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THE WHITE HOUSE
WASHINGTON

Date: May 16, 1990

FOR: DAVID CARNEY

FROM: ED ROGERS

- ☐ Action
- ☐ Your Comment
- ☐ Let's Talk

X ☒ FYI

THE WHITE HOUSE
WASHINGTON

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May 15, 1990

MEMORANDUM FOR JOHN H. SUNUNU
C. BOYDEN GRAY

FROM: NICHOLAS E. CALIO *NC*
THROUGH: FREDERICK D. MCCLURE *FM*
SUBJECT: ADA AMENDMENTS

Per our discussion of legislative issues last Thursday morning, we talked with Representative Bill McCollum and other Republicans about ADA amendments that the Administration might be able to support in a letter to the Hill. The amendments we believe we should consider supporting are included in the attached memorandum from Jack Howard to me.

The bill is scheduled for the Rules Committee on Tuesday and for floor debate Wednesday and Thursday. Hence, this matter is TIME SENSITIVE and we will have to act quickly in order to be helpful.

MEMORANDUM FOR NICK CALIO

May 14, 1990

FROM: JACK HOWARD 
SUBJECT: ADA FLOOR AMENDMENTS

Although the Rules Committee has not yet met to consider a rule for consideration of the ADA bill, here is a selected list of amendments most likely to be offered. I have also indicated those amendments which I believe the Administration should support:

1. Remedies (Sensenbrenner): Unless a Democrat suddenly steps forward, Rep. Sensenbrenner will offer an amendment to "de-link" the remedies in the ADA bill from those in the Civil Rights Act. The disability groups will strenuously object, arguing that what they negotiated last summer was parity, i.e., that the same remedies that are available to everyone under Title VII of the Civil Rights Act should be available to disabled people.

This cuts so clearly against the grain of the deal negotiated with the Senate that we have no other choice but to fight this now and fight it hard. Word is circulating, by the way, in the business community and filtering to the Hill that we may not make our fight here and may focus instead on the Civil Rights Act of 1990 instead.

2. Tax credits (Upton/Mfume/Moody): It is highly unlikely that the rule for the ADA bill will allow an amendment to be offered which will give small businesses a \$5,000 tax credit for complying with the ADA bill's mandates. In exchange for not making a fight on the rule, Rostenkowski and/or Hoyer will make a commitment to trying to get the tax credit in the next revenue bill, such as reconciliation. For now, it looks like a Sense of the Congress amendment may be offered instead. We should support it and keep the pressure on to put the tax credit in reconciliation.

3. Reasonable accommodation (Lancaster): The guts of the bill is that businesses must make reasonable accommodations for disabled people, unless that accommodation creates "an undue hardship" for the employer. The terms "reasonable accommodation" and "undue hardship" are vaguely defined. Rep. Lancaster will offer an amendment further defining the term "reasonable accommodation" to make clear that, prior to the imposition of a court remedy or civil action, disabled people must notify the business entity of his disability as well as make suggestions for making accommodations.

I am not sure how strenuously the disability community will object to the amendment. My guess is that their reaction will be that it places too much of a burden on the disabled employee. My recommendation is that we support the amendment.

4. Undue hardship (Olin): this amendment will stipulate that an "undue hardship" occurs when the employer incurs more than 10 percent of an employee's salary in making an accommodation.

The business community is split on this issue. Some feel that specifying a figure creates a floor as opposed to a ceiling in making accommodations. Given the fact that

there is no consensus among our allies on this, my recommendation is that we remain neutral on the amendment and concentrate on better definitions of reasonable accommodation and allowing tax credits for small businesses. If we can get two out of those three, that should ameliorate greatly the impact on business.

