

CHICAGO FLOODING

Mr. DURBIN. Mr. President, today President Bush was in Texas to see firsthand the devastation from Hurricane Ike. Unfortunately, this is not the first time, nor will it be the last time, that Mother Nature has shown us her worst. My heart goes out to the millions of displaced residents and evacuees who are anxious to return home, who are without power, who must depend on others for food and water and other necessities, and who face the long hard task of rebuilding their homes and communities.

We know a little of what that is like in Illinois. In June, the Midwest was hit by massive flooding, some of the worst we have seen since the Great Flood of 1993. Experts called it a 200 to 500-year event. It left entire communities underwater, broke levees, and washed away roads, bridges, and millions of acres of cropland. The damage could have been worse, if Illinoisans had not worked so long and so hard to fill sandbags, fortify levees, and stand their ground against the rising waters of the Mississippi.

But sometimes weather-related disasters strike with no warning and you don't have time to prepare for the worst. Over the weekend my State was hit by the sixth major flooding event in the last year alone when 3 days of rain dumped more than 100 billion gallons of water on the city of Chicago—two or three times the normal amount. More than 7 inches of rain fell on the Chicago area on Saturday alone, setting a new 1-day record at O'Hare. In the suburbs, some of the worst flooding was along the Des Plaines River, which crested at near-record levels, displaced thousands of residents, and flooded hundreds of homes.

On Monday I had a chance to see for myself the damage in Albany Park, a neighborhood in Chicago that was one of the hardest hit areas. Thirty-ninth Ward Alderman Margaret Laurino accompanied me as I met with residents like Aaron Gadiel, who waded through knee-high water in his fishing boots and searched his home to see if he could salvage clothing for his kids. I want to commend the local and city officials I saw going door to door with pumps, checking to see if residents needed help, and pitching in wherever they were needed. I especially want to thank Terry O'Brien, president of the Metropolitan Water Reclamation District, and Ray Orozco, executive director of Chicago's Office of Emergency Management and Communications, OEMC, for taking the time to show me the extent of the flood damage.

The same weather system that dumped billions of gallons of rain on Chicago also caused the Mississippi and Illinois Rivers to swell in other parts of Illinois. U.S. Army Corps officials are keeping a close eye on the system of levees and dams that protect these communities to make sure that these residents don't experience a repeat of the June floods.

Today the skies are clearing over Chicago. Water levels are falling, roads are reopening and some folks are returning home. But the recordbreaking rains that evacuated thousands, left four dead, closed roads and flooded homes have left more than a watermark. As Des Plaines Mayor Tony Arredia rightly pointed out, we still have cleaning up to do. I am committed to making sure that Illinoisans do not face this task alone.

TRIBUTE TO SECOND LIEUTENANT HOWARD CLIFTON ENOCH, JR.

Mr. MCCONNELL. Mr. President, I rise today because after more than 60 years, a Kentucky family has been reunited with a father and grandfather they never knew. And an American hero is coming home.

Second Lieutenant Howard Clifton Enoch, Jr., U.S. Army Air Forces, was last seen on March 19, 1945, when he took off in his P-51D Mustang single-seat fighter plane for a mission over Germany. He crashed while engaging enemy aircraft near the city of Leipzig.

His remains could not be immediately recovered, and once Soviet forces took over the part of that country that would become East Germany—including the area around Leipzig recovery became impossible for decades.

Howard Enoch III was born 3 months after his father's plane crashed. He grew up in Marion, KY, never knowing his namesake. Now, thanks to the work of some dedicated men and women in the Department of Defense, his father's remains have been identified.

A German researcher originally identified the crash site, and notified our Government. The Joint POW/MIA Accounting Command, the arm of the Department of Defense charged with recovering the remains of our lost heroes, sent a recovery crew to Germany. They used mitochondrial DNA analysis to identify the remains, and in 2007 they contacted Howard Enoch III with the astonishing news.

Howard Enoch III's two young daughters gained new insight into their grandfather. And the discovery brought Howard in touch with a cousin he never knew, who had served alongside Second Lieutenant Enoch in Europe in World War II.

Now Second Lieutenant Enoch will be buried at Arlington National Cemetery, alongside America's greatest heroes. And the Enoch family can know that after valiant service to his country, six decades later, a soldier will finally rest in peace. I wish to offer my deepest appreciation to Howard Enoch III for his father's service and his family's sacrifice on behalf of our country.

