public and private bus transportation. Numerous substantive changes were made in the transportation sections of the ADA during these committee considerations. [\[FN61\]](#)

Finally, the Judiciary Committee considered the bill in April 1990. This was the "last chance" for the business and disability communities to have any further modifications made in the bill during a House committee consideration. The result was another set of negotiations, this time between representatives of the Administration and representatives of the disability community. During these negotiations, an agreement was reached whereby a group of six amendments--three requested by the Administration and three by the disability community--were accepted by the Judiciary Committee in a bipartisan manner. [\[FN62\]](#)

The final stages of the ADA took another three months. On May 22, 1990, the House of Representatives passed the bill by a vote of 403-20. [\[FN63\]](#) During consideration of the bill, however, the House had added a provision allowing discrimination against people with contagious diseases who worked in foodhandling positions. [\[FN64\]](#) In addition, the House and the Senate had passed markedly different provisions regarding

the manner in which each House of Congress would be covered under the ADA. [\[FN65\]](#) Through the use of various complicated *531 legislative maneuvers, both of these issues were resolved. [\[FN66\]](#) The final conference report of the ADA was passed by the House of Representatives by a vote of 377-28 on July 12, 1990, and by the Senate on July 13, 1990 by a vote of 91-6. [\[FN67\]](#) The President signed the ADA into law on July 26, 1990. [\[FN68\]](#)

This account lays the bare background of the process by which the ADA was discussed, negotiated, settled, and refined over a period of three years. This framework will now be used to analyze the medical examinations and inquiries section of the employment title of the ADA.

III. MEDICAL EXAMINATIONS AND INQUIRIES

A. Background

One of the key aspects of the ADA's employment title is a series of restrictions on the use of medical examinations and inquiries, both during the application process and after individuals have been employed. [\[FN69\]](#) These restrictions may also have the most immediate effect on employers because all application processes and questionnaires will need to be reviewed, and many will have to be modified, in light of the law's requirements.

The ADA's requirements with regard to pre-employment medical examinations and inquiries can be best understood by contemplating the following, quite common scenario: A person with a disability, such as epilepsy, diabetes, or Hodgkin's cancer in remission, applies for a job. One of the first steps in the application process is for the applicant to fill out a medical questionnaire which asks: "What medical conditions do you have or have you ever had?" The person with the disability truthfully fills out the questionnaire. The person then completes various other steps in the application process, including an interview, submission of a writing sample, and submission of references. At the end of the process, the applicant is denied the job.

At this point, the applicant has no firm knowledge as to why he or she was denied the job. It could be that as soon as the prospective employer realized that the person had a disability, such as diabetes, epilepsy or a slight hearing impairment, the employer decided not to offer the person the job. In that case, the other steps in the process were basically irrelevant. Or, it could be that the employer was not affected at all by the applicant's disability, but that the applicant's references or writing sample did not meet the employer's standards. The problem for the person with a disability, however, is that while the discrimination *532 may have occurred because of his or her disability--that person can never definitively know if that was the case. In fact, many people with disabilities are often denied jobs because their disability is identified early in the application process and that fact taints the remainder of the application process. [\[FN70\]](#)

To address this problem, the section 504 regulations issued by HEW in 1977 established a two-step process for medical examinations and inquiries of job applicants. [FN71] The first step is the initial application stage. At that point, an employer is restricted from requiring an applicant to submit to any medical examination, or to respond to any medical inquiries, such as filling out medical history questionnaires. [FN72] The employer is allowed, however, to ask the applicant whether the applicant can perform "job-related functions." [FN73] Thus, for example, an employer is allowed to ask, in the initial application stage, whether the person has the educational and professional qualifications necessary for the job. The employer is also allowed to ask whether the applicant can do specific job functions, such as drive a car, lift 50 pounds, or answer the telephone if these are essential functions of the job. [FN74] The employer is not, however, allowed to ask whether the applicant has a disability or question the severity of a specific disability.

After the employer has determined that the applicant possesses the necessary qualifications for a particular job, and has decided (for whatever other reasons) that this is the person the employer wants to hire, the employer is required to extend a conditional job offer to that applicant. This conditional offer then triggers the second stage of the process. [FN75] At this point, the employer may require that the applicant undergo a medical examination or respond to medical inquiries, and may condition the final offer of employment on the results of those medical tests or inquiries. [FN76]

There are, however, certain conditions placed on the use of these examinations and inquiries. First, if an employer wishes to require a medical examination, the examination must be required of all applicants and not simply of selected applicants. [FN77] Second, the information obtained as a result of the medical examinations must be kept strictly confidential. [FN78] Third, and of key importance, ***533** the results of the medical examination may not be used to withdraw the conditional job offer from an applicant unless the results indicated that the applicant is no longer qualified to perform the job. [FN79]

This two-step process, established by the section 504 regulations, addressed concerns of both people with disabilities and recipients of federal funds. On the one hand, it protected applicants with disabilities by allowing them to isolate, if and when, their disability unjustifiably influenced a hiring practice. It further protected them by restricting the use of medical examination results to the withdrawal of conditional job offers solely in situations where the applicants were truly not qualified to perform the job in question. On the other hand, it protected employers by allowing them to discover possible disabilities prior to the applicant receiving a final job offer that would, in fact, limit an applicant's ability to perform the job.

The regulations issued by the Department of Labor to implement section 503 for federal contractors took a different approach to the issue of medical examinations and inquiries. Those regulations provide that federal contractors may conduct comprehensive medical examinations of applicants at any point in the application process, "provided that the results of such an examination shall be used only in

accordance with the requirements of this section." [\[FN80\]](#) Thus, while the section 503 regulations protect people with disabilities from the unlawful use of medical examination results, unlike the section 504 regulations, they do not help applicants with disabilities isolate whether their disability has been a determining factor in an employment decision.

While the section 504 regulations were more protective of people with disabilities than the section 503 regulations, they still left some concerns unaddressed. First, the section 504 regulations allowed employers to discover an applicant's entire medical history and condition, even if that information was not relevant to the job. Although the section 504 regulations precluded the employer from using nonrelevant medical information as a justification for withdrawing a conditional job offer, the regulations put no restrictions on the type or kind of medical examination the employer could require after the conditional job offer had been proffered. Many people with disabilities did not want employers to be allowed to identify their disability if it was not relevant to the job duties. For example, people with HIV, epilepsy, or a history of mental illness feel that being forced to disclose their disability, in the course of obtaining employment, is an infringement of their privacy.

Second, the section 504 regulations did not spell out clearly any restrictions on medical examinations of on-the-job employees. [\[FN81\]](#) Various scholarly interpretations of section 504 had noted that there was no logical reason to distinguish ***534** between applicants and employees in this regard. [\[FN82\]](#) Nevertheless, because the regulations did not clearly refer to employees, at least one court had questioned whether the medical examination restrictions applied to employees. [\[FN83\]](#)

B. The Development of the Medical Examinations and Inquiries Section of the ADA

The manner in which the ADA addressed the issue of medical examinations and inquiries of applicants and employees changed as the bill progressed through Congress. These changes reflected the realities of legislative drafting, politics, and compromise.

The initial ADA bill, S. 2345, introduced in the 100th Congress, set forth broad types of prohibited discrimination--for example, employer practices, housing, actions by public accommodations, and communications. [\[FN84\]](#) It then described broad forms of prohibited discrimination--for example, denying a person with a disability "the opportunity to participate in or benefit from a service, program, activity, benefit or other opportunity." [\[FN85\]](#) These broad forms of prohibited discrimination were applied across the board to all the entities covered by the bill--employers, housing operators, or public accommodations. The bill did not have separate, distinct sections dealing with each of these subject areas.

During final discussions on the draft of S. 2345, the disability advocates felt that a prohibition on medical examinations, similar to that which existed in the section 504 regulations, needed to be added explicitly to the statute. [\[FN86\]](#) It was difficult,

however, to add a prohibition to the bill that was unique to the area of employment, when the bill did not have a separate section on employment. The somewhat curious solution reached in S. 2345, therefore, was to place a number of specific employment prohibitions in the context of regulations that would be issued by the Equal Opportunity Employment Commission ("EEOC"). The bill thus directed the EEOC to issue regulations that included prohibitions on pre-employment inquiries. [\[FN87\]](#) Because this section was added at such a late stage, S. 2345 simply repeated the section 504 regulations verbatim and made no attempt to address and correct the other concerns that had existed with those regulations. [\[FN88\]](#)

During the period of January 1989 to May 1989, when the second ADA was drafted, both the structure and the content of the law changed. First, the second ADA was organized along issue areas, with each issue addressed in a ***535** separate title. [\[FN89\]](#) Thus, prohibitions that were unique to a particular area could be dealt with separately. Second, although the language of the bill substantially tracked the language used in the section 504 regulations, some modifications were made to address specific concerns.

