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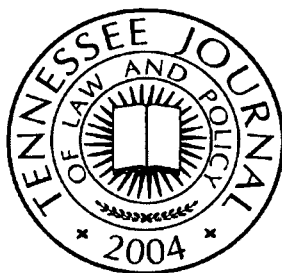
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SYMPOSIUM

Tennessee v. Lane: Disability Rights in the New Millennium

PERSONAL STORIES

Beverly Jones & George Lane

PLAINTIFFS' LEGAL STRATEGY

William Brown

UNITED STATES'S LEGAL STRATEGY

Patricia Millet

TENNESSEE'S LEGAL STRATEGY

The Honorable Michael Moore

TENNESSEE'S RESPONSE TO THE DECISION

The Honorable Paul G. Summers & Elizabeth Martin

THE POLICY IMPLICATIONS

Elizabeth McCallum

*TENNESSEE V. LANE: WINNING THE BATTLE,
LOSING THE WAR?*

Michael L. Foreman & Ossai Miazad

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THE TENNESSEE JOURNAL OF LAW & POLICY

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Editor's Note

On April 13, 2005, the JOURNAL hosted its first symposium. Such an event is a significant undertaking, and the JOURNAL is grateful for the special contributions made by the following:

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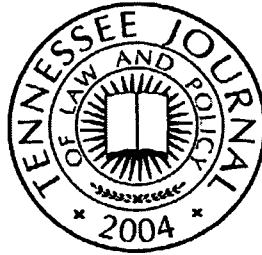
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Personal Stories

*Beverly Jones & George Lane*¹

I. Ms. Beverly Jones:

Good afternoon. George has informed me that I am to go first this afternoon, so I will take advantage of that. My name is Beverly Jones, and let me first of all thank you for allowing George and me to be a part of this symposium. It is my first appearance since March 17, 2005 after the case officially ended.

My personal story in relation to *Tennessee v. Lane*² began in 1990, upon my completion of court reporting school. It was at that time that I found myself as a court reporter relying on individual attorneys across the state to hire me to go and report individual cases for them. On a regular basis when I reported trials, I would encounter courthouses that were inaccessible. Many courtrooms were on the second and sometimes the third floor of buildings that were not equipped with elevators. For many years in order to continue working in these particular counties, and these particular courthouses, I would have to ask for assistance. This often required me to allow people to carry me up the stairs. Most of the time, these people were

¹ Ms. Jones and Mr. Lane joined as plaintiffs in *Tennessee v. Lane*. Ms. Jones, who uses a wheelchair, is a certified court reporter. She was compelled to decline employment because of her inability to gain access to several courtrooms and related facilities in at least 24 Tennessee counties. Mr. Lane, also a wheelchair user, was charged with a traffic violation in Polk County. The courtroom in which he was required to appear on the appointed morning was located on the second floor of a courthouse that was not equipped with an elevator. Mr. Lane crawled up two flights of stairs in order to reach the courtroom, only to have the case postponed until the afternoon session. Having returned to the first floor, he refused to crawl up the stairs a second time and, as a result, was jailed for contempt of court.

² 541 U.S. 509 (2004).

complete strangers. The stairwells in these courthouses were very narrow and very steep, with many turns and flights of stairs to get to those second and third level courtrooms.

As I became more familiar with the individuals I was working with in these courthouses, I began to talk to them along with others in county governments who ran the judicial programs. We all agreed that there was a need for access to the courtrooms. I started writing letters to individuals and making phone calls in hopes that we would find a solution and that I could find an answer to the problems that I was facing.

I contacted the Governor's Committee for the Employment of People with Disabilities; I contacted the Department of Justice; I contacted the Legislative Action Network; and I talked with the Administrative Office of the Courts. I contacted Senator Al Gore's office and many, many others, and voiced my concern about the inaccessible courtrooms that I was encountering on a regular basis in the areas in which I was traveling as a court reporter. The responses from these individuals were usually similar in that they all recognized and acknowledged that there was a problem. Many of these individuals had their own stories of instances that they had witnessed where an individual with a disability could not access the courtroom. But no one was quite sure what to do to solve the problem. After many years of continuing speak with individuals in these counties, I did begin to see changes.

I began to see courthouses installing elevators. I began to see sidewalks outside courthouses replaced with new sidewalks equipped with ramps. I began to see courtrooms being built on first floors. I began to see restrooms modified and made accessible, and I began to see new [signs] in parking lots designating accessible parking. Most of what were once entirely inaccessible courthouses were now becoming accessible.

A few courthouses remained inaccessible for as long as six years after January 26th, 1992, the deadline date of the Americans with Disabilities Act³ for these courthouses to come into compliance. In August of 1998, I chose to personally sue the State of Tennessee about the counties that remained inaccessible. The adventure that followed the filing of this lawsuit will be spoken about by some of the other speakers later this afternoon.

One of my most memorable recollections was being present at the Supreme Court oral argument and hearing Justices Rehnquist and Scalia describing being carried as a mere inconvenience rather than a form of discrimination. According to them, an offer to be carried provided access to the courtroom. I will never forget their comments. Seven years later, the few courthouses that remained have come into compliance by making structural changes, or by creating and implementing a policy on how to deal with a situation when a person with a disability needs assistance to the judicial program in that county. The State's policy also speaks to that, and you will be hearing more about that later this afternoon.

In my outline that I received from the college, they asked me to talk about what this case means to me. I have been asked that many times, and I think I've given a different answer every time. I was reflecting back on everything last night, and realized the outcome of this case is significant to me because in the beginning, when I chose to take on the counties that would not come into compliance, it was not just about Beverly Jones needing to go to work, it was not just about George Lane needing to defend himself, it was about access to the judicial programs of this State for every single person. The significance of the outcome of *Tennessee v. Lane*, I believe, has been accomplished in that the judicial program within the state is readily accessible to everybody. Thank you.

³ 42 U.S.C. §§ 12131-12300 (2005).

II. Mr. George Lane:

Well, I guess you all know I'm George Lane. I would like to say it is an honor to be here. I am a big UT fan. I became disabled after working 16 hour shifts and falling asleep coming home from work. Paying taxes and maintaining our government buildings does not say anything for my character. I had no idea that the [Americans with Disabilities Act] or any law of that sort existed. I just knew that I was summoned to court for driving on a revoked license. In the rural county where I am from, you better get there, so I climbed up the steps and it made a mockery of me, which is why I want to give a lot of credit to my counsel who looked beyond the client and looked at the cause. Therefore, you know, it is just—to me—I have done several interviews, and I am sure if you all have ever heard me talk, I live by the K.I.S.S. program, "Keep it simple, stupid."

It is not real hard to see a person's needs, when he has a fundamental right to access our government buildings. This is America, not a third world country. I am pleased with the changes that [have] occurred due to this case, and just to know that—like Beverly said earlier—it is not just about myself or Beverly. There are 250,000 disabled people in this state, 55 million people in the U.S. To indirectly touch or to aid them in some way, I think it is truly a blessing from God. I feel real fortunate just being a part of it.

Like I say, when I first became disabled I was a very angry man. [It] took my—it took my livelihood away, I was unable to work. But God took a bad situation and made it good. Now there is no one else in this state that will ever have to crawl up some steps or to be carried to perform her job. Like I say, I feel truly blessed to be a very small part of a very good thing. And I give credit to God and my counsel, Bill Brown and his assistant Lisa. That is all I have got to say.

Plaintiffs' Legal Strategy

*William Brown*¹

Thank you, Mr. Stephens, I want to begin by thanking the Tennessee College of Law and the Tennessee Journal of Law and Policy for inviting my client and friends, George Lane, Beverly Jones, and me to participate in the symposium on the case. It is also a pleasure to renew acquaintances with Solicitor General Moore, and Attorney General Summers, with whom I had the occasion to share a bit of history with on a cold day in January in Washington, D.C. I am pleased to see Patty Millett visiting with us in Tennessee. I can never say enough about the encouragement and support she gave me during the course of preparation for the argument before the Supreme Court last year. For that I will be eternally grateful. As we approach the anniversary of *Tennessee v. Lane*,² it is appropriate for us to reflect for a few moments on the implications of that decision and appreciate the strategies that were used to develop the issue that was decided. Perhaps the first thing that we should address is: What was the issue that was presented?

