The ADA Project
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Prepared by: LEGISLATION CLINIC

Lara Bollinger, Student Advocate
Laurie Morin & Marcy Karin, Faculty Supervisors

# THE ADAAA NEGOTIATIONS:

## *SOME REFLECTIONS FROM THE FIELD --10 YEARS LATER*

On March 28, 2019, The ADA Project—a public education resource related to the Americans with Disabilities Act ("ADA"), 42 U.S.C. 1201 *et seq.*, and the ADA Amendments Act ("ADAAA"), 122 Stat. 3553—was launched by the Quinnipiac University Civil Justice Clinic and the UDC Law Legislation Clinic.[1] Among other things, the website analyzes emerging areas of the law and serves as a public repository for legislative history materials related to the ADA and ADAAA.

As part of the launch, individuals who negotiated the ADAAA reflected about the bill's passage and takeaways for other systemic reform campaigns. The nine individuals who shared their experiences with the ADAAA were:[2]

- Kevin Barry (Professor of Law, Quinnipiac University);
- Mike Eastman (Partner, NT LAKIS);
- Chai Feldblum (Partner, Morgan Lewis);
- Sandy Finucane (former Vice President of Legal and Government Affairs, the Epilepsy Foundation of America);
- Andy Imparato (Executive Director, Association of University Centers on Disabilities);
- Randy Johnson (Partner, Seyfarth Shaw);
- Larry Lorber (Senior Counsel, Seyfarth Shaw); and
- Allison Nichol (Director of Legal Advocacy, the Epilepsy Foundation of America).

These speakers shared stories about the ADAAA negotiations from the perspective of the communities representing business and persons with disabilities. They highlighted lessons learned about the importance of trust and evolving relationships, key points in the legislative process, bipartisanship, and how the resulting law solved many of the problems with the narrow way in which the original ADA had been interpreted by courts.

This document captures the remarks shared at the March 28th launch event.

[1] The ADA Project, www.adalawproject.org; *see* Invitation, https://www.eventbrite.com/e/the-ada-project-launch-kickoff-event-for-disability-rights-symposium-tickets-57529851334# (launch event information)

[2] These were some of the key players who negotiated the passage of the ADAAA; however, not everyone who played an important role was able to attend the event. *See* Chai Feldblum, Kevin Barry, & Emily Benfer, *The ADA Amendments Act of 2008,* 13 TEX. J. C.L. & C.R. 187 (2008) (containing a more detailed description of the negotiation, including naming the key stakeholders from Congress, the business community, and the disability community).

**Kevin Barry** kicked off the remarks by sharing his perspective as a fellow in the Federal Legislation Clinic of Georgetown University Law Center from 2006-2008.[3] At the time, Barry knew little about disability rights law. Chai Feldblum, his clinic supervisor, assigned him to work with a team of student attorneys to provide *pro bono* services to the Epilepsy Foundation of America in support of its efforts to amend the ADA. In that role, Barry was a member of the team of disability rights lawyers that successfully negotiated draft legislative language with lawyers from the business community, resulting in the passage of the ADAAA.[4]

Barry credited advocates in the room as his teachers and thanked them for the lessons he learned. He said that he learned about the power of persistence when he repeatedly heard from congressional staff that the passage of the ADAAA was "never going to happen." He also discussed the *humanity and humor* that characterized the negotiations, like when one of the lead lawyers in the negotiation responded to a mistake he'd made with a handwritten note: "You're still awesome!" In the winter or spring of 2008, when negotiations were at a standstill, Barry learned about *patience* as advocates continued to generate ideas that would eventually resolve the impasse. He learned about *radical inclusion* when the disability community rejected a *per se* list of covered disabilities in favor of an approach to coverage that would apply equally to everyone. He appreciated the disability community's characteristic refusal to create an "in group" and an "out group." Lastly, Barry acknowledged the *power of women*—both with and without disabilities—to effect positive social change, when he noted the strength, passion, and leadership of the women he had worked alongside. He ended his remarks by saying to the group of advocates in the room, "If I accomplish half of what you have done in your careers, I will consider my career a great success."