The second ADA bill, S. 933, did not include a separate section on medical examinations and inquiries. Instead, in Title I--the employment title-- the bill stated that discrimination included:

[t]he imposition or application by a covered employer . . . of qualification standards, tests, selection criteria or eligibility criteria that identify or limit, or tend to identify or limit, a qualified individual with a disability, or any class of individuals with disabilities, unless such standards, tests, or criteria can be shown by such entity to be necessary and substantially related to the ability of an individual to perform the essential functions of the particular employment position. [\[FN90\]](#)

This provision addressed a number of the concerns that had been raised regarding medical examinations, although it did so differently than the section 504 regulations. First, the bill did not establish the two-stage application process of the section 504 regulations. Instead, the bill prohibited an employer from requiring that either an applicant or an employee undergo any test that would "identify" the individual as having a disability, unless the employer first proved that the particular test result being requested was "necessary and substantially related" to the individual's ability to perform the functions of the job. [\[FN91\]](#)

This general provision protected an employer's right to require an applicant or employee to take a medical or physical examination that was, in fact, necessary to determine the individual's ability to perform a job. For example, under this provision, an employer could require that all applicants for a bus driving position, and all current bus drivers, pass an eye examination. An employer could also require that all applicants for a construction job, and all current construction workers, pass a test to demonstrate lifting ability if that was necessary to perform the job. Employers could not, however, require broad, wide-ranging medical examinations--of either applicants or employees--unless they demonstrated that the results of the examinations were necessary to insure the applicants' or employees' ability to perform the job.

This section of S. 933 raised considerable concerns on the part of the business community, which were communicated to members of Congress, the Administration, and to representatives of the disability community. The concerns of the business community were two-fold. First, most large businesses do not receive federal grants, and thus, do not fall under the requirements of section 504 as federal fund recipients; rather, they have contracts with the federal government for the provision of goods or services. Most businesses, therefore, were *536 more familiar with the section 503 requirements for federal contractors, rather than with the section 504 requirements for federal fund recipients. Because the section 503 regulations placed restrictions solely on the use of medical examination results, and not on the administration of such examinations, the concept of restrictions on the administration of medical examinations was relatively foreign to many businesses. [\[FN92\]](#)

Second, representatives of the business community were horrified that businesses would be required to "job-validate" every medical examination or inquiry made of applicants or employees. It is interesting to note that the actual motivation for this provision on the part of the disability community had been to prohibit employers from inquiring into particular disabilities, such as HIV infection, which pose a social stigma simply by identification, but have no relevance to the person's ability to perform the job. Under the actual wording of the provision, however, employers were required to job-validate every medical examination they used, regardless of whether the examination identified disabilities with social stigma or not. [\[FN93\]](#) Thus, the actual motivation for the statutory provision was not precisely reflected in the provision's text. Although it is possible that business community members might have accepted a job-validation requirement solely for tests that identified disabilities of "social stigma," they were emphatically opposed to such a requirement for all examinations. [\[FN94\]](#)

The second ADA bill, S. 933, was ultimately changed as a result of the Administration-Senate negotiations that took place in June and July 1989. [\[FN95\]](#) The Administration was opposed to the broadly worded provision in S. 933, primarily because it was difficult to find an exact analogue in the section 504 regulations. When it became clear during the negotiations that this provision had been designed, in part, to deal with the issue of medical examinations and inquiries, the Administration's solution was to import the language relating to medical examinations used in the section 504 regulations directly into the *537 ADA. [\[FN96\]](#) A new section, entitled "Medical Examinations and Inquiries" was therefore inserted into the version of S. 933 considered by the Senate Labor and Human Resources Committee. [\[FN97\]](#)

For pre-employment inquiries and examinations, the new ADA section mirrored the section 504 regulations, and indeed, picked up almost verbatim the language of those regulations. Under this system, a two-stage application process is mandated. In the first stage, an employer may not ask an applicant whether he or she has a disability or ask questions regarding the nature or severity of an applicant's disability. The employer, however, may ask whether the applicant can perform "job-related functions." [\[FN98\]](#)

After a conditional job offer has been made, the ADA allows the employer to require all forms of medical examinations and to make all types of inquiries of job applicants. There is no "job-validation" requirement for these examinations or inquiries. The same restrictions placed on these exams and inquiries by the section 504 regulations are placed on them by the ADA as well. Thus, the examinations and inquiries must be required of all "entering employees" for a job, and not simply of selected applicants. In addition, the results of the examinations or inquiries must be kept completely confidential and may be used only "in accordance" with the employment requirements of the ADA. [\[FN99\]](#)

This last restriction is the one of key importance to people with disabilities. While the ADA--like section 504--placed no "job-validation" requirement for performing the examinations and inquiries themselves, there was still a job-validation requirement on the use of the results of such examinations and inquiries. That is, such results may not be used to withdraw a conditional job offer from an applicant unless they indicate that the applicant is not qualified to perform the job. [\[FN100\]](#)

Assume, for example, that a necessary qualification requirement for a job is to drive a truck on a regular basis. If the examination or inquiry reveals that the applicant, even with reasonable accommodation, cannot fulfill this necessary requirement of the job, then the results of the exam may legitimately be used to withdraw the conditional job offer. By contrast, if the examination reveals that the person has Hodgkin's cancer in remission, or some other disability which does not affect the person's driving ability, the conditional job offer may not ***538** legitimately be withdrawn. [\[FN101\]](#)

As a practical matter, this restriction on the use of medical examination and inquiry results, together with potential liability for unwarranted disclosure of medical information, may convince many employers not to require broadrange medical examinations and inquiries. As noted, the ADA creates a cause of action for breaches of confidentiality of medical records obtained by the employer through testing or inquiries of job applicants. [\[FN102\]](#) Because employers may actually use only those test results which have direct relevance to an employee's ability to perform the job, it makes sense for employers to tailor medical tests to obtain only that information which is most necessary and relevant to the essential job function. Under the ADA, an employer could legally ask an applicant about every possible past and current medical condition. Such questions, however, would simply increase the amount of information the employer must ensure is not inadvertently disclosed. As a practical matter, therefore, employers will probably focus on collecting information that is either directly relevant to an applicant's ability to perform essential job functions or information the employer concludes is necessary to obtain as baseline information for a possible worker's compensation claim in the future.

The new medical examination and inquiry section added to S. 933 also included provisions explicitly covering on-the-job employees. [\[FN103\]](#) These provisions filled the gap that had existed in the original section 504 regulations, but drew on the background principles and case law of section 504 for their substantive approach. [\[FN104\]](#)

Under established section 504 principles, once an employee is on the job, the person's actual performance is the best measure of that person's ability to do the job. An employee who is no longer "qualified"--that is, an employee who is not adequately performing the essential functions of the job, even with reasonable accommodation--may be dismissed from the job. Thus, the ADA allows an employer to require those medical examinations or inquiries which are necessary to determining whether the employee remains qualified for the job-- for example, examinations and inquiries which are "job-related and consistent with *539 business necessity." [\[FN105\]](#)

The legislative reports give the following example. Assume that an employee starts losing a significant amount of hair. Under the ADA, an employer does not have the right to pry into an employee's medical condition simply for the sake of curiosity. Thus, an employer may not require that the employee be tested for cancer unless such testing is job-related--that is, unless the test for cancer is necessary to actually measure the person's actual performance of essential job functions. As the reports explain, "[w]hile the employer might argue that it does not intend to penalize the individual, the individual with cancer might object merely to being identified, independent of the consequences. As was made abundantly clear before the Committee, being identified as disabled often carries both blatant and subtle stigma." [\[FN106\]](#) The same analysis applies to unjustified demands for employees to undergo tests to identify epilepsy, diabetes, HIV infection, or any other disability. [\[FN107\]](#)

By contrast, a medical examination or inquiry which is necessary to ascertain the person's actual ability to continue to perform an essential function of the job would be valid under the ADA as "job-related and consistent with business necessity." [\[FN108\]](#) Moreover, unlike medical examinations for job applicants, such examinations can be required of a specific employee, if the need arises to question the continued ability of that person to do the job.