That simply stated is whether or not Congress properly abrogated the State's Eleventh Amendment sovereign immunity against money damage claims by average citizens when it passed Title II of the ADA.³ It sounds like money. Little did I know in 1998 when I filed the lawsuit that the implications would be considerably more broad and dramatic. Please understand just how naive

¹ Mr. Brown argued *Tennessee v. Lane* on behalf of the plaintiffs, George Lane and Beverly Jones, before the United States Supreme Court. He is a 1974 graduate of the Tennessee Technological University and received his J.D. from the University of Tennessee College of Law in 1977.

² 541 U.S. 549 (2004).

³ 42 U.S.C. §§ 12131-12300 (2005).

I really was when I filed this lawsuit. I was a small town lawyer who had primarily had a practice that consisted of doing deeds, wills, and mundane areas of trial practice. Most of my constitutional law experience was an occasional foray into the Fourth Amendment when I had a client that needed a break from criminal prosecution. I heard in law school there was a principle of law kept you from suing the state, but I thought Congress held the trump card. When George Lane rolled into my office in 1996 and told me about his experience in Polk County, Tennessee, where he had to crawl up some steps to get to court because he could not walk, and then was put in jail because he refused to crawl or be carried, I thought that there was a law that said a state could not do that.

I went to the U.S. Code Annotated, and there it was in black and white. A state cannot discriminate against people with disabilities who are otherwise qualified in its programs and services because of that disability, period. In another section, it said that if a state did, then the person who had suffered that discrimination had a right to exercise all remedies including remedies at law and in equity, and that the state could not claim immunity.

Boy, this case looked like a slam dunk. It was obvious. I thought I could file suit, make the State and counties fix the courthouses like they were supposed to, maybe collect some money for George and Beverly, and maybe make some money for myself. Little did I know the road would be a lot longer, and the implications would involve the viability of Title II of the Americans with Disability Act, and the ultimate question of what power Congress really had under Section 5 of the Fourteenth Amendment to make states fulfill their fundamental responsibilities to their citizens under the Constitution.

In August of 1998, I filed suit in federal district court in Nashville on behalf of George and Beverly against the State of Tennessee and twenty-five counties claiming these public entities had discriminated against George,

Beverly, and all other citizens of the State of Tennessee with mobility disabilities because they conducted their judicial program in inaccessible courthouses. I asked the court to make them fix the program, to pay my clients money for damages for the discrimination they suffered, and to pay me some attorney's fees for having to bring the lawsuit.

My secretary told me that the state attorney general's office called and said they wanted to talk to me. I remember thinking to myself, "They want to settle!" I got on the phone, [and] they asked me if the State could have [an] extension of time to answer the complaint. I agreed to the request for an extension and I remember rocking back in my chair and saying, "Why do they want to embarrass themselves by having to admit everything?" The facts were not seriously in dispute, I had pictures of the courthouses and a ton of twists to what had happened to George and Beverly, there really was not a material issue of fact for the plaintiffs. We were not going to settle this month, but maybe soon.

A couple of weeks later, I received the State's motion for the case to be dismissed because of its Eleventh Amendment sovereign immunity, which when I read it through, I thought was silly. After all, didn't Congress pass a law saying that a state's sovereign immunity had been done away when it came to the ADA? Again, I thought this would be a slam dunk in reading over the state's memorandum of news, *City of Boerne v. Flores*.⁴ This case had been issued the year before, and the Court had directly pronounced the meaning of the Constitution, and that Congress could not overturn the Court's interpretation of the Constitution. *Boerne* was the beginning of a steady stream of cases where the Supreme Court began to restrict Congressional power under the Fourteenth Amendment.

⁴ 521 U.S. 507 (1997).

I filed my response to the State's motion to dismiss and [waited] for the decision. Several weeks later I received a copy of a document in the mail from the clerk's office, and noticed at the bottom of the page in longhand that I could barely read, Judge Higgins, our federal district judge, had written "State's motion to dismiss is denied," with his signature. So much for memorandum opinions.

I understood this to mean that he agreed with me and there really was not much to the State's motion to dismiss. A few weeks later I received another pleading from the State. This time they were appealing the case to the Sixth Circuit Court of Appeals in Cincinnati, as well as asking the court to stay all proceedings pending the appeal. I knew then the State really did not want to answer my complaint.

The district court state proceedings resulted in a stay of all the proceedings against the counties. If we could not get injunctive relief to fix the courthouses, we were dead in the water. We were not going to settle the case that month.

[I] went to Cincinnati to argue the case, and the federalism storm clouds were getting darker. The State argued forcefully because Title II involves a class of individuals that are disabled, under *City of Cleburne v. Cleburne Living Center*,⁵ only a rational basis [test was applied] for the state[s] to treat individuals with disability differently under the Fourteenth Amendment.

As such, the State argued that under *Boerne*, Congress had overstepped its authority because it was preventing states from treating people with disabilities differently. As long as their conduct was rational, states were constitutionally permitted to discriminate. This was terribly wrong, especially with reference to our case. After all, we were not just talking about any program, we were talking about the fundamental right of access to the courts.

⁵ 473 U.S. 432 (1985).

It struck me as the ultimate insult to say to disabled citizens that everyone has a fundamental right of access to the courts except you, and that only a rational basis test would be applied to your right to access that program, and if the sovereign cannot afford to fix that program, well, tough luck.

When Congress passed the ADA, they made a specific finding that those with disabilities were a discreet and insular minority that was powerless to defend its rights. When we had oral argument in the Sixth Circuit, the panel hearing the case seemed to be buying into the Congress's argument. While we were waiting for the court to decide our case, the Supreme Court delivered its opinions in *Florida Prepaid v. College Savings Bank*⁶ and *Kimel v. Florida Board of Regents*.⁷ Cases were being delivered by the Court striking down congressional attempts to take away state sovereign immunity. None of these, however, involve the Americans with Disability Act.

Then the Court delivered its opinion in *Board of Trustees v. Garrett*.⁸ This was the first time the court had dealt with the ADA on the issue of money damages against the state. The issue presented for the Court allowed the Court to deal with both Title I and Title II of the ADA.

The Court continued its rightward march. In a vote of five to four with Kennedy and O'Connor concurring, the Court struck down congressional action in abrogating a state's sovereign immunity, but it only resolved Title I claims associated with employment. It specifically deferred Title II and government programs to a different day.

Needless to say, there were few who supported the ADA who had much hope for the continued viability of the

⁶ 527 U.S. 627 (1999).

⁷ 528 U.S. 62 (2000).

⁸ 531 U.S. 356 (2001).

Americans with Disability Act. We did not hear from the Sixth Circuit for over two years.

In July of 2002, the Circuit Court issued a *pro curia* opinion affirming the decision over the district court. We had won again. This was in spite of *Garrett* and clearly bucking the collective trend in the Supreme Court and circuits. For some reason, this conservative circuit court just could not hold that Congress did not have the power to keep people from having to crawl or be carried up steps to get to court.

The State asked the Court to reconsider and the Court took it under advisement. They thought about it until January 10, 2003, and again ruled in our favor. We waited for several months to see what the State was going to do, and we got their application for certiorari to the U.S. Supreme Court. I realized I was not going to get the case settled that month either.

We filed our response and waited for the Court to determine if certiorari would be granted. During that time there was a tremendous pressure from disability rights community on the State to drop their appeal. We, likewise, came under extensive pressure from many in the disability rights community to not go forward and to withdraw our claim for monetary damages.

There was a common feeling that this case could make or break the ADA, and some advocates in the disability community were not willing to take the risk. My attitude was that if we cannot win this one, what could we win? Certiorari was granted, we waited on the State's brief. When we received it, we went to work on ours. I was very fortunate to have the able assistance of Sam who taught constitutional law at Harvard and was an expert on disability rights. Tom Goldstein, of the firm of Goldstein & Howe, also assisted us on our brief. We went round and round about various approaches to take on the brief.