Earlier this month, the Bluegrass Chapter of Honor Flight paid special tribute to Second Lieutenant Enoch at the World War II Memorial in our Nation's Capital. Honor Flight is a non-profit organization which transports World War II veterans from anywhere in the country to see the memorial, free of charge.

Honor Flight and its volunteers, many of whom are veterans themselves, are doing a great service for our Nation by allowing these veterans to make this important trip. Second Lieutenant Enoch never got a chance to visit the World War II Memorial. But it was built for him, and his thousands of fellow soldiers. So I am glad that 63 years later, Honor Flight has recognized his service.

For a long time, the Enoch family has felt not only the loss of Second Lieutenant Enoch, but also doubt about his final fate. I am pleased for them that that doubt is over. They can take comfort that 2LT Howard Clifton Enoch, Jr. will lie among Arlington's heroes. And they can take pride that this U.S. Senate honors his service and his sacrifice.

REPORT ON THE TOMB OF THE UNKNOWN

Mr. AKAKA. Mr. President, I am pleased to share a report with our colleagues, which I received last month from the Departments of the Army and Veterans Affairs. The report addresses the Army's and VA's plans for repairing and preserving the Tomb Monument at the Tomb of the Unknowns. As many of our colleagues may know and appreciate, the Tomb is a national monument of great historical significance, especially to our Nation's veterans, located on the hallowed ground of Arlington National Cemetery.

The Tomb Monument, which sits above the tombs for the unknowns from World War I, World War II, and the Korean conflict, has developed several cracks along the natural faults in the marble. For some time, there has been discussion of possibly replacing the original monument. However, prior to taking this option, I wanted to ensure that at the very least decision-makers considered options for preserving, rather than replacing the monument. While I understand the concerns about the cracks in the Tomb Monument, I along with many others believe that our national monuments are not diminished by signs of their age. Many of our most treasured American symbols, from the Liberty Bell to the Star-Spangled Banner, are physically worn and weathered. This does not diminish their value or significance. I would argue that the same is true for the Tomb of the Unknowns.

It is our Nation's tradition to preserve our historic national symbols. We must protect them from the notion that they can be easily discarded or replaced. With those concerns in mind, my colleague from Virginia, Senator WEBB, and I successfully added language requiring a report on plans for the Tomb Monument to last year's National Defense Authorization Act. The joint report acknowledges that replacement of the Tomb Monument could have a negative impact on the historic significance of the Tomb of the Unknowns.

I am pleased that the joint report outlined several alternatives to replacing the Tomb Monument. I urge the Departments, in their respective capacities, to pursue the best means of preserving the Tomb Monument for future generations of veterans and Americans. While the Departments may have to consider partial or full replacement of the Tomb Monument at some future date, at this time there are still a number of other options which should be pursued.

Mr. President, I ask unanimous consent that letters and the Executive Summary of the report be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

DEPARTMENT OF THE ARMY, OFFICE
OF THE ASSISTANT SECRETARY,
CIVIL WORKS,

Washington, DC, August 11, 2008.

Hon. RICHARD B. CHENEY,
President of the Senate,
U.S. Capitol, Washington, DC.

DEAR MR. PRESIDENT: In accordance with Section 2873 of the National Defense Authorization Act for Fiscal Year 2008, enclosed is a report on alternative measures to address cracks in the monument at the Tomb of the Unknowns at Arlington National Cemetery (ANC). The report contains information about the monument in response to the provisions in subsection 2873(a) with respect to (1) plans considered for replacement and disposal; (2) the feasibility and advisability of repair; (3) current maintenance and preservation efforts; (4) an explanation of why no repair attempt has been made since 1989; (5) comprehensive cost estimates for replacement and repair; and (6) assessment of its structural integrity.

Options for addressing the cracks are described in the report. A decision on a final course of action will not be made until our responsibilities are fulfilled under Section 106 of the National Historic Preservation Act and the National Environmental Policy Act. Also, subsection 2873(b) states that "[t]he Secretary of the Army and the Secretary of Veterans Affairs may not take any action to replace the monument at the Tomb of the Unknowns at Arlington National Cemetery, Virginia, until 180 days after the date of the receipt by Congress of the report required by subsection (a)." According to subsection 2873(c), the limitation in subsection 2873(b) does not prevent undertaking repair of the monument or acquiring marble for the repair, subject to the availability of appropriations. Accordingly, while long-term options continue to be explored, experts in the field of marble maintenance and conservation are being consulted to assist ANC in the development and implementation of a maintenance and repair plan to ensure that the existing marble is appropriately protected.