The compromise reached in the Administration-Senate negotiations was, like all compromises, one with advantages and disadvantages for each side. On the one hand, the compromise adopted the clearly demarcated two-stage process established by the section 504 regulations for pre-employment inquiries, rather than the section 503 regulatory approach. [\[FN109\]](#) This ensured that people with disabilities had a chance of determining whether their disability had been an improper motivating factor in a job decision. [\[FN110\]](#) In addition, the compromise clarified the gap in the section 504 regulations with regard to on- the-job employees. [\[FN111\]](#) On the other hand, the compromise removed the provision requiring employers to job-validate all medical exams or inquiries made of applicants. This meant that employers were legally allowed to identify all disabilities of applicants, after conditional job offers had been made, including those disabilities *540 carrying social stigma. [\[FN112\]](#)

The approach to medical examinations and inquiries, reached during Senate consideration of the ADA, remained the approach adopted by the House of Representatives throughout its consideration of the ADA. The only modification to the medical examinations and inquiries section was made during negotiations preceding

markup of the bill by the Judiciary Committee. Some businesses had pointed out that the section regarding "prohibited examinations and inquiries" of current employees provided that: "A covered entity shall not conduct or require a medical examination . . . unless such examination is shown to be jobrelated and consistent with business necessity." [\[FN113\]](#) A literal reading of the statute meant that an employer could never conduct a medical exam that was not first job-validated, even if the examination was voluntary. Many businesses were conducting voluntary medical examinations as part of their "corporate wellness" programs and they were concerned that such programs would be invalidated under the ADA. [\[FN114\]](#)

It was never the intention of the advocates of the ADA to prohibit voluntary medical examinations. Thus, the agreement was made to delete the word "conduct" from the section describing prohibited examinations and inquiries. [\[FN115\]](#) The business community, however, also wanted the statute to clearly state that voluntary medical examinations were permissible. Although disability advocates felt that such an additional provision was superfluous, the provision regarding voluntary examinations was added because it was consistent with the agreed upon policy approach. [\[FN116\]](#) Once a new subsection had been added, however, stating that voluntary examinations were permissible, it was necessary to add another subsection applying the confidentiality and nondiscrimination requirements of the overall section to the results of those voluntary examinations as well. [\[FN117\]](#)

C. Ramifications of the ADA Process

The manner in which the ADA's provisions regarding medical examinations and inquiries were negotiated, settled, and refined had significant ramifications in terms of what ultimately appeared in the statute and what did not. The following section describes how the reality of politics shaped the form of the ADA with regard to three issues in the medical examinations and inquiries area.

***541** 1. Testing Categories of Employees

The section 504 regulations provide that a recipient of federal funds may condition an offer of employment on the result of a medical examination, conducted prior to an employee's entrance on duty, provided that "[a]ll entering employees are subjected to such an examination regardless of handicap." [\[FN118\]](#) The appendix to the regulations does not give much further guidance regarding the term "all entering employees." It simply states that "the revised provision allows an employer to condition offers of employment to handicapped persons on the results of medical examinations, so long as the examinations are administered to all employees in a nondiscriminatory manner and the results are treated on a confidential basis." [\[FN119\]](#)

When the new section on medical examinations and inquiries was added to the second ADA bill, S. 933, as a result of the Administration-Senate negotiations, the exact

language of the section 504 regulations was imported into the statute. Under the heading of "Employment Entrance Examination," the bill provided that a covered entity may condition a job offer on the results of a medical examination if, among other things, "all entering employees are subjected to such an examination regardless of disability." [\[FN120\]](#) There was no further clarification in the bill regarding how the term "all entering employees" was to be interpreted.

Understandably, some concern was raised on the part of members of the business community regarding the practical application of this requirement. They asked the Administration and Senate negotiators whether this provision was to be taken literally--that is, whether it meant that a business which employed various categories of employees (such as managers, clerical workers, and construction workers) had to give the same medical examinations to all employees entering its business. [\[FN121\]](#)

The answer from both the Administration and Senate negotiators, as well as from advocates for the disability community, was that the same medical examination had to be required of all employees entering the same job category. Thus, as the accompanying reports from the Senate Labor and Human Resources Committee and later from the House Education and Labor Committee explained: "For example, an entity can test all police officers rather than all city employees, or all construction workers rather than all construction company employees." [\[FN122\]](#)

The question, of course, is why this clarification was relegated to committee reports, rather than placed in the statute itself. The answer rests on the realities of timing and politics. First, the concern regarding the ambiguous phrasing of the term "all entering employees" was raised after the initial compromise on the *542 section had been reached between the Administration and Senate negotiators. [\[FN123\]](#) There is always a reluctance to reopen an issue after it has been successfully resolved. Second, and of probably greater importance, the guiding principle underlying the entire Administration-Senate negotiations was to track the section 504 approach. Often, the most effective way to implement that principle was simply to import the section 504 regulatory language directly into the ADA statute. In cases where that approach was used, there was significant reluctance, on both sides of the negotiating table, to change any of the regulatory language unless a compelling reason was put forward to do so. In the case of the term "all entering employees," it was felt that clarifying the term in report language, through the addition of the phrase "in a particular job category," was sufficient. [\[FN124\]](#)

Indeed, when the EEOC issued its regulations to Title I of the ADA, [\[FN125\]](#) the regulation dealing with employment entrance examinations included the words left out by Congress. The relevant regulation provides that employers may condition a job offer on the results of an employment entrance examination "if all entering employees in the same job category are subjected to such an examination regardless of disability." [\[FN126\]](#) Thus, although a strict reading of the statutory language of the ADA would have placed a significant burden on employers, the EEOC relieved that burden by placing the clarifying legislative intent into the language of the regulations.

2. Voluntary Questioning of Applicants

In most places in the ADA, such as the one described above, the legislative report language clearly complements the statutory language. Legislative history, however, is not always so clearly consistent with statutory language. In the latter cases, it is difficult for an agency to legitimately fill in missing pieces of the statute. For example, in the area of voluntary inquiries in the pre-employment stage, the EEOC chose not to supplement the statutory language in the manner indicated by various legislative reports.

The section 504 regulations include several paragraphs describing the manner in which an employer may solicit voluntary information from an applicant regarding his or her disability. [\[FN127\]](#) The regulations provide that a recipient may "invite applicants for employment to indicate whether and to what extent they are handicapped" in situations where a federal fund recipient is taking remedial ***543** action to correct the effects of past discrimination; where the recipient is taking voluntary action to overcome the effects of conditions that resulted in the limited participation in its programs by people with disabilities; or where a recipient is taking affirmative action pursuant to the requirements of section 503 of the Rehabilitation Act. [\[FN128\]](#) The regulations further provide that the recipient must make it clear to the applicant that the information is being requested solely for remedial or affirmative action purposes, on a voluntary basis, and that the refusal to provide the information will not subject the applicant to any adverse treatment. [\[FN129\]](#)

The original ADA bill, S. 2345, included the aforementioned paragraphs from the section 504 regulations. [\[FN130\]](#) As noted, S. 2345 had placed the entire section of medical examinations and inquiries under the rubric of regulations to be issued by the EEOC. The section, therefore, included almost verbatim the analogous section 504 regulations.

When the second ADA bill, S. 933, was developed, the Senate drafters subsumed the concept of restrictions on medical examinations and inquiries within the more general prohibition against tests and standards that "identify or limit" people with disabilities. [\[FN131\]](#) The drafters had no realistic way, within that generally worded provision, to add specific allowances for certain voluntary inquiries.

The appropriate place to have added such an allowance, if Congress had wished to do so, was in the new section on medical examinations and inquiries added to the revised ADA as a result of the Administration-Senate negotiations. As explained above, that compromise section was substituted for the general provision that had required job-validation of any tests that "identified or limited" people with disabilities.

The lack of any such allowance in the statute reflected a simple dynamic in the negotiation process. As noted, the basic principle driving the negotiations was to draw on the precedent of section 504 regulations and caselaw. In many circumstances, that

resulted in the exact language of the regulations being imported into the statute. Yet, the negotiators on the ADA knew they were supposed to be writing a law, not a regulation. While, in certain cases, it seemed to them that political agreement could be reached solely by resorting to existing regulatory language (hence the birth of the general medical examination section in the ADA), the three long paragraphs in the section 504 regulations relating to voluntary inquiries seemed "too regulatory" to place into the statute. Such an allowance seemed to be exactly the type of explication of a statutory provision that was more appropriately the responsibility of a regulatory agency, rather than of Congress.

Therefore, the accompanying committee reports state that certain types of voluntary inquiries would be allowed. Both the Senate Labor and Human Resources *544 Report and the House Education and Labor Report repeat verbatim the section 504 regulations regarding the circumstances in which certain voluntary inquiries regarding an applicant's disability could be made. [\[FN132\]](#) Both reports note that "[c]onsistent with the section in the legislation pertaining to pre-employment inquiries, it is the Committee's intent" that such voluntary inquiries be allowed. [\[FN133\]](#)

Of course, the only medical inquiries that were strictly consistent with the statutory section pertaining to pre-employment inquiries were those that were explicitly allowed by the statute. Indeed, all other medical inquiries had been explicitly prohibited by the statute. What the committee reports clearly meant was that, consistent with the intent of the section in the ADA legislation pertaining to pre-employment medical inquiries, certain voluntary medical inquiries were to be permitted. [\[FN134\]](#)

The flaw in the ADA drafters' reasoning is that once statutory language clearly prohibits all medical inquiries, it is illegitimate for a regulatory agency to rule that certain inquiries remain valid. Indeed, the EEOC regulations do not allow for the solicitation of information regarding an applicant's disability, even in cases where an employer professes to be doing so for voluntary remedial or affirmative action purposes. [\[FN135\]](#) In a section entitled "Medical examinations and inquiries specifically permitted," both the regulations and the appendix do not include voluntary pre-offer examinations or inquiries as acceptable under the ADA. [\[FN136\]](#)

The EEOC's decision not to allow voluntary medical inquiries in the pre-employment stage illustrates the fact that principles of statutory construction may operate, at times, to subvert congressional intent. It illustrates as well, however, that it is Congress that may need to change, rather than the principles of statutory construction.