Barry then called on his mentor and former supervisor **Chai Feldblum**,[5] who was the director of the Georgetown Law Federal Legislation Clinic at the time the ADAAA was negotiated. She said that the ADA "was and is all about civil rights." During the negotiation process, Feldblum's constant message to lawmakers was, "We don't want pity, we want our rights." That language was important to the disability community to counter the remarks of people who said they felt bad for people with disabilities.

Feldblum highlighted the spectrum of disability and how it really encompasses all of us. She shared that she was upset at the implementation of the original ADA, as the courts had interpreted it to include far fewer people than intended by the law. However, she said they had to wait for the right time to advocate for legislative change.

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[3] *See* UDC Legislation Clinic, Expanding Access to Rights Under the ADA: The History and Impact of the ADAAA, A Conversation with Kevin Barry, The ADA Project (2018-2019), www.adalawproject.org/s/Barry-Oral-History.
[4] *Id.*
[5] *See* UDC Legislation Clinic & ASU Work-Life Law and Policy Clinic, The Past, Present and Future of the ADA: A Conversation with Chai Feldblum, The ADA Project (revised 2019), www.adalawproject.org/s/Feldblum-Oral-History.

Feldblum reminisced about her career and professional experience at the Equal Employment Opportunity Commission, where she served as Commissioner in the years following the ADAAA. She is continuing her advocacy by creating preventative harassment strategies for big companies in her new role at Morgan Lewis. She emphasized that there is a need to include education on harassment on all bases, not just sexual harassment. Feldblum concluded by saying that there is still room for improvement with the ADA, as amended by the ADAAA. She then stated that "The arc of history is long, but it bends towards justice, and every single one of us in this room is part of that."

During the negotiations, **Sandy Finucane** was the Vice President of Legal and Government Affairs for the Epilepsy Foundation of America, whom the Georgetown Law Federal Legislation Clinic represented. At the time, she also was the Chair of the Civil Rights Task Force for the Consortium of Citizens with Disabilities. She remembered being there for the Supreme Court's *Sutton*[6] case in 1995 and knew it would be bad for people with epilepsy.

In the *Sutton* case, the United States Supreme Court held that a person whose condition could be remedied through mitigating measures did not have a disability under the ADA. For individuals with epilepsy whose seizures were under control with medication, that meant they would not qualify as an individual with a "disability" for purposes of the ADA. Finucane said it took three months until the first epilepsy-related case was filed, which involved a person with epilepsy who had a seizure on the job and was fired due to the seizure. Because the individual only had seizures sporadically, the court found that the individual did not have a disability.

After *Sutton*, there were there were a lot of "bad cases" where people with a variety of disabilities were told that they did not have a disability for purposes of the ADA. In 2006, the push for legislative change began, culminating in the passage of the ADAAA two years later. Finucane noted that it felt like a long couple of years.

To illustrate this, Finucane told a story of the intensity of the work related to passing the ADAAA. In the middle of the negotiations, Finucane came home to smoke pouring out of her house and the fire alarm going off. She walked right into the house, through the smoke and noise, sat down, and continued talking on the phone about passing the ADAAA.

In getting the bill passed, Finucane said that the most important things to her were the stories they were able to gather and the personal relationships that were built. The team put a lot of effort into finding stories of people with disabilities who were discriminated against in every circuit. Finucane said a turning point was when Congress invited Carey McClure to testify before the Education and Labor Committee.[7] McClure had been an electrician for twenty years and got his dream job at General Motors. He sold his house

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[6] Sutton v. United Airlines, Inc., 527 U.S. 471 (1999).

[7] Carey L. McClure, Statement Before the Health, Labor, Education, and Pensions Committee (July 15, 2008), https://www.help.senate.gov/imo/media/doc/McClure.pdf.

and moved across the country for this job. He was then "kicked out" of his position because he had muscular dystrophy and could not lift his arms above his head, despite engaging in similar work previously with an accommodation. Upon hearing his story, Members of Congress were "falling over each other" to tell him, "We will fix this problem."