In accordance with a 2004 Memorandum of Understanding between the Department of the Army and the Department of Veterans Affairs (VA), the role of VA is limited to procurement, transportation, and sculpting of a replacement for the base, main die block, and cap of the Tomb Monument, should ANC determine that replacement is required. VA has no role in determining whether the Monument should be replaced, or in its maintenance and repair.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection

to the presentation of this report for consideration of the Congress.

Very truly yours,

JOHN PAUL WOODLEY, JR.,
Assistant Secretary of the Army (Civil Works).
WILLIAM F. TUERK,
Under Secretary for Memorial Affairs,
Department of Veterans Affairs.

DEPARTMENT OF THE ARMY, OFFICE
OF THE ASSISTANT SECRETARY,
CIVIL WORKS,

Washington, DC, August 11, 2008.

Hon. NANCY PELOSI,
Speaker, House of Representatives,
U.S. Capitol, Washington, DC.

DEAR MADAM SPEAKER: In accordance with Section 2873 of the National Defense Authorization Act for Fiscal Year 2008, enclosed is a report on alternative measures to address cracks in the monument at the Tomb of the Unknowns at Arlington National Cemetery (ANC). The report contains information about the monument in response to the provisions in subsection 2873 (a) with respect to (1) plans considered for replacement and disposal; (2) the feasibility and advisability of repair; (3) current maintenance and preservation efforts; (4) an explanation of why no repair attempt has been made since 1989; (5) comprehensive cost estimates for replacement and repair; and (6) assessment of its structural integrity.

Options for addressing the cracks are described in the report. A decision on a final course of action will not be made until our responsibilities are fulfilled under Section 106 of the National Historic Preservation Act and the National Environmental Policy Act. Also, subsection 2873(b) states that "[t]he Secretary of the Army and the Secretary of Veterans Affairs may not take any action to replace the monument at the Tomb of the Unknowns at Arlington National Cemetery, Virginia, until 180 days after the date of the receipt by Congress of the report required by subsection (a)." According to subsection 2873(c), the limitation in subsection 2873(b) does not prevent undertaking repair of the monument or acquiring marble for the repair, subject to the availability of appropriations. Accordingly, while long-term options continue to be explored, experts in the field of marble maintenance and conservation are being consulted to assist ANC in the development and implementation of a maintenance and repair plan to ensure that the existing marble is appropriately protected.

In accordance with a 2004 Memorandum of Understanding between the Department of the Army and the Department of Veterans Affairs (VA), the role of VA is limited to procurement, transportation, and sculpting of a replacement for the base, main die block, and cap of the Tomb Monument, should ANC determine that replacement is required. VA has no role in determining whether the Monument should be replaced, or in its maintenance and repair.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report for consideration of the Congress.

Very truly yours,

JOHN PAUL WOODLEY, JR.,
Assistant Secretary
of the Army (Civil
Works).
WILLIAM F. TUERK,
Under Secretary for
Memorial Affairs,
Department of Vet-
erans Affairs.

REPORT ON ALTERNATIVE MEASURES TO ADDRESS
CRACKS IN THE MONUMENT AT THE
TOMB OF THE UNKNOWN AT ARLINGTON NATIONAL
CEMETERY, VIRGINIA

EXECUTIVE SUMMARY

Alternative measures are being explored to address cracks in the Tomb of the Unknowns Monument at Arlington National Cemetery (ANC). The Tomb Monument is the four-piece marble object located over the vault containing the remains of the World War I Unknown, and is a component of the Tomb of the Unknowns. Section 2873 of the National Defense Authorization Act for Fiscal Year 2008, Public Law 110-181 (Act), directed the Secretary of the Army and the Secretary of Veterans Affairs to submit a joint report to Congress on plans to address the cracks with respect to (1) replacing the Monument and its disposal, if it were removed; (2) an assessment of the feasibility and advisability of repairing the Monument rather than replacing it; (3) a description of current efforts to maintain and preserve the Monument; (4) an explanation of why no attempt has been made since 1989 to repair it; (5) comprehensive estimates of the cost of replacement and the cost of repair; and (6) an assessment of its structural integrity.