As the previous example regarding the term "all entering employees" demonstrates, and indeed, as numerous other examples within the ADA could demonstrate as well, a statutory construction approach which relies solely on the strict words of a statute, with no reference to legislative intent, would not be appropriate. Such an approach would undermine the legitimate intent of Congress and would sometimes result in absurd conclusions. Thus, a basic principle of statutory interpretation should be to look to accompanying indicia of legislative intent whenever a term in the statute is unclear or is

not sufficiently defined, *545 and where the legislative history provides an explanation that is consistent with the particular provision at issue or with the statute in general.

A statutory interpretation approach that requires that the intent of Congress, as reflected in legislative statements, always govern, however,--even if such statements are directly contradictory to the stated terms of the statute--would likewise be difficult to accept. There is no doubt that the realities of congressional negotiation, settlement, and compromise are such that it is often easier to relegate items to a legislative report, even items on which there is no significant policy disagreement, rather than to incorporate the items in the final version of the statute. Nevertheless, a statement in a legislative report cannot plainly contradict the actual words of the statute and still be given weight. What this means, unfortunately, is that Congress may not always get the law that it intends. Such are the pitfalls of legislative writing in the midst of legislative politics.

In any event, to the extent it is solace to the ADA drafters, including myself, the EEOC's approach is probably the appropriate one to adopt. If employers truly wish to engage in remedial and affirmative action for people with disabilities, the best approach is not to ask applicants to fill out "voluntary" questionnaires which identify all past and present medical conditions of the applicant. It would be more effective for the employer to initiate contact with vocational rehabilitation agencies, private rehabilitation entities, independent living centers, or other local disability organizations, and identify and encourage people with disabilities to apply for jobs with the employer. Indeed, people with "hidden disabilities," such as epilepsy, HIV infection, or heart disease, which would be the types of disabilities most often identified on such questionnaires, do not usually need affirmative action. These individuals simply need to be protected from inappropriate consideration of their medical condition that might preclude them from a job for which they are qualified. Such individuals remain best protected by an absolute bar on pre-offer inquiries or exams.

Based on a strict reading of the statute, however, a dilemma could have existed for employers who are required to collect information regarding applicants' disabilities for purposes of compliance with the affirmative action requirements of Section 503 of the Rehabilitation Act. The EEOC regulatory guidance removes this dilemma by providing that employers covered under section 503 may continue to collect such information.

[\[FN137\]](#)

3. Job-Related and Consistent with Business Necessity

In describing limitations that would apply to medical exams and inquiries made of current employees, the ADA could not directly track the section 504 regulations because those regulations did not explicitly address the issue of current employees. [\[FN138\]](#) Instead, the Administration and Senate negotiators drew on *546 principles developed under Rehabilitation Act case law and regulations to develop a new provision specifically directed to current employees.

Under section 504 requirements, a person with a disability had to be "qualified" to perform a job. To be "qualified," a person had to be able to perform the essential functions of a job, with reasonable accommodations if necessary. Thus, an employer could demand that an employee undergo a medical examination, if the examination was necessary to determine whether the employee could actually continue to perform the essential functions of the job.

The Administration and Senate negotiators found it difficult, however, to devise a term or phrase that would incorporate this standard. On its face, it does not seem that it would have been difficult to set forth this standard in a few words. For example, the second ADA bill, as introduced, had described the standard in relatively straightforward terms: any test used had to be shown by the entity "to be necessary and substantially related to the ability of the individual to perform the essential functions of the particular employment position." [\[FN139\]](#)

The problem that the Administration faced was that this standard was used in the ADA not only as the limitation on medical examinations and inquiries of employees, but also as the standard for determining the validity of tests and criteria that had a disparate impact on people with disabilities. [\[FN140\]](#) The Administration was concerned that any terms used to describe the standard in the ADA could have implications for the Administration's stance on the appropriate disparate impact standard to be used in cases brought under Title VII of the Civil Rights Act of 1964. In that context, the Administration was clearly at odds with the general civil rights community. The civil rights community was committed to overturning the Supreme Court case of *Wards Cove Packing Co. v. Atonio*, [\[FN141\]](#) which had significantly altered the disparate impact standard under Title VII in a manner that made it more difficult for plaintiffs to prevail. [\[FN142\]](#) The Administration, by contrast, was committed to upholding the *Wards Cove* decision. [\[FN143\]](#)

The clear differences between the Administration negotiators and the Senate sponsors of the ADA on the *Wards Cove* issue threatened to create an impasse on the ADA negotiations. The resolution of the conflict did not result in a particularly well written law, but it did succeed in resolving the impasse and thereby creating a bill that would ultimately become law. [\[FN144\]](#) The negotiators agreed, as a policy matter, to disagree regarding the correct standard to be applied to disparate impact claims under Title VII. At the same time, however, ***547** the negotiators agreed that the standard under the ADA would be the section 504 standard prior to the *Wards Cove* decision. [\[FN145\]](#)

The negotiators agreed also not to be overly explicit regarding this policy agreement in the statute. Thus, they searched for a phrase that had some direct precedent in either the section 503 or section 504 regulations, or case law developed under these sections, that could legitimately be used as a clear "hook" to which a more explicit explanation could be attached in accompanying committee report language. The resulting phrase was--"job-related and consistent with business necessity." [\[FN146\]](#)

The Committee Reports from the Senate Labor and Human Resources Committee, the

House Education and Labor Committee, and the Judiciary Committee provided an explanation for the term "job-related and consistent with business necessity." These reports explained that, under this standard, any criteria or requirements with a disparate impact, or any medical examinations or inquiries of current employees, had to be "carefully tailored to measure the person's actual ability to do [the] essential function[s] of the job." [\[FN147\]](#) In addition, even if a criterion provided an accurate measure of an applicant's actual ability to perform a job, the applicant also had to be offered a reasonable accommodation to meet the criterion. [\[FN148\]](#) Finally, the reports made clear that employers had the same burden of proof as had been placed on them under section 504 case law prior to the Wards Cove decision. [\[FN149\]](#)

This compromise, again, had advantages and disadvantages for each side. On one hand, the Administration accepted that the Wards Cove standard would not be imported into the ADA. On the other hand, the Senate sponsors accepted that the ADA would fail to have, within the statute itself, a clear, explicit, and understandable standard.

The difference between the resolution of this issue, as compared to the resolution of the voluntary inquiries issue described earlier, is that the compromise did not result in the statute establishing one standard and the legislative reports *548 setting forth a radically different one. Instead, the statute was studiously neutral and ambiguous both on the meaning of the standard it was setting forth and on the burden of proof. Under appropriate canons of statutory interpretation, therefore, it is legitimate to turn to the legislative reports for explication of the statute. In this case, the legislative reports are not inconsistent with the statute but rather provide a useful explanation.

The EEOC regulations essentially track the approach of the ADA. In the sections dealing with qualification standards and prohibited medical examinations, the regulations themselves simply repeat the term "job-related and consistent with business necessity" without further explanation and use the neutral formulation that these standards and tests must be "shown to be" job-related and consistent with business necessity. [\[FN150\]](#) In the appendix to the EEOC regulations, however, the EEOC clearly notes that the employer has the burden of proving that standards or tests are job-related and consistent with business necessity, as had been required under section 504 case law, and that the meaning of the concept of "business necessity" is the same as under section 504. [\[FN151\]](#)

IV. CONCLUSION

The ADA is a sweeping civil rights law that will, in all likelihood, have a significant effect on this country. It is a law that sets forth detailed rights and responsibilities for people with disabilities, employers, and businesses providing goods and services to the public. If properly enforced, the requirements of the law will have an important long-term effect on how employers and businesses interact with people with disabilities.

The ADA also represents a classic example of the legislative process. Each piece of

legislation is a product of many forces: opposing interest groups, members of Congress with differing objectives, and an Executive branch with a political and social agenda. These factors, together with factors such as legislative time pressures, the dynamics of negotiations, and the need for compromise, shape the outcome of many laws--including the ADA.