We knew there were two strengths we had. First, there was the fact [that] it does not sound right to have

people having to crawl upstairs to get to court to a bunch of lawyers, especially if the alternative is for the lawyers to carry them. The second thing was that we had the strong counter to the *Cleburne* rational basis standard, the issue of fundamental rights. The problem we confronted was that while our case implicated fundamental rights, Title II implicated everything including, as the State strategically spoke about, rest stops on the interstate. The breadth of Title II posed a difficult problem that would be difficult to cover in a maximum 50 page brief. We ran into the problem of running out of pages before we could finish the second prong if we had to cover everything.

Sam Bagentoss suggested the “as applied” analysis, that is to say that we would ask the Court not to feel compelled to address all aspects of Title II, but only consider whether Title II was constitutional as it applied to the fundamental right of access to the courts. This allowed us to focus the Court’s attention on what was a serious problem with serious facts concerning a fundamental right. It also gave us the strategic advantage of keeping the Court’s attention on access to the courts and not access to rest stops. Besides, Patty Millett and the Justice department would have to cover everything else and we knew they would do a splendid job.

We filed our brief, and I started attending some moot court sessions, all of which Patty Millett participated in. The first one I went to was in December of 2004, about a month before the oral argument. I had a panel of eight experienced constitutional lawyers, all of whom had argued numerous times before the Supreme Court to serve as my moot justices.

It was a grueling experience to say the least. And [it] lasted for about an hour and a half. Then they got to tell me what they really thought of my presentation. Now, you need to understand the moot took six times the length of time I would have before the Court. I did not have a chance to catch my breath or collect my thoughts while

being pounded by a group of lawyers who not only practiced constitutional law, but also argued before the U.S. Supreme Court for a living. You can imagine what they thought of me and it was not good.

It was after that experience that the implications of *Tennessee v. Lane* really hit me square in the face. One of my colleagues sat me down and told me that the future of 55 million Americans with disabilities was riding on my shoulders. He was not optimistic. I filed a lawsuit to get a little money for George and Beverly which had evolved into a question of whether or not 55 million Americans could be denied their fundamental rights of citizenship. My shoulders were really sagging under the responsibilities. This was serious business.

I arrived at the court on the morning of January 13th, 2004, I had worked hard, gone through two or more moots, [and] listened to fifteen Supreme Court arguments that were available online. Ours was the first case on the docket and General Moore opened the argument. Some of the first questions that were posed to him were by Justice Sandra Day O'Connor.

Now, with the five to four split in *Garrett*, we knew we had to change one vote—it had to be either Kennedy or O'Connor, and I was looking to O'Connor. She had a history of being pragmatic with a common sense approach to most of her decisions associated with civil rights. My reading of her was that she wanted people to be treated properly, with respect and dignity without placing a too onerous burden on the states. I was also optimistic about her because she had been a state trial judge that had to deal with real people in a personal way. I suspected that in Arizona she had to deal with old, uncomfortable courthouses, stubborn county commissions, and perhaps had even seen a few people carried up steps in her life's experience. She might not buy everything in Title II, but I felt that she would not be comfortable letting the state get

by with having people crawl up steps to get to court. Justice O'Connor's questions were direct and simple.

She asked, "Mr. Moore, does Tennessee provide any cause of action for the alleged violations here? The lack of access to the courthouse?" He candidly responded, "No — there is no private action under our State Public Buildings Act."⁹ She asked him again, "You're satisfied under Tennessee law there would be no monetary relief available?" He responded, "I think that is right." She then asked him a third question: "And would there be any enforcement actions at all available to compel under Tennessee law the courthouse to be accessible?" He answered, "No, your Honor." The argument went another fifteen minutes including my fifteen minutes, but after those three questions I felt confident our strategy had worked. Sandra Day O'Connor was not about to leave my clients without a remedy against the denial of their fundamental rights.

On May 17th, 2004, the court announced the decision in an opinion by Justice John Paul Stevens. We had won by a 5-4 vote with Justice O'Connor in the majority. Justice Stevens focused on exactly what we had set out for them, [that] access to the courts is a fundamental right and there is ample history in the record that Congress generated that supports the conclusion that the states have unconstitutionally discriminated against people with disabilities in the administration of their programs. In conclusion, the Court need only consider Title II in the context of access to the court and we will leave to another day the abrogation of sovereign immunity with reference to other programs.

Justice O'Connor did not write a word, but her influence and belief in civil rights is clearly there.

There was hope that the purposes for which Title II was passed would be a reality. The potential for disaster,

⁹ Tenn. Code Ann. §§ 68-120-201 to -205 (2005).

for not only disability rights but all aspects of civil rights, is starkly contained in the dissenting opinions of Chief Justice Rehnquist and Scalia. The Chief Justice rejected the “as applied” inquiry. More significantly, the Chief Justice said that there was nothing unconstitutional about George Lane having to crawl up the stairs to get to court, nor was there anything unconstitutional about his being arrested for refusing to be carried. In fact, it was perfectly acceptable. After all, he did get to court. George Lane’s inconvenience, his words, of having to crawl to his day in court was not in his opinion unconstitutional. He commented that, “Jones, a disabled court reporter, does not seriously contend that she suffered a constitutional injury.” I was trying to be as serious as I could get. The principle that bad conduct by states towards its citizens, even if illegal and discriminatory, is never unconstitutional almost became the law of the land.

Justice Scalia’s dissent was even more drastic. His view would, in effect, abolish the ability of Congress to enact prophylactic [legislation] under the Fourteenth Amendment in any area except race. In other words, Congress has no general prospective power under the Fourteenth Amendment to protect citizens from the denial of due process of law or the equal protection of the laws in any area except race. This conclusion, if held by a majority of the Court, would have completely emasculated the Fourteenth Amendment. It provides protection from arbitrary acts by states against their citizens. Those citizens would not be subject to any protection by Congress, without the Fourteenth Amendment, which extends the right of private litigants to bring actions to vindicate their civil rights. It would bring in serious question whether Congress had the power to pass legislation that gave authority to the federal executive branch to intervene in federal courts on behalf of citizens who were being deprived of fundamental rights on grounds other than race. The one caveat was that Congress could conduct trials

directly at specific states and state actors where there had been an identified history of "relevant constitutional violations." That, of course, would never happen. What senator would ever let his state be singled out for a trial by Congress, let alone allow a finding of relevant constitutional findings?

In addition, remember that under *Boerne*, the Supreme Court decides what is and is not constitutional. If the principle that bad conduct is not unconstitutional conduct was the law of the land, there may not have been any civil rights to protect. This would turn on its head the concept that the role of Congress is to pass laws that regulate conduct, not to make findings of fact in order to punish conduct. The implications of the issue for the Court in *Tennessee v. Lane* were broader than money damages under Title II. The power of Congress to protect citizens with or without disabilities from the denial of fundamental rights was eerily at stake. Because of the shift of one vote by one justice, perhaps the whole concept of civil rights was saved.

I never dreamed my little case to fix the courthouses and get George and Beverly a little money would bring our country back from the brink of the abolition of the power of Congress to guarantee the civil rights of all of us, even in areas other than disabilities. Should a person be denied their rights of citizenship because they are disabled?

Hopefully the answer to that question will never again be seriously in doubt. The real hope for individuals with disabilities under Title II is not that they will be able to collect money from states, it is that they will be treated like any other citizen and they will not have to sue every time they want or need to access a state program. With the decision in *Tennessee v. Lane*, it is clear that they are citizens whose fundamental rights under the Constitution can be protected by congressional action. Hopefully, they will be expanded to other programs and services as applied analysis is developed. The best news for George and

Beverly is the state has adopted procedures that no person has to crawl up steps to get to a court of law. For me, I finally got this case settled.