In 1963, ANC initiated a program of monitoring and investigation of the Monument in response to the development of two parallel cracks in its main block. The cracks, which now measure nearly 48 feet in combined length, appear on all four sides of the Monument and extend almost entirely through the block. According to stone conservation experts, the cracks are not compromising the structural integrity of the stone and are repairable. ANC repaired the cracks twice, once in 1975, and again in 1989, and is now in the process of initiating another repair of the Monument. The results of studies and monitoring of the Monument over the past four decades confirm that, despite repairs, the cracks continue to lengthen and widen, which is perhaps a natural phenomenon of the material. Since 1990, a third crack has become visible, whose origins are uncertain. The Monument can be repaired again, but its condition will continue to deteriorate. Although it is not known when the Monument will reach the point of being beyond repair, the natural aging process that weathers and cracks outdoor marble makes it likely that it will need to be replaced at some point in the future. The cracking and minor erosion of the Monument have led ANC to consider various treatment options, including repairing the cracks, obtaining and stockpiling marble for future replacement of the monument, and the immediate replacement of its cap, die block, and base.

The impetus to consider various treatment options for the Monument is the culmination of over 40 years of deliberation, starting with the first report on the cracks in the early 1960s, and continuing through the two previous repairs. In evaluating whether to continue to maintain and repair the Monument or replace it, ANC is giving full consideration to its historic significance. ANC recognizes the associative qualities that link the Monument to World War I and its veterans. ANC also realizes that the Tomb of the Unknowns has come to memorialize all of the service men and women that have sacrificed their lives for this country in subsequent military conflicts that continue today. In this regard, the Tomb of the Unknowns has significance, beyond its historic significance, that transcends the past and present to the future. As its steward, ANC is responsible to do what it can to ensure that the Monument stands, as unflawed and perfect as possible, in honor of the sacrifices that it represents.

To preserve the solemn dignity of the Monument for those that it honors and for

future generations of Americans, ANC is considering alternative actions that could be taken. Repair of the Monument is a viable alternative, as verified by experts in the field of stone conservation. Replacement is another alternative under consideration, due to the uncertainty of obtaining suitable marble in the future. Only marble with specific qualities can be used for replacement, so the current and future existence and availability of such marble is of concern. Suitable marble is available today, but may not be in the future, and there will never be a greater quantity of suitable marble in the future than there is now. It is primarily for this reason that ANC is considering replacement of the Monument as one potential long-term solution.

There is more information in this report on the potential replacement option than there is for other options, because the replacement option is much more complex than the other options under consideration. Also, the potential replacement option has undergone the most scrutiny through the Section 106 review process. The preponderance of information on replacement should not be construed as favoring this option over the other options under consideration.

In response to ANC's request to provide a Tomb Monument replacement, the Department of Veterans Affairs (VA) entered into a Memorandum of Understanding (MOU) with the Department of the Army in 2004 that outlines respective responsibilities. VA will be responsible for the procurement, transportation, and sculpting of a replacement for the base, main die block, and cap of the Tomb Monument when and if Army decides replacement is necessary. Both agencies have compliance requirements under Section 106 of the National Historic Preservation Act and the National Environmental Policy Act (NEPA). No decision on a final course of action will be made until both agencies fulfill their respective responsibilities under both of these laws.

Furthermore, subsection 2873(b) of the Act states that "The Secretary of the Army and the Secretary of Veterans Affairs may not take any action to replace the monument at the Tomb of the Unknowns at Arlington National Cemetery, Virginia, until 180 days after the date of receipt by Congress of the report required by subsection (a)." According to subsection 2873(c), the limitation in subsection 2873(b) does not prevent the repair of the current Monument or the acquisition of blocks of marble. Accordingly, while long-term options such as continued repair, procurement of replacement marble, and immediate replacement continue to be explored, ANC is working with experts in the field of marble maintenance and conservation to develop and implement a maintenance and repair plan to ensure that the existing marble is appropriately protected. ANC will take no action to acquire replacement blocks of marble until after Section 106 and NEPA requirements are complete.

STATEMENT OF MANAGERS—S. 3406

Mr. HARKIN. Mr. President, I ask unanimous consent that this Statement of Managers to S. 3406 be reprinted in the RECORD with its endnotes.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

STATEMENT OF THE MANAGERS TO ACCOMPANY S. 3406, THE AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT OF 2008

Contents:

- I. Purpose and Summary of the Legislation
- II. Background and Need for Legislation
- III. Legislative History and Committee Action
- IV. Explanation of the Bill and Committee Views
- V. Application of the Law to the Legislative Branch
- VI. Regulatory Impact Statement
- VII. Section-by-Section Analysis

I. PURPOSE AND SUMMARY OF THE LEGISLATION

The purpose of S. 3406, the "ADA Amendments Act of 2008" is to clarify the intention and enhance the protections of the Americans with Disabilities Act of 1990, landmark civil rights legislation that provided "a clear and comprehensive national mandate for the elimination of discrimination on the basis of disability."¹ In particular, the ADA Amendments Act amends the definition of disability by providing clarification and instruction about the terminology used in the definition, by expanding the definition, and by rejecting several opinions of the United States Supreme Court that have had the effect of restricting the meaning and application of the definition of disability.