An analysis of the medical examinations and inquiries section of the ADA illustrates the concrete outcomes of this legislative process in the law's statutory language and legislative history. I believe the analysis demonstrates that it is appropriate, and indeed necessary, to take legislative intent into account in developing a reasoned and thoughtful interpretation of a law in light of the unintentional, and sometimes intentional, ambiguities that Congress places in a statute. At the same time, the analysis serves as a warning to legislative drafters that congressional intent cannot be assumed to be applied in all cases, regardless of how clearly that intent may be stated in the legislative history.

The challenge of the future will be the effective implementation of the ADA. As Judge Stephen Breyer, Chief Judge of the First Circuit, has noted, courts appropriately look to a range of sources in their efforts to understand and *549 interpret a law. [\[FN152\]](#) It is to be hoped that both the written and oral traditions of the ADA, as explicated in part by this article, will be helpful to the courts, to persons with disabilities, and to entities with responsibilities under the law.

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[\[FN1\]](#). Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at [42 U.S.C.A. §§ 12101-12213 \(West Supp. 1991\)](#) and [47 U.S.C.A. §§ 225, 611 \(West 1991\)](#)). Textual references to provisions of the ADA are cited to the codified actions of the U.S.C.A.

[\[FN2\]](#). Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C.).

[\[FN3\]](#). Pub. L. No. 88-352, 78 Stat. 243 (1964) (codified as amended at [42 U.S.C. §§ 2000a-2000e \(1988\)](#) and other scattered sections of 42 U.S.C.).

[\[FN4\]. 29 U.S.C. § § 791, 793, 794 \(1988\).](#)

[\[FN5\].](#) Section 501 of the Rehabilitation Act covers all departments and agencies of the federal government (including the United States Postal Service) and requires such entities to develop and implement an affirmative action plan for the hiring, placement, and advancement of people with handicaps. [29 U.S.C. § 791](#). Section 503 of the Rehabilitation Act covers entities that have a contract of more than \$2,500 with a federal department or agency for the provision of goods and services, and likewise requires affirmative action to employ and advance people with handicaps. [29 U.S.C. § 793](#). Sections 501 and 503 have been interpreted by the courts to prohibit discrimination as well. See, e.g., [Gardner v. Morris, 752 F.2d 1271 \(8th Cir. 1985\)](#) (β 501); [Moon v. Department of Labor, 747 F.2d 599 \(11th Cir. 1984\)](#) (β 503), cert. denied, [471 U.S. 1055 \(1985\)](#). Section 504 covers all entities that receive federal funds, as well as all the programs and activities conducted by federal agencies, and prohibits discrimination on the basis of handicap. [29 U.S.C. § 794](#).

[\[FN6\].](#) See, e.g., [School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273 \(1987\)](#) (school); [Lussier v. Dugger, 904 F.2d 661 \(11th Cir. 1990\)](#) (prison); [Giauza v. Vernick, 756 F. Supp. 632 \(D. Mass. 1991\)](#) (medical center); [Herining v. Village of Mayfield Village, 610 F. Supp. 17 \(N.D. Ohio 1985\)](#) (village).

[\[FN7\].](#) See, e.g., [Office of Fed. Contract Compliance Program v. PPG Indns., Inc., No. 86-OFCCP-9 \(Dep't Labor 1989\)](#) (suit under β 503); [Office of Fed. Contract Compliance Program v. Commonwealth Aluminum, No. 82-OFCCP-6 \(Dep't Labor 1988\)](#) (same), [Office of Fed. Contract Compliance Program v. Ozark Airlines, Inc., 80-OFCCP-24 \(Dep't Labor 1986\)](#) (same); [Office of Fed. Contract Compliance Program v. Western Electric Co., No. 80-OFCCP-29 \(Dep't Labor 1985\)](#) (same). There is no private right of action under β 503 of the Rehabilitation Act; the only enforcement mechanism is the Department of Labor's Office of Federal Contract Compliance Program ("OFCCP"). See, e.g., [Rogers v. Frito-Lay, Inc., 611 F.2d 1074 \(5th Cir.\)](#), cert. denied, [449 U.S. 889 \(1980\)](#).

[\[FN8\].](#) See, e.g., [Consolidated Rail Corp. v. Darrone, 465 U.S. 624 \(1984\)](#) (employment); [Southeastern Community College v. Davis, 442 U.S. 397 \(1979\)](#) (education); [United States v. Baylor Univ. Medical Center, 736 F.2d 1039 \(5th Cir. 1984\)](#) (medical services), cert. denied, [469 U.S. 1189 \(1985\)](#); [Leary v. Crapsey, 566 F.2d 863 \(2d Cir. 1977\)](#) (bus transportation); [United Handicapped Fed'n v. Andre, 558 F.2d 413 \(8th Cir. 1977\)](#) (urban mass transit).

[\[FN9\].](#) See [29 U.S.C. § § 791, 793](#) (referring solely to affirmative action in employment decisions).

[FN10]. See, e.g., [29 U.S.C. § 706\(8\)\(A\) \(1988\)](#) (definition of "individual with handicaps" under Title V of the Rehabilitation Act); [45 C.F.R. § 84.11 \(1990\)](#) (forms of prohibited employment discrimination); [45 C.F.R. § 84.12 \(1990\)](#) (requirement of reasonable accommodation). It should be noted that the Rehabilitation Act protects individuals with a handicap against discrimination. People with disabilities, and their advocates, prefer to use the term "disability" rather than "handicap." In recognition of that preference, the term "disability" is used throughout the ADA and this article. The definition of disability is the same as the definition of handicap under § 504, with the exception of the exclusion of current illegal users of drugs and the exclusion of certain other individuals.

[FN11]. [42 U.S.C. §§ 2000e to 2000e-17](#).

[FN12]. *Id.*

[FN13]. See, e.g., H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 3, at 26, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 267, 448-49.

[FN14]. The provisions of the ADA were developed over the course of approximately three years. A brief description of that process acts forth the framework in which various compromises were reached during development of the law. See other articles within this symposium edition on the ADA for additional material on the statute's development.

[FN15]. Chai Feldblum, Personal Notes and Observations Regarding Chronology of the ADA, at 1 (on file with the author). I use the term "disability advocates" throughout this piece. In doing so, I am referring to the "legal" advocates who researched, analyzed and negotiated the content of the law. This author was a lead person in that group and this article reflects primarily meetings in which the legal content of the ADA was discussed. In such meetings, this author and Patrisha Wright from the Disability Research Education and Defense Fund would have always been present. Other individuals who participated in such meetings, at various points and for different issues, included: Robert Burgdorf, then from Easter Seals, and Arlene Mayerson, from DREDF (both on law generally). Jim Weisman, from Eastern Paralyzed Veterans of America, and David Capozzi, from Easter Seals (for transportation issues); Bonnie Milstein, from the Mental Health Law Project (for mental disability issues); and Ellen Weber and Katie O'Neill from the Legal Action Center (for drug and alcohol issues). Karen Strauss, from the National Center for Law and the Deaf, was the lead advocate on the communications section of the law.

There was a much larger group of disability advocates who provided the key strategic

and lobbying force for the law. It is impossible to name all those who worked on passage of the ADA, both in D.C. and across the nation, and this article does not focus on that aspect of the law's development. As a general matter, however, the Civil Rights Task Force of the Consortium of Citizens with Disabilities was the leader in such work, headed by Patrisha Wright of DREDF, Elizabeth Savage, then of the Epilepsy Foundation, and Curtis Decker of the National Ass'n of Protection and Advocacy Systems.

[FN16]. The National Council on the Handicapped, now called the National Council on Disability, is a twelve-member council appointed by the President and charged with reviewing federal laws and programs affecting persons with disabilities and making recommendations to the President and to Congress for improving such programs and laws. See Rehabilitation Amendments of 1984, Pub. L. No. 98-221 § 142, 98 Stat. 17, 27.

[FN17]. NATIONAL COUNCIL ON THE HANDICAPPED, TOWARDS INDEPENDENCE (1986), NATIONAL COUNCIL ON THE HANDICAPPED, ON THE THRESHOLD OF INDEPENDENCE (1988) [[hereinafter THRESHOLD OF INDEPENDENCE].

[FN18]. THRESHOLD OF INDEPENDENCE, *supra* note 17.

[FN19]. Feldblum, *supra* note 15, at 1.

[FN20]. 45 C.F.R. § 84 and app. (1990). The regulations were first issued in 1977 at 42 Fed. Reg. 22,677-94 (1977).

[FN21]. See, e.g., 28 C.F.R. 41 (1990) (Dep't of Justice); 32 C.F.R. 56 (1990) (Dep't of Defense); 34 C.F.R. 104 (1990) (Educ. Dep't); 40 C.F.R. 12 (1990) (Env'tl. Protection Agency).