United States's Legal Strategy

*Patricia Millett*¹

First of all, I want to thank you for inviting me here today. It is a privilege to be here, and I hope all of you law students realize that something very exceptional is happening here. You all have probably spent one, two, or three years talking about legal issues like those we litigated in the Supreme Court. When I went to law school, nobody spent much time teaching that there are real people behind cases, and that before you get to go to the Supreme Court, you have to have a client willing to make that fight. That is how it works. Law school is a wonderful place, but you always have to remember that there are real people behind every case, and I think that has really come home today. It has been a privilege to hear these stories.

When Mr. Lane said that he was a small part of a big case, he was wrong. He and Ms. Jones are the case. It is too easy, particularly for those of us that practice in front of the Supreme Court, to forget that and just get wrapped up in the legal issues. I hope you will take that message home with you. It is certainly something that I will remember.

I work in the Solicitor General's Office of the United States Department of Justice and we represent the U.S. government in the Supreme Court. While it is always a privilege to handle a case in the Supreme Court, there are some cases—and this is one—that I will remember throughout my career. That is not only because of the interesting legal issues, but most importantly the human implications of the case for people who face exceptional challenges and ask for nothing more than fair treatment and consideration by their government.

¹ Ms. Millett is an Assistant to the Solicitor General. She is a Harvard Law School graduate.

This case was between Beverly Jones, George Lane, and the State of Tennessee. Why was the U.S. government in this case? “We’re your government, we are here to help,” I told Mr. Brown. He did not seem to believe me at first. One of the jobs the Justice Department and the Solicitor General’s office do is defend the constitutionality of federal law. So, while Mr. Brown just happened to get a case with this great issue—great federal courts and constitutional law issues—we had been battling with the Supreme Court on these issues for years, although we had not been doing very well. Mr. Brown could be justifiably unenthusiastic at our arrival on the scene—we came to him armed with losses in *City of Boerne v. Flores*,² *Kimel v. Florida Board of Regents*,³ and *Board of Trustees v. Garrett*.⁴ Although, to our credit, in *Nevada Department of Human Resources v. Hibbs*,⁵ we finally won one. So maybe we had a little credibility with him.

*Tennessee v. Lane*⁶ was case number five in what thus far had been an ever-expanding list of federalism losses. The Supreme Court had been cutting back on Congress’s power to enact laws that applied to the states, both under Section 5, the civil rights power, and the Commerce Clause power as well. So, at some level, we were beginning to feel that our job had become to show up every term of the Supreme Court with a “kick me again” sign. Title II of the Americans with Disabilities Act,⁷ while finally decided in part in this case—still not totally resolved, which I will get to—had already been before the court multiple times. They had granted certiorari to decide this issue since the year 2000 in *Kimel*, in which the Supreme Court decided Congress did not have the power to

² 521 U.S. 507 (1997).

³ 528 U.S. 62 (2000).

⁴ 531 U.S. 356 (2001).

⁵ 538 U.S. 721 (2003).

⁶ 541 U.S. 509 (2004).

⁷ 42 U.S.C. §§ 12131-12300 (2005).

require the states to pay damages for violations of the Age Discrimination in Employment Act.⁸ There was also a disability claim in that case. After they decided the age issue, they granted certiorari to decide the disability issue. That case was settled.

Then they granted review in a case coming out of the Eighth Circuit involving a police officer who had somewhat limited vision, but performed perfectly fine on a shooting test. That case was settled.

Then there was the Court's decision in *Garrett*, where the Supreme Court decided that Title I of the Americans with Disabilities Act, which applies to employment, was not a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment. Finally, the term before *Lane*, we briefed the constitutionality of Title II in a case coming out of California that dealt with medical licenses for doctors. That case was dismissed by California shortly before oral argument. We had been dealing with this issue for quite some time, and Supreme Court precedent gave little reason for optimism. We were very conscious of the barriers that we faced in front of the Supreme Court. Now we do not have individual clients in the sense that Mr. Brown did. Our client is the U.S. government and the power of Congress to enact its laws. Our goal was to stop the hemorrhaging of congressional power to enforce civil rights. We accordingly wanted to have Title II of the Americans with Disabilities Act upheld as broadly as possible. Because of what had gone before, there were some important decisions that needed to be made. After all, when we first briefed this issue, we did not have *Garrett* on the books.

In *Garrett*, the Supreme Court had held that just a couple pages in the U.S. Code before Title II there is another section of the Americans with Disabilities Act—

⁸ 29 U.S.C. §§ 621-34 (2005).

Title I—that is not Section 5 legislation. That is a really hard precedent to wrestle with. Have you ever been in a case where they have already held that another part of the act is unconstitutional? But there was more.

How many of you have heard of a case called *Buck v. Bell*?⁹ Did you hear about that case in favorable terms? Probably not. *Buck* was an old Justice Holmes decision upholding the power of government to sterilize the mentally retarded. It is generally consigned to the *Dred Scott*¹⁰ trash bin of judicial decision-making. At least that is how I learned it in law school, because the Court, in *Buck*, seemed to sign onto the whole eugenics movement. They endorsed the notion that, if you are mentally retarded, you are the product of bad blood and we should try to purify society by preventing you from reproducing and, in that mindset, perpetuating the so-called “problem.” It is terrible language.

In *Garrett*, the Supreme Court cited that decision, but not with much blushing. In response to our argument in that case about a history of discrimination on the basis of disability and our arguments about the history of sterilization, the Court responded with “We upheld those. See *Buck v. Bell*.” Now, I am not suggesting the Court would decide the case the same today. It would not. But *Buck* is evidence of discrimination in our history.

That is where we found ourselves when *Lane* arose, which is why we were so cautionary while Mr. Brown was so optimistic. To Mr. Brown, disability discrimination seemed so self-evidently a problem. But we were very conscious that we had to establish special protections for people with disabilities to overcome a history of discrimination.

That is what had been recognized in the race discrimination area. Congress had to have special powers

⁹ 274 U.S. 200 (1927).

¹⁰ *Scott v. Sandford*, 60 U.S. 393 (1856).

to overcome race discrimination because it was so embedded. Gender discrimination was the same in *Hibbs*.

I had thought it was simple at first, too, when I first came to the Americans with Disabilities Act. I thought the Religious Freedom Restoration Act¹¹ was largely Congress in a turf fight with the Supreme Court, eyeball to eyeball and toe to toe over fundamental conceptions of religious freedom. But if anything it is Section 5 legislation. If there is anything Congress is especially equipped to do, it is protecting the rights of individuals with disabilities because there is a real history of discrimination in this country. Sterilization, institutionalization, preventing people from voting, refusing employment, excluding them from schools—it is all chronicled in our brief. There is a real, undeniable history of discrimination here, a complex history.

In *Cleburne*,¹² the reason the Supreme Court applied rational basis analysis was not because they did not think disability discrimination was a problem. The rationale in *Cleburne* was, instead, that the legislature needs to deal with the recognized problem of disability discrimination. It is very complicated, and it entails careful line-drawing and balancing a lot of information that courts do not have. *Cleburne* was an institutional decision about who was better positioned to protect people with disabilities. I thought Title II is exactly what Section 5 legislation should be. But then along came *Garrett*.

Since *Garrett*, the Supreme Court had upheld the Family Medical Leave Act¹³ in *Hibbs*. That was our first law upheld as proper Section 5 legislation since *City of Boerne*, and that involved gender discrimination. The opinion accepted the argument that where there is a recognized history of discrimination such that the Supreme

¹¹ 42 U.S.C §§ 2000bb to 2000bb-4 (2005).

¹² *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

¹³ 29 U.S.C. §§ 2601-54 (2005).

Court itself has applied heightened scrutiny and thus has recognized the problem, Congress has greater leeway under Section 5 of the Fourteenth Amendment. When you see the briefs and the arguments in *Tennessee v. Lane*, there was a lot of focus on rights subject to heightened security.