Finucane also acknowledged the importance of personal relationships. In particular, Finucane discussed the contributions of Representative Jim Sensenbrenner (R-WI) and his wife, Cheryl, who was a person with a disability and a board member of the American Association of People with Disabilities ("AAPD"). Rep. Sensenbrenner was chair of the Judiciary Committee for the House of Representatives in 2006. . Rep. Sensenbrenner introduced the ADA Restoration Act of 2006[8] and co-sponsored the ADAAA in 2008.[9] As his last act as chair of the Judiciary Committee before the Democrats took control of the House, Sensenbrenner told advocates, "I'm going to drop a bill" to fix the ADA. This started the ball rolling. Finucane ended by saying that working on passing the ADAAA had been the "most amazing experience of [her] life."

**Andy Imparato**, former President and CEO of AAPD, spoke about the role that Cheryl Sensenbrenner played in the passage of the ADAAA. In addition to Cheryl's physical disability, she has a sister with Down Syndrome. Cheryl convinced her husband to work on fixing the ADA. She handwrote letters to members of the House of Representatives asking them to co-sponsor the bill and was able to get about 60 Republicans to join in sponsoring the legislation. The large number of Republican co-sponsors helped make the business community take notice of the ADAAA.

Imparato then spoke of an 11th Circuit Case where a person with an intellectual disability wanted to bring a job coach with him to a job interview at Wal-Mart.[10] Wal-Mart said they did not allow anyone to join applicants during employment interviews. The 11th Circuit affirmed the district court's summary judgment in favor of Wal-Mart, stating, among other things, that it was unclear whether "thinking" was a "major life activity" for the purposes of the ADA. Even if thinking were a major life activity, the court held, Mr. Littleton, who was diagnosed with an intellectual disability, had not shown that his intellectual disability substantially limited his ability to think. When members of the House Education and Labor Committee heard this story during a hearing on the ADAAA, the Committee members responded that the decision made no sense; intellectual disability is, by definition, a substantial limitation on cognitive functioning.[11]

Imparato ended by saying that passing the ADAAA was a highlight in terms of making good policy. He emphasized that the final version passed the Senate by unanimous

[8] Americans with Disabilities Act Restoration Act of 2006, H.R. 6258, 109th Cong. (2006).
[9] For more information see The Legislative History of the ADAAA, The ADA Project (2019), http://www.adalawproject.org/legislative-process-1.
[10] Littleton v. Wal-Mart Stores, Inc., 231 Fed. Appx. 874 (11th Cir. 2007).
[11] For more information about statements and testimony, see The Legislative History of the ADA Amendments Act, The ADA Project (2019), http://www.adalawproject.org/adaaa.

consent because the legislation was bipartisan and had the support of both the disability and business communities.[12]

**Mike Eastman**, who worked at the U.S. Chamber of Commerce at the time of the negotiations, echoed the importance of bipartisanship to the passage of the ADAAA. He said that the most critical part of passing the legislation was having people on both sides of the table with an interest in developing a relationship of trust with each other. There was also a willingness among the group to look at alternative solutions. For the business community, one of the biggest challenges was how to support legislation that could make it easier for plaintiffs to sue businesses. Negotiators were successful because they built a vetting system that allowed them to push the business community toward a compromise without going too far.

Eastman also discussed three different deals that the group had or almost had along the way. First, there was a deal based on "means legislation" where the group proposed a *per se* list of disabilities. This had challenges for both the business and disability communities and fell apart. Next, there was a new proposed definition for "substantially limits" that passed in the House but the Senate "hated." The last deal, which was eventually passed into law, involved negotiators going back to the drawing board and getting what they wanted through rules of construction. He said it is not the most logical way to draft a law, but political reasons made it necessary.

**Randy Johnson**, another representative from the U.S. Chamber of Commerce at the time, shared that he remembers being at a press conference and making the decision to throw away his notes and just talk. He told the group he was there when Congress passed the ADA and that he knew the Supreme Court got the definition of disability wrong in the *Sutton* Trilogy.[13] He called for the crowd to just get those cases reversed, which they did. Johnson also said that he was not sure that they would get the amendments passed, but echoed that the process was thoughtful, collaborative, and unorthodox when compared to other legislative experiences in which he had been involved. He then shared a story of being on a sales call with the U.S. Chamber of Commerce after the passage of the ADAAA where he was asked, "Who wrote those screwy ADA Amendments in 2008?" Johnson answered that, "It was the right thing to do."