[FN22]. 29 U.S.C. § 794.

[FN23]. R. Burgdorf, "History" *The Americans with Disabilities Act A Practical and Legal Guide to Impact, Enforcement, and Compliance*, at 22-23 (1990); Scotch, *From Good Will to Civil Rights: Transforming Federal Disability Policy* (Temple U. Press 1984).

[FN24]. Feldblum, *supra* note 15, at 1.

[FN25]. Lowell Weicker, at that time, the Republican Senator from Connecticut and the ranking minority member of the Subcommittee on the Handicapped, was approached by the National Council on Disability to take the lead on the ADA because of his longstanding interest in the area of disability rights. Senator Tom Harkin, a Democratic Senator from Iowa and Chairman of the Subcommittee on the Handicapped, worked closely with Senator Weicker in this endeavor. In the House of Representatives, Congressman Tony Coelho, a Democrat from California and third-ranking Member in the House Democratic Leadership, was the key leader in the development of the ADA.

[FN26]. S. 2345, 100th Cong., 2d Sess., 134 CONG. REC. S5089 (daily ed. Apr. 28, 1988) (introduction of S. 2345).

[FN27]. H.R. 4498, 100th Cong., 2d Sess., 134 CONG. REC. H2757 (daily ed. Apr. 29, 1988) (introduction of H.R. 4498). For purposes of this article, the ADA that was introduced in the 100th Congress will be referred to as S. 2345 and not as H.R. 4498. The two bills were identical.

[FN28]. [45 C.F.R. § 84.12\(a\)](#).

[FN29]. S. 2345, 100th Cong., 2d Sess. § 7(a)(1), 134 CONG. REC. S5112 (daily ed. Apr. 28, 1988).

[FN30]. *Id.* § 8(c), 134 CONG. REC. S5112-13. The draft legislation also modified the definition of "disability." *Id.* § 3(2)(A).

[FN31]. Joint Hearing before the Subcomm on the Handicapped of the Senate Comm. on Labor and Human Resources and Subcomm. on Select Education of the House Committee on Education and Labor, 100th Cong., 2d Sess. 926 (1988).

[FN32]. See Feldblum, *supra* note 15, at 1-2.

[FN33]. *Id.*

[FN34]. Senator Lowell Weicker was defeated in his re-election bid in November 1989. As a result, Senator Tom Harkin, Chairman of the Senate Subcommittee on the

Handicapped (later renamed Subcommittee on Disability Policy), took an even greater role in the development and passage of the ADA. Senator Harkin's staff director for the Committee, Bobby Silverstein, was a key person in those efforts. In addition, Senator Edward Kennedy took a much greater role in the development and passage of the ADA during the 101st Congress. Senator Kennedy's staff people in that effort, Carolyn Osolinik, chief counsel of Senator Kennedy's Immigration and Refugee Subcommittee of the Judiciary Committee, and Michael Iskowitz, staff counsel with the Labor and Human Resources Committee, were active in the development of every stage of the ADA and essential to its passage.

[FN35]. Feldblum, *supra* note 15, at 2. Throughout the ADA drafting process, the Civil Rights Task Force of the Consortium of Citizens with Disabilities, headed by Patricia Wright of the Disability Rights Education and Defense Fund, Elizabeth Savage, then of the Epilepsy Foundation, and Cart Decker of the National Association of Protection and Advocacy Systems were the main strategic and lobbying force behind the ADA.

[FN36]. *Id.*; S. 933, 101st Cong., 1st Sess., 135 CONG. REC. S4984-98 (daily ed. May 9, 1989).

[FN37]. H.R. 2273, 101st Cong., 1st Sess., 135 CONG. REC. H1791 (daily ed. May 9, 1989). See also Feldblum *supra* note 15, at 2. On June 15, 1989, Congressman Tony Coehlo resigned from the House of Representatives. Before he left, Congressman Coehlo asked Congressman Steny Hoyer, Democrat from Maryland and Chairman of the Democratic Caucus, to take over leadership on the ADA in the House of Representatives. Congressman Hoyer became the key person shepherding the ADA through the House. *Id.*

[FN38]. [45 C.F.R. § 84.4 \(1990\)](#).

[FN39]. S. 933, *supra* note 36, tit. ??, 135 CONG. REC. S4988-89.

[FN40]. [45 C.F.R. § 84.12\(b\)](#).

[FN41]. Cf. S. 2345, 100th Cong., 2d Sess. § 3(5) (1988) with S. 933, *supra* note 36.

[FN42]. S. 933, *supra* note 36, § 3(3), 135 CONG. REC. S4988.

[FN43]. Id. β 202(b)(1), 135 CONG. REC. S4989. S. 933 also reinstated the definition of disability used under β 504 of the Rehabilitation Act. See id. β 3(2).

[FN44]. Hearings on S. 933 Before the Subcomm, on the Handicapped of the Senate Comm. on Labor and Human Resources, 101st Cong., 1st Sess. (May 9, 10, 16, & June 22, 1989) [hereinafter Labor & Human Resources Comm. Hearings].

[FN45]. See Feldblum, *supra* note 15, at 2-3.

[FN46]. Labor & Human Resources Comm. Hearings, *supra* note 44, at 808-20 (prepared statement of former Attorney General Dick Thornburgh).

[FN47]. Id.

[FN48]. Feldblum, *supra* note 15, at 2-3.

[FN49]. S. 933, *supra* note 36, β β 102, 302, 135 CONG. REC. S10,701-08 (daily ed. Sept. 7, 1989). Representatives of the business community were concerned that courts might apply the general requirements of Title I in a manner that would be inconsistent with the specific requirements of the employment title (at that point, Title II of S. 933), which included various protections and limitations on behalf of employers. As a general matter, the employer community was opposed to having two separate sections of the bill set out the same employment requirements because of the potential for confusion.

[FN50]. Id. β β 101(9), 301(5), 135 CONG. REC. S10,702, S10,705. The section 504 regulations did not include a definition for "undue hardship," but simply set forth factors to be considered when weighing whether a particular accommodation posed an undue hardship. See 45 C.F.R. β \$4.12(c). The business community wanted a clearer definition of the standard of "undue hardship" included in the law. In addition, because the term "readily achievable" had not previously been used in the β 504 regulations, the business community wanted a definition of that term as well.

[FN51]. S. 933, *supra* note 36, β 106; 135 CONG. REC. S10,703 (daily ed. Sept. 7, 1989). The Civil Rights Act of 1964 did not allow for the recovery of compensatory or punitive damages. In the public accommodations title, however, the Attorney General was given the authority to bring cases for violations of that title and to request the imposition of monetary fines. Id. β 308; 135 CONG. REC. S10,707 (daily ed. Sept. 7, 1989).

[FN52]. Feldblum, *supra* note 15, at 2. The Committee passed the bill by a vote of 16-0 on August 2, 1989. The final piece of the negotiations was completed at 3:00 a.m. on the day of the Senate Committee consideration; the Senate left for its summer recess on August 4, 1989.

The entire period of the negotiations took place within a very short time frame. Indeed, Senate sponsors of the ADA often felt as if they were "racing against the clock" because of a desire to have the negotiations completed, and for the Senate Labor and Human Resources Committee to consider the bill, before Congress left for its August recess. *Id.*

The reality of political time pressures represents a severe and real limitation to the recommendations I make later in this article regarding optimal modes of legislative drafting for purposes of statutory construction principles. The question is whether such real limitations call for a modification of those statutory construction principles, or whether such limitations mean that congressional intent will simply not always be perfectly implemented in subsequent judicial interpretation.

[FN53]. SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES, S. REP. NO. 116, 101st Cong., 1st Sess. (1990) (hereinafter SENATE REPORT); see also Feldblum, *supra* note 15, at 4. Some concerns still remained and were reflected in the additional views of Senators Orrin Hatch and Dan Coats, incorporated in the Senate Committee report. SENATE REPORT, *supra*, at 96-107.

[FN54]. 135 CONG. REC. S10,774, S10,776, S10,780 (daily ed. Sept. 7, 1989) (removal of current users of illegal drugs from coverage under the Rehabilitation Act of 1973); *Id.* at S10,776 (removal of transvestites from coverage under the ADA); *Id.* (removal of current users of illegal drugs from coverage under the employment title of the ADA); *Id.* at S10,784-85 (removal of current users of illegal drugs from coverage under all titles in the ADA); *Id.* at S10,785-97 (removal of individuals with selected mental and sexual disorders from coverage under the ADA).

[FN55]. *Id.* at S10,803. Sixteen senators did not vote.

[FN56]. H.R. 2273, 101st Cong. 2d Sess. (1989). The ADA was referred to the Education and Labor Committee, which held jurisdiction over the Rehabilitation Act of 1973, to the House Judiciary Committee, which held jurisdiction over civil rights laws, and to the Public Works and Transportation Committee and the Energy and Commerce Committee, which respectively held jurisdiction over various transportation areas.