Yes, we made the straightforward argument about disability discrimination under the equal protection clause. The oral argument also brought up questions about the right to go to the ice skating rink, though. Quite frankly, why shouldn't somebody be able to go to a public skating rink just because they have a disability? If it only costs fifty cents to make the doors wider, do it so that all your citizens—all the people government is supposed to work for—can go ice skating. But we also spent a lot of time focusing on the fundamental rights that are implicated by disability discrimination, whether access to the courts, Eighth Amendment violations in prisons and mental institutions, First Amendment rights, or the right to vote. In framing the arguments, there was a focus on the fundamental rights aspect because it had worked so far under Section 5 of the Fourteenth Amendment.

When you read the briefs, the other thing that becomes clear is that the prior cases where the Supreme Court had held Congress lacked Section 5 authority (other than *Boerne*) involved only claims for damages. They generally involved employment cases, where the substance of the law could be sustained as Commerce Clause legislation. There, thus, was no question that Congress could pass the law and make the states comply with the law. The Court just held that states do not have to pay damages. That is the import of the Section 5 ruling in those cases. The same was true for Title I of the Americans with Disabilities Act. It is not totally unconstitutional. It still applies to the states as Commerce Clause legislation, however no damages can be awarded.

The difficulty with Title II, as we saw it, is it is less clear. It would be an open question in the Supreme Court's

view—whether the Title is Commerce Clause legislation. We defend it as Commerce Clause legislation, but it is challenging in some applications to identify the Commerce Clause nexus. Access to polling place cases is difficult to justify as commerce. However, we would win the ice skating rink—that is commerce. In the brief we tried to paint a picture of where an adverse holding on the Section 5 power would leave us.

If the Supreme Court says Title II is not valid Section 5 legislation, and if they were to say that its application to state capital buildings, state courthouses, and state polling places is not Commerce Clause legislation, then where would that leave our country? You would be able to get into any building, any McDonald's in the country, and any private building of a requisite size. You could get into your ice skating rink and your county park facilities. But you could not get into your capital or your courthouse, and you could not get into polling places to vote. How can that be how our Constitution leaves things? How could a constitutional amendment enacted after the Civil War to empower then predominantly African-Americans, freed slaves, have that result? Certainly the concern of the Fourteenth Amendment's framers was not to get freed slaves into ice skating rinks.

That was the image our brief attempted to leave in the Supreme Court's mind.

One more thing about strategies in the case: there was a significant distinction between our brief and Mr. Brown's. I think it was helpful for the Supreme Court to have the two approaches. He focused heavily on access to the courts and on the "as applied" challenge. You can argue that something is unconstitutional facially anyway that it is applied. You also can argue that a law is unconstitutional in one application and not another.

What Mr. Brown argued is that the court did not have to decide congressional power to enact all of Title II. After all, it is a big statute, and it covers everything the

government does—ice skating rinks to courthouses. All he needed for his clients to win was access to the courts, which is a clear fundamental right that is not subject to rational basis scrutiny under *Cleburne*. It is specially protected by the Constitution and the Court, and so Congress has leeway.

Our job is to defend Title II as a whole, from ice skating rinks to courthouses. So we argued in our brief that the Court should decide the constitutionality of Title II as a whole. After all, the whole concept of Section 5 legislation is that Congress can do more than outlaw things that are unconstitutional. All of your rights against race and gender discrimination in employment encompass a lot more than just what the Constitution requires.

The Family Medical Leave Act certainly provides more than what the Constitution requires. Congress can give more under Section 5 of the Fourteenth Amendment than the bare minimum constitutional protection. Our view was, as some of the states had argued, that the “as applied” approach would be used to divide and conquer congressional legislation. Our concern was if you tear this statute apart and look at it in each application, and ask if we really need it in each context, the Court will say that you do not really need it here, or here, or here. Certainly not in this day and age. If they could do that, they might also say a ban on intentional gender discrimination is appropriate Section 5 legislation, but a ban on employment practices with a disparate impact is not. Given our general lack of success in the Supreme Court in recent cases, we thought it was dangerous to argue that Title II should be divided up that way and start scrutinizing each application of the statute. So the Supreme Court had both proposed approaches before it.

As you know, the Supreme Court did uphold Title II, but only as applied to access to the courts claims. It was a great victory, it is a wonderful opinion, it decided a lot of important issues, and will help with the defense of other

statutes. But we still have the question of where do we go after *Tennessee v. Lane*.

We now have to defend Title II in all of its other applications. We just filed a petition for a writ of certiorari last month for the Supreme Court to address the constitutionality of Title II in the context of prison administration. There is a division in the circuit courts. One has upheld it, two have struck it down. There was a recent decision from the Eleventh Circuit a few days ago upholding Title II as applied to education, but the same issue is also being litigated elsewhere. We cannot sit back and say we are done. There are still many more applications to be dealt with, and it will be up to the Supreme Court to sort out exactly what lines it wants to draw on congressional power or whether it will, at the end of the day, hold, as it should, that Title II in all of its applications is constitutional. Thank you very much.

Tennessee's Legal Strategy

*The Honorable Michael Moore*¹

The State of Tennessee did not anticipate that *Lane*² would be the first case through which the Court would address the Title II sovereign immunity issue. We fully recognized that its unattractive facts made the case a particularly unfavorable vehicle for that purpose. By the time the Sixth Circuit finally disposed of the State's petition for panel rehearing in January 2003, the Supreme Court had already granted review in *Medical Board of California v. Hason*,³ a case from the Ninth Circuit that presented the sovereign immunity issue in a far more favorable light from the perspective of the States.

We thus had every reason to believe that, when the time arrived to file our petition for certiorari in *Lane* in the Spring of 2003, *Hason* would already have been argued and submitted, and that the Court would simply hold our petition pending its decision in *Hason*. Then, most likely, the Court would remand our case to the court of appeals for reconsideration in light of *Hason*. But, in an extraordinary turn of events, just a few weeks before *Hason* was to be argued and after the case had been fully briefed on the merits, California abruptly asked that its certiorari petition in that case be dismissed, a request that the Court obliged. Thus, *Lane* came front and center as the next available case that might be used to address the issue. Within a matter of weeks after *Hason* had been dismissed, Tennessee filed its petition for certiorari in *Lane*; respondents Lane and Jones, as well as the United States, promptly filed responses that essentially acquiesced in a grant; and the Court granted the petition at the end of the Term in late June 2003.

¹ Michael Moore is the Tennessee Solicitor General.

² *Tennessee v. Lane*, 541 U.S. 509 (2004).

³ 279 F.3d 1167 (9th Cir. 2002), *cert. granted*, 537 U.S. 1028 (2002).

Our petition for certiorari framed two questions for the Court's consideration. The first presented the generic sovereign immunity issue: whether Title II of the ADA⁴ exceeded Congress's authority under Section 5 of the Fourteenth Amendment and, thus, failed validly to abrogate the States' Eleventh Amendment immunity from private damages actions. The second question asked the Court specifically to address the Sixth Circuit's assertion that the outcome of the sovereign immunity analysis should vary depending upon the nature of the constitutional right implicated by the particular allegations of the Title II claim in each case, a "context-specific" approach that in our view was wholly inconsistent with the Court's prior abrogation jurisprudence. The Court limited its grant of certiorari to the first question, an action suggesting to us that our opening brief should concentrate on demonstrating why Title II, viewed in its entirety, failed the "congruence and proportionality" test for valid abrogations of Eleventh Amendment immunity.

It is often said that the skill that is most essential to conducting a successful Supreme Court practice is the ability to count to five. Since all nine of the current Justices had written extensively on the subject of sovereign immunity during the previous decade, we were able to predict with a high degree of confidence that, no matter how the parties briefed the case, the States could *not* win the votes of Justices Stevens, Souter, Breyer, or Ginsburg and that, just as surely, we should be able to count on the vote of the Chief Justice as well as those of Justices Kennedy, Scalia, and Thomas. Accordingly, our goal as we approached briefing the case was to construct an argument that maximized our opportunity to attract (or, more precisely, to hold) the critical fifth vote needed to win the case—the vote of Justice O'Connor.

⁴ 42 U.S.C. §§ 12131-12300 (2005).