5. Essential functions (McCollum): an amendment giving greater weight to an employer's job description as the evidence of the essential functions of a particular position. Currently, the bill prohibits identification of a disability by inquiry or examination during the job application process. In effect, employers may ask questions relating to the ability of an employee to perform job-related functions, but questions about whether the employee is disabled are precluded. So if a disabled person were to apply for a job as a driver, the employer could ask whether the potential employee has a drivers' license but not whether he has a visual impairment.

The disability community could react very strongly to an amendment like this, claiming that it would open the door to covert discrimination against disabled people. My recommendation is that this amendment falls within the classification of definitional amendments; therefore, we should support it.

6. Small business phase-in (T. Campbell): an amendment will be offered giving small businesses six months after promulgation of final regulations in which they would not be subject to penalties. Currently, the bill's effective dates are two years for the employment provisions and 18 months for the public accommodations requirements.

Hoyer may work with Campbell to offer a substitute proposal. We should support either proposal. Until the remedies issue is fixed, there is no deal.

7. Food handling (possible Democrat): this amendment would state that employers are not required to assign to a job an individual who is serving food, preparing food or in health care if he has a communicable disease. The latest word is that the Democrats will accept the amendment on the floor.

8. Congressional Coverage (Hoyer): this amendment will extend coverage of the bill to Congress. Since Hoyer will be offering it, it will pass easily. Obviously, we should support it.

10. Transportation issues: there will probably be a series of amendments offered by Public Works Committee Republicans aimed at the one car per train issue and the issue of exempting small towns from making their rail stations accessible. Public Works has not sent a list of proposed amendments yet, so it is difficult to say with certainty which ones we should support.

to McClure/Darman/Porter

FYI on 4/3/90

Document Originally
Attached to
Following Page

United States Senate

WASHINGTON, DC 20510

March 30, 1990

ACTION

The Honorable John Sununu
Chief of Staff
The White House
Washington, D.C. 20500

Dear John:

I appreciate our recent discussions on the Americans with Disabilities Act. As a follow-up to our conversations, I want to set out more fully the issue as I understand it in our deal on the remedies in the ADA.

As you know, the ADA, as introduced in May 1989, incorporated by reference in the employment title the remedies available under two other statutes -- section 1981 of the Civil Rights Act of 1866 and Title VII of the Civil Rights Act of 1964.

As the sponsors of the bill stated on numerous occasions, our goal from the outset has been to see that individuals with disabilities have remedies which are parallel to the remedies available to other minorities and women.

Throughout the discussions leading up to our deal in August 1989, Administration representatives urged us to exclude section 1981 from the remedies. They argued that sufficient parallelism for employment discrimination remedies could be achieved by limiting the ADA's remedies to the remedies in Title VII.

The Administration stated that use of section 1981 was inappropriate, because it was a generic civil rights statute from the Civil War era, and that ample remedies for individuals with disabilities were contained in Title VII, the "modern" job discrimination statute.

The key fact is that from all your side said and did, throughout our discussions, the Administration fully accepted the principle of parallelism. The only issue was whether parallelism should include section 1981 as well as Title VII.

My side finally agreed to drop the section 1981 remedies in the ADA. From my perspective, our deal was made on the basis that the remedies in the ADA would be parallel to the

remedies in Title VII; persons with disabilities would be no better off, and no worse off, than other persons protected by Title VII. During our discussions, there was never any suggestion, or even a hint, from your side to my side, that the Title VII remedies should be "frozen" for persons with disabilities as of the date of our deal.

There is strong supporting evidence of the Administration's commitment to such parallelism with Title VII throughout Senate consideration of the ADA. The importance of that principle was highlighted by Attorney General Thornburgh in his testimony before the Senate Labor and Human Resources Committee on June 22, 1989, in which he stated:

"Because S.933 uses existing civil rights laws for minorities and women as its model, the remedies under this bill should parallel these existing laws."