[FN57]. *Id.* Each House committee, with its particular Democratic and Republican leadership and its respective staff, displayed a unique approach to the deliberations and

negotiations on the ADA. During this cutire process. Congressman Steny Hoyer was the key player in ensuring that the ADA continued to move smoothly through the House of Representatives. See Feldblum, *supra* note 15, at 2. Congressman Hoyer was assisted throughout this effort by his expert staff person Melissa Schulman.

[FN58]. See Feldblum *supra* note 15, at 4-5. The Education and Labor Committee had jurisdiction over the Rehabilitation Act and was therefore a key committee in the House of Representatives. In addition, it was the first time that House members had the opportunity to carefully scrutinize the ADA. Representatives Hoyer and Bartlett were designated by their respective party leaderships to negotiate a refined ADA that would garner broad support in the House of Representatives. Representatives Hoyer and Bartlett personally devoted a significant number of hours to these negotiations. *Id.*

[FN59]. *Id.* at 4-5; see also Cohen, *Ironing Out a Bill for the Disabled*, *Nat'l J. J.*, Jan. 20, 1990, at 139.

[FN60]. Feldblum, *supra*, note 15 at 3; see also Feldblum, *List of Changes in the ADA Enacted by the Education and Labor Committee* (unpublished paper November 14, 1990) (on file with the author).

[FN61]. Feldblum, *supra* note 15, at 6.

[FN62]. 136 CONG. REC. H2623-26 (daily ed. May 22, 1990) (statement of Congressman Fish describing the six amendments); see also Feldblum, *supra* note 15, at 6-7.

[FN63]. 136 CONG. REC. H2638-39 (daily ed. May 22, 1990).

[FN64]. *Id.* at H2483-84 (daily ed. May 17, 1990). The amendment was passed by a vote of 199-187. *Id.*

[FN65]. The Senate provided that its members would be covered under the law just like all other entities were covered. In other words, a plaintiff could bring a lawsuit against a member of Congress in federal court. 135 CONG. REC. S10, 780-82 (daily ed. Sept. 7, 1989). By contrast, the House of Representatives provided that its members would be covered by the ADA, but that plaintiffs would be restricted to use of an internal administrative system set up by Congress. H.R. 2463, 101st Cong., 2nd Sess., § 509, 136 CONG. REC. H2425 (daily ed. May 16, 1990) (vote accepting the rule). *Id.* at

H2463 (β 509 to resolve charges of discrimination of the ADA).

[FN66]. See Feldblum, *supra* note 15, at 3; 136 CONG. REC. S9528-32 (daily ed. July 11, 1990) (motion to recommit to conference with revised version of Senate coverage under the ADA comparable to coverage of the House of Representatives); *Id.* at S9532-56 (daily ed. July 11, 1990) (motion to recommit to conference with revised version of amendment concerning food-handlert, with requirement that the Secretary of Health and Human Services publish a list of diseases that can actually be transmitted through food-handling).

[FN67]. 136 CONG. REC. H4629-30 (daily ed. July 12, 1990); *Id.* S9695 (daily ed. July 13, 1990).

[FN68]. Americans with Disabilities Act of 1990, *supra* note 1.

[FN69]. [42 U.S.C.A. β 12112\(c\)](#).

[FN70]. See SENATE REPORT, *supra* note 53, at 39; H.R. REP. NO. 485, *supra* note 13, pt. 2, at 72.

[FN71]. See [45 C.F.R. β 84.14 \(1990\)](#).

[FN72]. *Id.* [β 84.14\(a\)](#).

[FN73]. *Id.*

[FN74]. *Id.*, app. A, No. 18.

[FN75]. *Id.* [β 84.14\(c\)](#).

[FN76]. *Id.*

[FN77]. *Id.* [β 84.14\(c\)\(1\)](#), app. A, No. 18.

[FN78]. Id. [β 84.14\(d\)](#). The individuals who may obtain access to the records are:

1. Supervisors and managers who need to be informed regarding necessary restrictions on the duties of the employee or regarding necessary accommodations;
2. First aid and safety personnel, if appropriate in the individual case, who may be informed if the disability would require emergency treatment; and
3. Government officials investigating compliance with the Rehabilitation Act may be provided the information upon their request.

Id.

[FN79]. Id. [β 84.14\(c\)\(2\)](#). The regulations state that medical examination results may be "used only in accordance with the requirements of this part." Id. This same roundabout terminology was imported into the ADA. [42 U.S.C.A. β 12112\(c\)\(2\)\(C\)](#).

[FN80]. 41 C.F.R. [β 60-741.6\(c\)\(3\)](#) (1991).

[FN81]. The regulations, [45 C.F.R. β 84.14](#), are titled and refer solely to "pre-employment inquiries."

[FN82]. See generally AMERICAN BAR ASS'N, AIDS: THE LEGAL ISSUES 168 & n.44 (1988).

[FN83]. [Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1, 714 F. Supp. 1377, 1389 \(E.D. La. 1989\)](#), aff'd, [909 F.2d 820 \(5th Cir. 1990\)](#).

[FN84]. S. 2345, 100th Cong., 2d Sess. [β 4\(a\)\(1\)-\(6\)](#) (1988).

[FN85]. Id. [β 5\(a\)\(1\)\(A\)\(i\)](#).

[FN86]. Feldblum, supra note 15, at 1. Part of the reason for adding the prohibition in the statute was to ensure that the [β 504](#) regulatory approach, rather than the [β 503](#) approach would be adopted for purposes of the ADA.

[FN87]. S. 2345, 100th Cong., 2d Sess. [β 8\(c\)\(3\)](#) (1988).

[FN88]. Feldblum, supra note 15, at 1.

[FN89]. S. 933, 101st Cong., 1st Sess, Table of Contents, 135 CONG. REC. S4987-88 (daily ed. May 9, 1989). S. 933 still included a general Title I which applied to all areas, but the bill also devoted separate titles to the areas of employment, public services, public accommodations, and telecommunications. *Id.*

[FN90]. *Id.* β 202(b)(3), 135 CONG. REC. S4989 (daily ed. May 9, 1989) (emphasis added).

[FN91]. *Id.*

[FN92]. By contrast, most advocates for people with disabilities were more familiar with β 504, rather than β 503 requirements. The reason was simple. There is no private right of action under β 503 and the only recourse is an administrative complaint processed through the Department of Labor. See *supra* note 7 and accompanying text for citations to cases interpreting the limited right of action through the Department of Labor. Private disability lawyers did not usually intervene in these cases. Instead, most private attorneys who brought cases for people with disabilities brought them pursuant to β 504, which allowed private plaintiffs a right of action in federal court. See *supra* notes 6 & 8 and accompanying text for citations to cases brought under β 504.

[FN93]. Feldblum, *supra* note 15, at 1-2. See *supra* note 90 and accompanying text discussing the language of the medical examination usage provision.

[FN94]. While the motivation for the provision was actually narrower than its final wording, it was difficult to devise a narrower provision for both political and practical reasons. As a political matter, a provision explicitly prohibiting solely the administration of tests to determine disabilities such as HIV infection, epilepsy and mental illness would have been difficult for Congress to pass. As a practical matter, it would have been difficult for the provision to have provided a definition of a "disability that causes social stigma."

[FN95]. Representatives of the business community had relayed their concerns to the Administration regarding the overall bill, including their concerns with this particular provision. See Feldblum, *supra* note 15, at 3.

[FN96]. *Id.*

[FN97]. S. 933, supra note 36, [§ 102\(c\)](#), 135 CONG. REC. S10703 (daily ed. Sept. 7, 1989).

[FN98]. [42 U.S.C.A. § 12112\(c\)\(2\)\(A\)](#). An employer may not, however, ask an applicant whether he or she has a disability that would prevent the person from doing job-related functions. Such a question is the same as asking an applicant, in the early application stages, whether the person has a disability, but simply sugar-coats the question with a general reference to "job-related functions." Instead, an employer must determine what are the necessary job functions and must ask the applicant directly whether he or she can perform those functions. *Id.*

[FN99]. *Id.* [§ 12112\(c\)\(3\)](#).

[FN100]. *Id.* As one legislative report put it: "The results of the medical examination cannot be used to discriminate against a person with a disability if the person is still qualified for the job." H.R. REP. NO. 485, supra note 13, at 43.

[FN101]. [56 Fed. Reg. 35,737-38 \(1991\)](#) (to be codified at [29 C.F.R. § 1630.14](#)). The EEOC regulations explain the requirement in this way:

Medical examinations permitted by this Section are not required to be job-related and consistent with business necessity. However, if certain criteria are used to screen out an employee or employees with disabilities as a result of such an examination or inquiry, the exclusionary criteria must be job-related and consistent with business necessity, and performance of the essential job functions cannot be accomplished with reasonable accommodation as required in this part.