In our quest for that fifth vote, we were presented with a tactical dilemma of sorts. On the one hand, the strongest argument in favor of immunity and against abrogation derives from the sheer breadth of Title II. By covering all “services, programs, and activities,” the legislation purports to regulate virtually everything a state undertakes to do; Congress made no effort whatsoever to tailor the law’s provisions to those state activities that might implicate the exercise of fundamental constitutional rights.

Moreover, the case law under Title II demonstrates that it is most often applied in contexts that have nothing to do with the exercise of constitutional rights (state parks, highway rest areas, parking, performing arts centers, museums, access to public gardens, etc.). The “overbreadth” argument thus dictated that we emphasize the operation of Title II as a whole and assert that the Congressional abrogation of sovereign immunity should be invalidated in its entirety because Title II was not a proportionate response to any demonstrated contemporary pattern of constitutional violations of the rights of disabled persons by the states. Indeed, for the most part, the statute is unconcerned with protecting constitutional rights.

The “overbreadth” argument had the additional virtue of allowing us to dwell at length upon Title II’s quite remarkable and unprecedented intrusion upon state sovereignty while avoiding very much discussion of the unattractive facts of our case.

But many Court-watchers more savvy than we cautioned us that Justice O’Connor, even while sympathizing with our view that Title II represented a particularly egregious example of federal overreaching, would be hesitant to strike down Title II in its entirety and would perhaps find a narrower argument more palatable. One that, for example, sought to sustain sovereign immunity in public building access cases, but would leave unresolved the validity of the Congressional abrogation in

other contexts (*e.g.*, in voting cases, education cases, or cases involving the rights of institutionalized persons).

The problem with this approach, of course, was that it would tend to blunt the impact of our strongest argument (the statute's overbreadth) and would require us to confront head on the application of Title II to courts and courthouses (and, even more distastefully from our point of view, to address Mr. Lane's and Ms. Jones' unfortunate experiences at Tennessee's courthouses). The fear was that, if we were forced to argue this case on the basis of its facts (rather than on the basis of overarching principles of state sovereignty and federalism), our prospects of attracting Justice O'Connor's vote would be greatly diminished, and that we might even run the risk of putting another friendly vote (Justice Kennedy) in play. In the final analysis, the divergent approaches taken by respondents Lane and Jones, on the one hand, and by the United States, on the other, forced us to embrace both tactics. The lawyers for Lane and Jones did not even attempt to defend the breadth of Title II; they argued instead that the validity of Title II's abrogation of sovereign immunity should be considered on a case-by-case basis and should be sustained in the courthouse access context as a valid exercise of the federal power to enforce the fundamental constitutional right of access to the courts. The United States, by contrast, urged the Court to reject the respondents' context-specific approach and went for broke, attempting to defend Title II in its entirety.

The State was required to analyze the case under both approaches. Our opening brief and half of our reply emphasized the statute's indefensible overbreadth; the other half of our reply argued that, even as applied in the narrow courthouse access context, Title II exceeded Congress's authority to enforce the Fourteenth Amendment because there was insufficient evidence presented to Congress that the States were violating the constitutional rights of disabled persons at courthouses.

The decision of the five-member majority in *Lane* turned out to be a relatively narrow one, the price (we suspect) of persuading Justice O'Connor to join it. Damages claims under Title II may proceed against the States in cases involving the right of access to the courts and (perhaps) in cases involving the exercise of other fundamental constitutional rights. But the Court's opinion expressly disavows any implication that it is intended to authorize Title II damages claims in other contexts.⁵ The lower federal courts appear to agree with our view of *Lane*'s narrow scope and have for the most part declined to extend it beyond cases involving the exercise of fundamental constitutional rights. Thus, the viability of Title II's attempted abrogation of state sovereign immunity remains largely unsettled after *Lane*. As one participant observed at a seminar I recently attended concerning *Lane*'s impact, the future of damages claims against the states under Title II may well depend upon how many of the Justices are big hockey fans.

⁵ "Whatever might be said about Title II's other applications, the question presented in this case is not whether Congress can validly subject the States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths, but whether Congress had the power under § 5 to enforce the constitutional right of access to the courts." *Tennessee v. Lane*, 124 S. Ct. 1978, 1992-93 (2004).

Tennessee's Response to the Supreme Court's Decision

*The Honorable Paul G. Summers & Ms. Elizabeth Martin*¹

I. General Summers:

The State of Tennessee has conceded from the outset of the *Lane*² litigation that the Americans with Disabilities Act³ applies to it and that its obligation to comply with the ADA may be enforced by suits for injunctive relief and attorneys' fees under *Ex parte Young*.⁴ The only issue before the Supreme Court was whether or not an individual could seek money damages from the State for violations of the ADA. The Supreme Court held that the State could be sued for damages in cases where a violation of the constitutional right of access to the Courts was proven. The State's vulnerability to damages claims in other contexts remains an open question.

Because the State of Tennessee has always agreed that it must comply with the ADA, the impact of the Supreme Court's decision in *Lane* is of limited practical significance. The State of Tennessee has, and continues, to accommodate persons with disabilities and does not discriminate against persons with disabilities. Of course, Title II of the ADA is applicable to many other areas of state government in addition to the judicial program. A brief review of the cases filed against the State of Tennessee before and after the Supreme Court's decision in *Lane* reveals that there has not been an increase in the number of cases filed in all areas under Title II. Indeed, the number of cases alleging disability discrimination is not disproportionate to the number of cases filed against the

¹ Paul G. Summers is the Tennessee Attorney General & Reporter. Elizabeth Martin is an Assistant Tennessee Attorney General.

² *Tennessee v. Lane*, 541 U.S. 509 (2004).

³ 42 U.S.C. §§ 12131-12300 (2005).

⁴ 209 U.S. 123 (1908).

State of Tennessee. That there has been no flood of damages claims in the aftermath of *Lane* provides at least circumstantial evidence for the proposition that the State's record of compliance is adequate in most respects.

Subsequent to the Supreme Court's decision in *Tennessee v. Lane*, the case was remanded to the U.S. District Court for the Middle District of Tennessee. A settlement was negotiated between the State and the plaintiffs. The settlement did not provide for damages by the State. It provided only for payment of attorneys' fees and that the State would take particular actions regarding access to the courts by disabled persons. As a practical matter, this outcome is exactly what plaintiffs could have obtained from the State had they sued under *Ex parte Young* for injunctive relief and attorneys' fees. As part of that settlement, and with input from plaintiffs and their lawyers, a specific policy was adopted by the Tennessee Supreme Court to make certain that the Americans with Disabilities Act was followed with regard to state court proceedings.

This policy applies to all parties and attorneys as well as to court personnel. A copy of that policy is provided. This policy does not add any additional obligations on the State of Tennessee but provides a process for insuring compliance with the ADA.

Because Tennessee's judicial program involves the intersection of state and local governments, the policy is significant in its attempt to address all issues. However, the burden of compliance remains on the governmental entity involved, for the most part, the counties. In addition, the Administrative Office of the Courts has implemented a training plan to insure that all judges—both state and local—as well as their assistants and clerks of courts are trained regarding the requirements of the Policy on Judicial Access. An ADA coordinator for access to the judicial program has been assigned for each county to assist persons with disabilities. This training has already begun.

Even before the commencement of the *Lane* case, most state court judges were working diligently to provide access to the courts for necessary parties. However, due to the unique nature of Tennessee's judicial system, including municipal, county and state courts and the use of county courthouses for state judicial proceedings, the courts' record of compliance was not always consistent. Most of the issues raised by the *Lane* litigation did not involve intentional discrimination.

In Tennessee, every county is required to provide a courthouse.⁵ However, there are no provisions for funding by the state and no requirements related to the physical facilities beyond the simple requirement that there be a courthouse and that it be located within the city limits of the county seat.⁶ But there are no provisions of state law allowing the state court judges to enforce the requirements of the ADA against the counties. Because the ADA allows local and state governments to use alternative locations rather than make extensive renovations, the policy on access to the judicial program allows relocation of judicial programs in order to comply with the ADA. This is not new, but is a clarification of the State's policy.