**Larry Lorber** also represented the business community in negotiations over the ADAAA. Reflecting on the creativity involved in the drafting process, he told a story of a meeting that occurred after the bill had passed the House and was being considered by the Senate. The negotiators met with Senators Harkin (D-IA) and Hatch (R-UT). Hatch

[12] For more information about the ADAAA's legislative journey, see The Legislative History of the ADAAA, The ADA Project (2019), http://www.adalawproject.org/legislative-process-1.

[13] Sutton v. United Airlines, Inc., 527 U.S. 471 (1999); Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999); Albertson's Inc. v. Kirkingburg, 527 U.S. 555 (1999). The U.S. Supreme Court heard this trio of cases in the Spring of 1999. The decisions resulted in a significantly more limited definition of disability under the ADA. *S*ee After the ADA, The ADA Project (2019), www.adalawproject.org/after-the-ada.

did not like the term “substantially limited” in the bill. The Senators began to debate how much limitation was a “substantial” limitation. The solution was to write findings and purposes that are to be read as part of the law, which would require courts to consider them when interpreting the language of the ADA. Lorber also touched on the persistence of the negotiators to reach a deal on legislative language, recalling a call he received in June 2008 from one of the negotiators on the business side, who told him that the business community should walk away from the bill. Lorber tried to convince him otherwise. He ended by saying it was a fascinating time. Lorber credited Randy Johnson for bringing the business community together and holding it together throughout the passage of the bill. He said, “It really won’t happen this way again. This was negotiated legislation, every step of the way. It was really a remarkable experience.”

**Allison Nichol**, who was a lawyer at the Justice Department at the time the ADAAA was being negotiated, told two stories. The first involved Feldblum and her Legislation Clinic at Georgetown. Nichol came to the Clinic to meet with several of the negotiators and someone asked, “What do you think we should do?” Nichol responded that the group should make “a really long, hundred-page list” of covered disabilities. From a litigator’s perspective, Nichol said, “It was the only thing that made sense.” While the passage of the bill did not go exactly as the group had hoped, there were many successful efforts and ultimately the regulations were helpful. They made a huge difference.

Nichol’s second story was about trying the very first case under the original ADA. The case involved a man with terminal brain cancer and whether he was a person with a “disability” within the meaning of the statute.[14] The judge asked Nichol what she thought. She said, “Judge, my client has brain cancer. He’s disabled.” The judge easily concluded that the brain cancer should be a disability. Little did she know how narrowly definition of disability would come to be construed—excluding people with cancer because they were not “substantially limited,” and necessitating the ADAAA.

**Kevin Barry** then recalled receiving an email from Nichol pondering whether an early draft of the ADAAA would open the door to reverse discrimination claims—i.e., that those *without* disabilities (the majority group) might claim that they were being discriminated against because of preferential treatment of those *with* disabilities (a historically disadvantaged group). Negotiators cured the problem by inserting a provision that prohibits such claims.[15]

**Chai Feldblum** wrapped up the event by telling one more story relating to persistence in the face of opposition. She recalled having dinner one night with Jennifer Mathis, one of the negotiators from the disability community who worked at the Bazelon Center on

[14] EEOC v. AIC Sec. Investigation, 820 F. Supp. 1060 (N.D. Ill. 1993).
[15] 42 U.S.C. § 12201(g) (2012) (“Nothing in this chapter shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual’s lack of disability.”).

Mental Health Law. Earlier that day, negotiations appeared to have fallen apart once again over the definition of “substantially limited.” Feldblum and Mathis looked at each other and said, “If it’s going to be this definition, we might have to walk from the bill. It’s not going to be worth it in terms of making it easier for individuals to bring a claim under the ADA.” After three vodka martinis and a night’s sleep, she and Mathis reengaged in the negotiations the following day and found a way to resolve the issue. Feldblum thinks this is an important lesson for all of us: find hard-working colleagues with whom you want to work—“you may find yourself commiserating with them over dinner and three vodka martinis.” And then you might wake up the next day with a new perspective and see a path to systemic reform on the horizon.