The principle of parallelism with Title VII for employment discrimination remedies was also stated at the outset of consideration of the bill by Senator Hatch in his statement on the ADA at the first committee hearing on May 9, 1989. Senator Hatch criticized the remedies in the bill as going too far, because they also included section 1981 remedies. But Senator Hatch explicitly phrased his argument in terms of parallelism with Title VII:

"Relief in the employment context for discrimination on the basis of disability should parallel the relief available under Title VII of the 1964 Civil Rights Act."

With respect to the specific discussions leading up to our deal -- at our first meeting on the ADA on July 20, 1989, you said that Attorney General Thornburgh would handle the remedies issues.

I requested a meeting with Attorney General Thornburgh, and Senator Harkin and I met with him on July 24 to discuss remedies and other outstanding issues within his jurisdiction.

At that meeting, the Attorney General asked us to postpone the markup of ADA by the Labor and Human Resources Committee, scheduled for July 26th. He promised to send us a letter containing a "bill of particulars" that would set forth in some detail the major areas of disagreement between the Administration and the Senate sponsors.

I received that letter on July 26th. On July 27th, you and I and Senators Harkin, Durenberger, Hatch and Dole, Attorney General Thornburgh and Secretary Skinner met for three

hours in Senator Dole's Capitol office to discuss the remaining key issues on ADA, including remedies. The following day our staffs met again to attempt to reach a compromise. Finally, on July 31st, I called Attorney General Thornburgh and proposed a compromise package for ADA. On the issue of remedies, my offer was as follows:

"Title VII for employment, Title II plus Attorney General pattern and practice with Fair Housing civil penalties: \$50,000 for first offense, \$100,000 for subsequent offenses for public accommodations."

The Attorney General called me later that evening at home and agreed to my offer on almost all the remaining issues, including remedies.

You and I worked out an agreement for elevators in places of public accommodation the following day, August 1, in a telephone conversation.

Our staffs met through the night to work out language, particularly on public transportation. The Senate Labor and Human Resources Committee met on August 2 and unanimously reported the compromise, and President Bush endorsed the bill as reported.

Freezing the remedies available to people with disabilities under Title VII as of a certain date, or limiting those remedies for people with disabilities regardless of whether available remedies under Title VII for other minority groups and women are strengthened, would contradict the fundamental principle in the ADA that victims of disability discrimination in the workplace should have remedies available to them which parallel the employment discrimination remedies for other minority groups and women.

To repeat, during our discussions of employment discrimination remedies under the ADA, the Administration never suggested that, with respect to individuals with disabilities, it intended to freeze the remedies currently provided in Title VII, if Title VII were subsequently amended to strengthen those remedies. The use of a cross-reference to Title VII without limitation was retained in the final Senate bill as the description of employment discrimination remedies under the ADA.

To me, the Administration's current attempt to delete the incorporation by reference of Title VII remedies is flatly inconsistent with our deal and with the spirit of the ADA. Your proposed amendment would mean that if other minority groups and women obtain expanded employment discrimination remedies through amendments to Title VII, individuals with disabilities would not

enjoy parallel remedies. This approach would consign individuals with disabilities to second class status under our employment discrimination laws -- exactly what we are trying to prevent under the ADA.

Consider this final point as well, John. Under the proposed Administration amendment, if remedies for other minority groups and women are ever cut back under Title VII, individuals with disabilities would have greater remedies for employment discrimination than other groups. Such a result was obviously never contemplated in our discussions of the ADA compromise, and is contrary to the text of the bill which passed the Senate.

In the testimony of Deputy Attorney General Ayers on the Civil Rights Act of 1990, the Administration has indicated its opposition to the expanded remedies for Title VII proposed in the bill. The appropriate forum for pursuing your concerns about expanding Title VII remedies is the Civil Rights Act of 1990, not the ADA.

I hope the Administration will renew its commitment to our deal, that you will resist amendments which would weaken ADA, and that you will work with us for its prompt passage.

With warm regards, and my thanks for your personal consideration of this issue.

As ever
Sincerely,



Edward M. Kennedy