Many of the judges already used alternative locations. A number of the counties have made plans to renovate the courthouses or to build new courthouses or justice centers. This should alleviate problems involving access by individuals with disabilities as well.

The issue of alternative locations was a major issue in *Lane*. Mr. Lane's factual allegations in his complaint included a claim that he was offered an alternative location and he refused. Mr. Lane argued that the ADA required the State or County to provide an elevator with access to a second floor courtroom. While Mr. Lane has been successful in encouraging some counties to make physical

⁵ Tenn. Code Ann. § 5-7-104 (2005).

⁶ *Id.* § 5-7-105.

changes to their courthouses, the State has not agreed to provide or require physical changes if alternative locations can be used. Another issue raised by Plaintiffs was the State's requirement that a person with a disability needing an accommodation give reasonable notice to the Court in order to obtain the accommodation. Plaintiffs argued that this requirement was discriminatory.

The State disagreed and the policy ultimately agreed upon includes a notice requirement.

One positive outcome of the *Lane* lawsuit is that the Administrative Office of the Courts has recommended that Tennessee Code Annotated § 22-2-304 be amended. Subsection (c) of that statute currently provides that the names of all persons "known by the commissioners to have died or removed from the county or to have become mentally or physically disabled" drawn for jury service "shall be put aside and not used, and another name or names shall be drawn in its or their stead."⁷ The application of this statute was not raised by any of the plaintiffs. However, pending legislation deletes the requirement that the names of disabled persons be set aside and has been passed by the House (96-0). It will likely be approved by the Senate this legislative session.

Two statutes relating to jury duty remain on the books. First, Tennessee Code Annotated § 22-1-102(b) provides, "Persons not in the full possession of the senses of hearing or seeing shall be excluded from service on any jury if the court determines, of its own volition or on motion of either party, that such person cannot provide adequate service as a juror on such jury."⁸ This seems to be consistent with the ADA. In addition, Tennessee Code Annotated § 22-1-103 exempts certain persons and professions from jury service. The exemption includes

⁷ Tenn. Code Ann. § 22-2-304(c) (2005).

⁸ Tenn. Code Ann. § 22-1-102(b) (2005).

persons “disabled by bodily infirmity”⁹ and “persons not in the full possession of the senses of hearing or seeing.”¹⁰ However, this exemption does not excuse or prevent persons with disabilities from serving on a jury. It only exempts the person from the initial summons and allows the exempt person to choose the time frame for service.¹¹ This provision works well with the ADA Policy on Access to the Judicial Program because the exemption allows the prospective juror an opportunity to request any needed accommodation and gives the Court the opportunity to arrange for an accommodation such as an alternate location or interpreter.

Another point to consider in assessing the impact of *Lane* is to consider the impact of *Board of Trustees of the University of Alabama v. Garrett*¹² throughout state government. In *Garrett*, the Supreme Court held that individuals could not bring claims for money damages against the states for employment discrimination under Title I of the ADA. Subsequent to *Garrett*, however, the State of Tennessee continues to comply with the ADA in the employment area. There is a written policy forbidding disability discrimination in employment, an ADA coordinator at each agency, and oversight by the Tennessee Department of Personnel. Despite the fact that the State has immunity from claims for money damages arising from employment discrimination, the State continues to comply with the ADA.

⁹ Tenn. Code Ann. § 22-1-103(a)(5) (2005).

¹⁰ *Id.* § 22-1-103(a)(7).

¹¹ *Id.* § 22-1-103(c).

¹² 531 U.S. 356 (2001).

II. General Martin:

I will talk very briefly about the practical implications of *Lane* for the State of Tennessee. As General Summers pointed out, this case involved the judiciary, not the executive branch. That is where the main impact so far has been felt. We settled this case, and the settlement resulted in our paying attorneys' fees, agreeing to enter a policy that would address the issues of access to the court, and providing training for the judges, clerks, and the assistants to the court, to make sure the policy is implemented. The policy that we implemented is considered by a lot of people to be the blue ribbon policy. There were not very many out there. The problem in the judiciary is that it is a weird conjunction between states and counties. The courthouses are county courthouses. The Constitution in the State of Tennessee says the county has to provide a courthouse. The State has state court, but state court occurs in the courthouses supplied by the counties. But the State has no authority to make the counties do anything to their courthouses except have them. That puts the State in an awkward position.

The Administrative Office of the Courts has developed a policy that has been presented across the state. The Supreme Court of Tennessee has made this policy a rule, which applies to every attorney. Attorneys have the obligation to comply with the policy and make sure, if it is necessary, that they raise it before the judge. Attorneys just tell the judge they have a witness or plaintiff who needs to be in court, and the judge must provide accommodations under the rule. The rule is also applicable to a pro se parties. If a *pro se* party knows they need special accommodations, they have to ask for it.

Because of our unique position, some of the courthouses are very old. They are on the national historic register. They are impossible to renovate. There is simply no way to put an elevator in. We were not in a position to

ask the county to place elevators in their buildings. So we arrange for alternative locations, clearly allowed by the courts, with a little advanced notice. By allowing for alternative locations, we believe we have complied with Title II.

There are a few other policies which the State has adopted. One, the Administrative Office of the Courts submitted language to the legislature to change our jury statute so disability is not taken into account in creating a jury pool. That was not an issue in *Lane*, but it is a positive outcome because it raised the bar.

While disability is no longer a factor for creating juries, there is a statute which provides benefits for disabled persons from serving on juries. The statute, which applies to lawyers and doctors as well, allows people with disabilities to choose one week during the year that they are available to serve. This gives the court time to arrange an alternative location or interpreter in order to accommodate the person with a disability.

The statute also requires the judge to determine whether the disabled person can serve as a juror. The person's disability is only considered as it relates to the specific case that the person has been called to sit on the jury.

In 1999, I conducted one of the first training sessions for the clerks of the courts. Throughout the time that the ADA has been in effect, the State of Tennessee has been attempting to train judges, clerks, general sessions judges in how the ADA works. The State has also been making sure our courts are accessible. That training is continuing even now, and will continue for the next several years in order to make certain that all the judges are aware, and so our courts are, in fact, accessible to all persons including those with disabilities.

The Policy Implications

*Elizabeth McCallum*¹

Good afternoon everybody. I want to thank the JOURNAL for inviting me. It is an honor to be here in such distinguished company.

I knew that the *Tennessee v. Lane*² decision was a tremendously important case to the millions of Americans with disabilities, and I knew it was very interesting to lawyers because of the complexity of the legal issues involved. However, I did not realize how well-known the case was in Tennessee until this morning when I was in a taxicab on the way to the symposium from the airport. My taxi driver asked why I was going to the law school. I said I am going to speak in a symposium on the Supreme Court decision in *Tennessee v. Lane*. He said, "I know that case, that is the case where the guy was in a wheelchair and had to crawl up the stairs to get to the courthouse" I thought, wow, even the taxi driver knows about it. He said "I have a view on the case." Being used to D.C. cab drivers I was not sure I wanted to ask what his view was, but I took my life in my hands and asked. He said, "I think it is very simple. We can make Burger Kings accessible, why can't we make courthouses accessible?" I was strongly reminded of that comment when Mr. Lane told us about his K.I.S.S. motto earlier today.

I have to start with a caveat here. I am an antitrust lawyer, not a civil rights lawyer. I became involved in this case when my firm was lucky enough to be asked to participate in writing an amicus brief in the first of the sovereign immunity ADA cases in the Supreme Court, the

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² 541 U.S. 509 (2004).

Garrett case.³ I was pulled in on that brief, and then we wrote another *amicus* brief in the *Hason*,⁴ the California case that was dismissed. Then we wrote another *amicus* brief in *Lane*, and in that case the plaintiffs finally got their win.

