

TESTIMONY OF DICK THORNBURGH
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BEFORE THE SENATE JUDICIARY COMMITTEE
REGARDING THE ADA RESTORATION ACT
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Thank you for that kind introduction. My name is Dick Thornburgh and I am currently counsel to the national law firm of Kirkpatrick & Lockhart Preston Gates Ellis LLP, resident in their Washington, D.C. office. I am the former Attorney General of the United States and the former governor of Pennsylvania. It is an honor to be here before you today to testify about the need for immediate consideration and passage of the ADA Restoration Act, S. 1881.

When I served as Attorney General of the United States under President George H.W. Bush, one of my proudest achievements was working on passage of the ADA. As parents of a child with a disability, both my wife and I fully understand the importance of the ADA to the 54 million Americans with disabilities and their families. The ADA – which sets as its goals equality of opportunity, full participation, independent living, and economic self-sufficiency for people with disabilities – is one of the most significant pieces of civil rights legislation in the past twenty-five years, and has changed the lives of millions of Americans with disabilities.

On occasions like this, I always have in my mind that glorious, sun-filled day, July 26, 1990, on the South Lawn of the White House, when President George H.W. Bush signed into laws the Americans with Disabilities Act. None of the 3,000 or so persons, with and without disabilities, present for the event will ever will forget the excitement of that day, as this bill of rights for millions of Americans became the law of the land.

Make no mistake about it – the passage of the ADA 17 years ago was the result of strong, bipartisan work. I was personally involved in these negotiations in my role as Attorney General

of the United State during the Bush Administration. Together, the Bush Administration and Congress – both the Senate and the House, Republicans and Democrats – as well as the business community and the disability community – worked together to get this important civil rights legislation passed. It took the personal investment of many individuals too numerous to mention –Boyden Gray, Samuel Skinner, President George H.W. Bush – as well as Senators Dole, Hatch, Harkin, and Kennedy and an equal number of committed members of the House. All of us worked together with one goal in mind – to break down the barriers to people with disabilities, and to open the social and economic door to the mainstream of American life. The passage of the Americans with Disabilities Act of 1990 was truly a cooperative effort.

Today I remain proud of the tremendous strides we have made in the empowerment of people with disabilities since the enactment of this important civil rights legislation. Many more people with disabilities have greater opportunities than ever before. We see greater numbers of children and adults with disabilities around us, partaking of the diverse benefits our society has to offer. We can feel the impact of improved accessibility. Moreover, the Americans with Disabilities Act has become a beacon and a model for disability policy reform throughout the world.

Yet despite this substantial progress, the ADA has not been as effective as intended in protecting some individuals with disabilities from employment discrimination. This problem is the direct result of judicial interpretation – or misinterpretation – of the definition of who qualifies as an “individual with a disability” under the statute. Under the three 1999 Supreme Court decision in *Sutton*, *Murphy* and *Kirkingburg*, as well as a series of lower court decisions, the definition of who qualifies as an “individual with a disability” has become so restrictive, and difficult to prove, that millions of people we all intended to protect from discrimination –

including people with intellectual and developmental disabilities, bipolar disorder, multiple sclerosis, epilepsy, diabetes, – are no longer covered by the law’s protections. I don’t think there are any among us who think that these conditions do not qualify as disabilities. Yet this is what the courts have concluded over and over again since 1999, and what now needs to be fixed by Congress.

And the problem that we now face is actually worse than that. In many instances these individuals are caught in a bizarre and unintended Catch-22. If they are taking their medication or using other measures to mitigate the impact of their disability, they risk that a court will no longer consider them to have an impairment that “substantially impacts one or more major life activities” and will conclude that they are not “disabled” and thus not entitled to the reasonable accommodation and antidiscrimination protections of the statute -- even if their symptoms would return as soon as their medication stopped. It is absurd to imagine that whether an individual is entitled to a reasonable accommodation – such as modifying a work schedule or having access to a communications device – should be judged in inverse proportion to their efforts to manage the symptoms of their disability.

Clearly this is not what was intended by those who worked together cooperatively in the years leading up to ADA passage in 1990. In fact, it is quite the opposite.

The definition of disability under the ADA is taken from the definition of “handicapped individual” contained in the Rehabilitation Act of 1973. When we were looking for an appropriate definition, I remember thinking that we should go with something familiar and that had worked well; and thus we turned to the definition of disability under the Rehabilitation Act. Prior to enactment of the ADA, courts had interpreted the term “handicapped individual” under the Rehabilitation Act broadly to include people with a wide variety of physical and mental

impairments, including (for example) epilepsy, diabetes, multiple sclerosis, hearing and vision impairments, cerebral palsy, heart disease, and intellectual and developmental disabilities. These impairments were recognized as disabilities even where a mitigating measure – like medication or a hearing aid – might lessen their impact on the individual. In most cases, defendants and the courts accepted that a plaintiff was a member of the protected class (“handicapped individual”) and moved on to the merits of the case, examining, for example, whether the plaintiff was qualified to perform the job, or whether a reasonable accommodation might cause an undue burden on the employer.

In addition to favorable treatment by the lower courts, the Supreme Court had also endorsed a “broad” interpretation of the definition of “handicapped individual” before Congress decided to adopt this model for the definition of disability in the ADA, as in the case of *School Board of Nassau County v. Arline*.

The repetition of this definition in the ADA thus was meant to incorporate the Rehabilitation Act’s administrative and judicial interpretations that had worked well to provide antidiscrimination protection to people with disabilities. Just to be sure, the legislative language went even further and included a specific statutory provision requiring courts to interpret the ADA to provide at least as much protection as the Rehabilitation Act and its implementing regulations:

Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. §790 et seq.) or the regulations issued by the Federal agencies pursuant to such title. 42 U.S.C. §12201(a).

Yet, despite consensus at the time between the Administration, Congress, Republicans, Democrats, the disability community, and the business community about the desired result, our best efforts did not achieve the intended result, nor the result that all of us had expected. The

Supreme Court's decisions in *Sutton*, *Murphy*, *Kirkingburg*, as well as in *Toyota v. Williams*, have effectively eliminated the ADA protections for many people with disabilities, particularly in the workplace. Those who have been excluded from the protections of the ADA are individuals whom we explicitly intended to protect under the statute. About this there can be no question – the specific language in the House and Senate Committee Reports bears that out.

The goal then, as now, was to ensure that all Americans with disabilities have the opportunity to participate in all aspects of American society. For many people with disabilities, a job or a career represents the optimum link to the American dream. The idea that an employee with a disability is entitled to a reasonable accommodation at work is not a controversial concept. Most people with disabilities just want an opportunity to work and to earn a paycheck, just like everyone else.

I believe that it is time for Congress to restore the original intent and protections for individuals with disabilities under this important civil rights statute that all of worked so hard to put into place 17 years ago by taking action and passing S. 1881, the ADA Restoration Act.