S. 3406 is the product of an extensive bipartisan effort that included many hours of meetings and negotiation by legislative staff as well as by stakeholders including the disability, business, and education communities. In addition, two hearings were held in the Senate Health, Education, Labor, and Pensions Committee to explore the issues addressed in this legislation. The goal has been to achieve the ADA's legislative objectives in a way that maximizes bipartisan consensus and minimizes unintended consequences.

This legislation amends the Americans with Disabilities Act of 1990 by making the changes identified below.

Aligning the construction of the Americans with Disabilities Act with Title VII of the Civil Rights Act of 1964, The bill amends Title I of the ADA to provide that no covered entity shall discriminate against a qualified individual "on the basis of disability."

The bill maintains the ADA's inherently functional definition of disability as a physical or mental impairment that substantially limits one or more life activities; a record of such impairment; or being regarded as having such an impairment. It clarifies and expands the definition's meaning and application in the following ways.

First, the bill deletes two findings in the ADA which led the Supreme Court to unduly restrict the meaning and application of the definition of disability. These findings are that there are "some 43,000,000 Americans have one or more physical or mental disabilities" and that "individuals with disabilities are a discrete and insular minority." The Court treated these findings as limitations on how it construed other provisions of the ADA. This conclusion had the effect of interfering with previous judicial precedents holding that, like other civil rights statutes, the ADA must be construed broadly to effectuate its remedial purpose. Deleting these findings removes this barrier to construing and applying the definition of disability more generously.

Second, the bill affirmatively provides that the definition of disability "shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act."² It retains the term "substantially limits" from the original ADA definition but makes it clear that this is intended to be a less demanding standard than that enunciated by the U.S. Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.³

With this rule of construction and relevant purpose language, the bill rejects the Supreme Court's holding in *Toyota v. Williams* that the terms "substantially" and "major" in the definition of disability must be "interpreted strictly to create a demanding standard for qualifying as disabled,"⁴ as well as the Court's interpretation that "substantially limits" means "prevents or severely restricts."⁵

Third, the bill prohibits consideration of mitigating measures such as medication, assistive technology, accommodations, or modifications when determining whether an impairment constitutes a disability. This provision and relevant purpose language rejects the Supreme Court's holdings in *Sutton v. United Air Lines*⁶ and its companion cases⁷ that mitigating measures must be considered.⁸ The bill also provides that impairments that are episodic or in remission are to be assessed in an active state.

Fourth, the bill provides new instruction on what may constitute "major life activities." It provides a non-exhaustive list of major life activities within the meaning of the ADA. In addition, the bill expands the category of major life activities to include the operation of major bodily functions.

Fifth, the bill removes from the third "regarded as" prong of the disability definition the requirement that an individual demonstrate that he or she has, or is perceived to have, an impairment that substantially limits a major life activity. Under the bill, therefore, an individual can establish coverage under the law by showing that he or she has been subjected to an action prohibited under the Act because of an actual or perceived physical or mental impairment. Because the bill thus broadens application of this third prong of the disability definition, entities covered by the ADA will not be required to provide accommodations or to modify policies and procedures for individuals who fall solely under the third prong. Such entities will, however, still be subject to discrimination claims.

Finally, the bill clarifies that the agencies that currently issue regulations under the ADA have regulatory authority related to the definitions contained in Section 3. Conforming amendments to Section 7 of the Rehabilitation Act of 1973 are intended to ensure harmony between federal civil rights laws.

II. BACKGROUND AND NEED FOR LEGISLATION

When Congress passed the ADA in 1990, it adopted the functional definition of disability from the Section 504 of the Rehabilitation Act of 1973,⁹ in part, because after 17 years of development through case law the requirements of the definition were well understood. Within this framework, with its generous and inclusive definition of disability, courts treated the determination of disability as a threshold issue but focused primarily on whether unlawful discrimination had occurred.

More recent Supreme Court decisions imposing a stricter standard for determining disability had the effect of upsetting this balance. After the Court's decisions in *Sutton* that impairments must be considered in their mitigated state and in *Toyota* that there must be a demanding standard for qualifying as disabled, lower courts more often found that an individual's impairment did not constitute a disability. As a result, in too many cases, courts would never reach the question whether discrimination had occurred.

Thus, some 18 years later we are faced with a situation in which physical or mental impairments that would previously have been