Id.

[FN102]. [42 U.S.C.A. § 12112\(c\)\(3\)\(B\)](#).

[FN103]. *Id.* [§ 12112\(c\)\(4\)](#).

[FN104]. See, e.g., H.R. REP. NO. 485, supra note 13, at 43; *id.* pt. 2, at 73. The manner in which these requirements are included in the ADA reinforces the argument that these requirements are already a part of [§ 504](#). The various legislative reports indicate that Congress was simply extending to the private sector the existing requirements of [§ 504](#). *Id.*

[\[FN105\]](#). [42 U.S.C.A. § 12112\(c\)\(4\)\(A\)](#).

[\[FN106\]](#). See H.R. REP. NO. 485, *supra* note 13, pt 2, at 75; see also SENATE REPORT, *supra* note 53, at 39.

[\[FN107\]](#). As the EEOC regulatory guidance explains, "The purpose of this provision is to prevent the administration to employees of medical tests or inquiries that do not serve a legitimate business purpose. For example, if an employee suddenly starts to use increased amounts of sick leave or starts to appear sickly, an employer could not require that employee to be tested for AIDS, HIV infection, or cancer unless the employer can demonstrate that such testing is job-related and consistent with business necessity." [56 Fed. Reg. 35,750 \(July 26, 1991\)](#) (Interpretive Guidance to [29 C.F.R. § 1630.13](#)).

[\[FN108\]](#). [42 U.S.C.A. § 12112\(c\)\(4\)\(A\)](#).

[\[FN109\]](#). See *supra* notes 71-79 and accompanying text for a discussion of the § 504 two-step process.

[\[FN110\]](#). *Id.*

[\[FN111\]](#). *Id.*

[\[FN112\]](#). Employers may choose to limit the breadth of pre-employment exams and inquiries for practical reasons. See *supra* notes 98-102 and accompanying text for a discussion of permissible and impermissible inquiries. Thus, for example, most employers would probably choose not to require that all applicants for a job undergo an HIV antibody test. *Id.*

[\[FN113\]](#). S. 933, *supra* note 36, § 102(c)(4), 135 CONG. REC. S10703 (daily ed. Sept. 7, 1989) (emphasis added).

[\[FN114\]](#). Feldblum, *supra* note 15, at 3.

[\[FN115\]](#). *Id.*

[FN116]. [42 U.S.C.A. § 12112\(c\)\(4\)\(B\)](#). See also Feldblum, *supra* note 15, at 6-7.

[FN117]. [42 U.S.C.A. § 12112\(c\)\(4\)\(C\)](#).

[FN118]. [45 C.F.R. § 84.14\(c\)\(1\)](#) (emphasis added).

[FN119]. *Id.* § 84, app. A, subpart B, No. 18, at 22,689.

[FN120]. [42 U.S.C.A. § 12112\(c\)\(3\)\(A\)](#) (emphasis added).

[FN121]. Feldblum, *supra* note 15, at 1.

[FN122]. SENATE REPORT, *supra* note 53, at 39; H.R. REP. NO. 485, *supra* note 13, pt. 2, at 73.

[FN123]. SENATE REPORT, *supra* note 53, at 39; H.R. REP. NO., *supra* note 13, pt. 2, at 73. The timing issues in this area can be partly traced to the manner in which the negotiations took place. The actual negotiations during July 1989 took place solely between representatives of the Administration and representatives of the Senate sponsors of the ADA; representatives of the business and disability communities were not present at the negotiations. As agreements were reached between the official negotiators, or as questions were raised in the course of the negotiations, those agreements or questions were conveyed in turn to representatives of the business and disability communities. See Feldblum, *supra* note 15, at 1.

[FN124]. Feldman, *supra* note 15, at 1.

[FN125]. [56 Fed. Reg. 35,734 \(1991\)](#) (to be codified at 29 C.F.R. § 1630-1630.16).

[FN126]. *Id.* (to be codified at [29 C.F.R. § 1630.14](#)) (emphasis added).

[FN127]. [45 C.F.R. § 84.14\(b\) \(1990\)](#).

[\[FN128\]](#). Id.

[\[FN129\]](#). Id. [β 84.14\(b\)\(1\)-\(2\)\(1990\)](#).

[\[FN130\]](#). S. 2345, 101st Cong., 2d Sess, [β 8\(c\)\(3\)\(B\)\(iii\)\(I\)-\(II\)](#) (1988).

[\[FN131\]](#). See supra notes 90-94 and accompanying text for a description of the original general provision.

[\[FN132\]](#). Senate Report, supra note 53; H.R. REP. NO. 485, supra note 13, pt. 2, at 72.

[\[FN133\]](#). Senate Report, supra note 53, at 40; H.R. REP. NO. 485, supra note 13, pt. 2, at 75-76.

[\[FN134\]](#). H.R. REP. NO. 485, supra note 13, pt. 3, at 44. The House Judiciary Committee Report was slightly more honest on this point than the other legislative reports. The report noted that "[c]onsistent with regulations implementing the Rehabilitation Act, covered entities may invite applicants to indicate whether and to what degree they have a disability only under the following circumstances." Id. (emphasis added). The report then set forth the [β 504](#) standard for such voluntary inquiries. The implicit point of the report was that covered entities were allowed to engage in the same activities under the ADA as they could under [β 504](#). Id.

[\[FN135\]](#). [56 Fed. Reg. 35,737-38](#) (to be codified at [29 C.F.R. β 1630.13-14](#), and app.).

[\[FN136\]](#). Id. (to be codified at [29 C.F.R. β 1630.14](#)).

[\[FN137\]](#). [56 Fed. Reg. 35,750-51 \(1991\)](#) (Interpretive Guidance to [29 C.F.R. β 1630.1\(b\), \(c\)](#) and [1630.14\(a\)](#)).

[\[FN138\]](#). See supra notes 81-83 and accompanying text.

[\[FN139\]](#). S. 933, supra note 36, [β 202\(b\)\(3\)](#), 135 CONG. REC. 4989 (daily ed. May 9, 1989).

[FN140]. The provision applied to all qualification standards that would "tend to screen out" persons with disabilities. *Id.* This applied to standards that were neutral on their face, but had a disparate impact on people with disabilities.

[FN141]. [490 U.S. 642 \(1989\)](#).

[FN142]. See Mayerson, [Title I--The ADA Employment Provisions, 64 TEMP. L. REV. 499, 511-12 \(1990\)](#).

[FN143]. *Id.*

[FN144]. Herein lies the essence of politics and legislative writing: sometimes members of Congress will accept a poorly written section of a bill in return for having the bill passed.

[FN145]. Mayerson, *supra* note 142, at 512.

[FN146]. Feldblum, *supra* note 15, at 2, 3.

[FN147]. SENATE REPORT, *supra* note 53, at 37-38; H.R. REP. NO. 485, *supra* note 13, pt. 2, at 71; *id.* pt. 3, at 42.

[FN148]. See citations *supra* note 147. In other words, the β 504 approach, which requires the provision and assessment of a reasonable accommodation, applies in this context as well.

[FN149]. See, e.g., SENATE REPORT, *supra*, note 53. The Senate Report and the House Education and Labor report used the same formulation to set forth this burden of proof. Both reports noted that the burden of proof was to be the same as "parafiel agency provisions are construed under β 504 of the Rehabilitation Act as of June 4, 1989." *Id.* at 38; H.R. REP. NO. 485, *supra*, note 13, pt. 2 at 72. The reports then cited four agency regulations in which, either directly in the regulations or in case law construing those regulations, the burden of proof had been placed on the employer. See also Mayerson, *supra* note 142, at 512-13.

The House Indiciary Report was more straightforward on the issue. That report simply stated that if an employer used a standard or test that had a discriminatory effect on

people with disabilities, "this practice would be discriminatory unless the employer can demonstrate that it is job-related and consistent with business necessity." H.R. REP. NO. 485, supra, note 13, pt. 3, at 42. The report cites [Prewitt v. United States Postal Serv., 662 F.2d 292, 308 \(5th Cir. 1981\)](#), the leading β 504 case on the burden of proof issue, for interpretive support.

[\[FN150\]. 56 Fed. Reg. 35,737](#) (to be codified at [29 C.F.R. \$\beta\$ \$\beta\$ 1630.10\(a\)](#) and [1630.13\(b\)](#)).

[\[FN151\]. 56 Fed. Reg. 8,600-01 \(1991\)](#).

[\[FN152\]](#). Justice Antouin Scalia and Judge Stephen Breyer discussed the use of legislative history in statutory interpretation in a presentation sponsored by the Committee on Legislation, D.C. Bar Association, March 11, 1991, Washington, D.C.

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