The *amicus* briefs we drafted in *Garrett*, *Hason*, and *Lane* focused on the history of state-sponsored discrimination against people with disabilities. Our goal was to focus on the portion of the *City of Boerne* case that says Congress can abrogate sovereign immunity under the Fourteenth Amendment as a response to a pervasive history of state-sponsored discrimination or unconstitutional behavior in the area.⁵ We tried to focus our *Lane* brief in response to some of the points the Court made in *Garrett* about the kind of evidence that Congress could look at and should consider when it is deciding whether to abrogate sovereign immunity. We tried to focus on cases of discrimination with the state as actor. We tried to focus on instances that rose to the level of constitutional violations. We tried to focus on not just some of the horrible things that happened in the early years of the century, but also things that happened close to the time when the ADA was enacted.

In our *Lane* brief, we described a whole spectrum of that kind of discrimination against people with disabilities. Of course, we focused on discrimination in the provision of judicial services and access to the courts, telling stories similar to the stories that Ms. Jones and Mr. Lane told about individuals being denied access to our judicial system and buildings. We provided evidence of both individual cases of discrimination against individuals in the judicial system and also systemic, structural barriers that prevented

³ Bd. of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356 (2001).

⁴ Med. Bd. of Cal. v. Hason, 538 U.S. 958 (2003).

⁵ City of Boerne v. Flores, 521 U.S. 507 (1997).

access to courthouses. We also focused more broadly on a number of other instances of state-sponsored discrimination outside the specific context of judicial access. That included discrimination in access to polling places and in the ability to vote. It included discrimination in jury service. It included some of the shameful history Ms. Millett referred to of state sterilization of people with disabilities. We described statutes, some still on the books, that prevent people from disabilities from obtaining marriage licenses and marrying freely. And, of course, there are some heart wrenching instances that we described of awful treatment of people with disabilities in institutions, both people who are institutionalized unnecessarily and people with disabilities who suffer horribly from inappropriate and cruel treatment while they are institutionalized and in prisons.

We were tremendously gratified and happy when some of the instances of the history of state sponsored discrimination that we talked about in our brief were some of the same instances that Justice Stevens mentioned in his majority opinion in *Lane*.⁶ I certainly do not mean to suggest our brief was the only one that described these kinds of instances. We were writing an *amicus* brief, so our role was to amplify one important issue of the case while the parties and the attorney general focused on the broader implications. There were a number of briefs that contained these kinds of descriptions, including the fabulous brief that the Department of Justice prepared.

Here is one thing that was tremendously interesting to me, and brings me to my substantive point about the policy implications of *Lane*. As I told you, we worked on the same brief recounting the history of state-sponsored discrimination in the *Garrett* case and in the *Hason* case as we did in the *Lane* case. It seems to me that the record in *Garrett* presented a very similar set of historical facts about

⁶ 541 U.S. at 524-27.

the history of state-sponsored employment discrimination against people with disabilities as the record in *Lane* presented with respect to discrimination against people with disabilities in the court system. There was the same rich and substantive record before Congress when it enacted Title I of the ADA that states had discriminated against people with disabilities in employment as there was when it enacted Title II that states had discriminated against people with disabilities in the provision of public facilities. But *Garrett* came out one way; *Lane* came out the other way. Why the difference? I think that the specific legislative findings that Congress issued in support of Title II were helpful, as was the fact that the issue involved in *Lane* was a deprivation of a fundamental right, access to the courthouse. I also think that the two opinions, *Lane* and *Garrett*, evidence in some aspects a fundamentally different approach to analysis of the legislative record. These different approaches may create some uncertainty for litigants and lower courts.

What is certain after *Lane*? Plaintiffs now can sue states for damages under the ADA for issues related to access to the courts and the judicial system. That is certain, and that is a tremendously important and a very significant victory for people with disabilities. Also after *Lane* there is far more scope for litigants to argue for an expansive reading of the history of discrimination in the legislative and public record. But the differences in the *Lane* and *Garrett* approach to the analysis may continue to create uncertainty about what courts can look at to determine if a particular claim passes muster and what that evidence means.

What are some of these differences? First, the *Garrett* majority opinion, in a manner similar to Judge Rehnquist's dissent in *Lane*, seemed to assume that the historical record that Congress is required to consider when it abrogates sovereign immunity is similar to the judicial record a court would need to make a decision in a specific

case. *Lane*, in contrast, took a more expansive view of the kind of evidence in the legislative record and the historical record that will suffice for the requisite pattern and practice of discrimination. It is more a difference of tone than of anything actually articulated in the opinion, but the *Lane* opinion was considerably more accepting of the concept that Congress acts like a Congress. Congress is a legislative body; it is supposed to consider all sorts of evidence from the social and historical record; and it does not have to develop a quasi-judicial record when enacting legislation.

Second, I think the *Garrett* opinion seemed to suggest that only evidence related to the statute at issue counted, *i.e.*, evidence in *Garrett* of state-sponsored discrimination in employment. The *Lane* Court, although it limited its holding to upholding Title II “as applied” to access to the courts, also looked at evidence of past discrimination from a whole variety of other areas and concluded that that evidence showed that Title II as a whole was enacted in the face of that extensive evidence.⁷

Third, the *Garrett* opinion seemed to indicate that any evidence of discrimination needed to be by the state acting as a state. In contrast, the *Lane* Court, in a footnote, recognized that local municipality activity, when the

⁷ “Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights,” citing discrimination in the areas of voting rights, institutionalization, marriage, education, jury service, and others, *id.* at 524-25; “Given the sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services, the dissent’s contention that the record is insufficient to justify Congress’ exercise of its prophylactic power is puzzling, to say the least,” *id.* at 528; legislative finding, “together with the extensive record of disability discrimination that underlies it, makes clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation,” *id.* at 529.

locality is acting as an arm of a state “counts” for purposes of the sovereign immunity analysis.⁸

Where are litigants and courts after *Lane* with respect to the necessity of a historical record of discrimination before Congress? It is like the proverbial man feeling the elephant, everybody touches a different place and comes to a different conclusion. After *Lane* and *Garrett*, each side is going to argue its own particular view of how you look at the historical record. In the end, the *Lane* view is the correct one—Congress should not be required to act like a court when it is enacting legislation.

In conclusion, *Lane* was a historic decision, one that represented a significant victory for the plaintiffs and for all people with disabilities. Thanks so much for the opportunity to share my thoughts about this case with you today.

⁸ *Id.* at 527 n.16.

Tennessee v. Lane: Winning the Battle, Losing the War?

Michael Foreman¹ & Ossai Miazad

Good afternoon. I am very happy to be here. I want to thank the dean, and Richard, I want to thank the JOURNAL for hosting this symposium. I feel like the last hitter in a long program with a lot of heavy hitters. It is very difficult to do the follow-up. I am going to steal one of Mr. Lane's mottos here, his K.I.S.S. theory, but I am going to change it to "Keep It Short, Stupid." I will attempt to keep it short.

For some of you who know of the Lawyer's Committee, you may be asking why we are here. For those of you who do not know of the Lawyer's Committee, I will explain. The Committee was founded in 1963. We litigate primarily race discrimination and sex discrimination class actions across the country. While we do not have many cases dealing with disability discrimination, the Lawyer's Committee is concerned about the erosion of Congress' power to legislate in the area of discrimination. The Committee has been involved in many of the sentinel cases dealing with discrimination. We filed an *amicus* brief in the *Lane*² case on behalf of NAACP lawyers. We were also involved in the *Boerne*³ case. Our goal was to put a stake in the ground so the court did not bleed over into the sex discrimination area or possibly the race discrimination area using the same theory. That is the victory in *Lane* is important to us.

When Ms. Jones started the day, she summed up the issue in front of you—you cannot sue the State. It has

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² *Tennessee v. Lane*, 541 U.S. 509 (2004).

³ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

sovereign immunity. I think her quote was something like you cannot sue “the high and mighty.”

I want to talk about what *Lane* is about in the big perspective. This case represents a constitutional struggle between the federal government’s ability to regulate versus the State’s claim that they are sovereign and have the power to act alone.

Since we are in a law school, I think we should do a law school exercise. I am going to state a couple principles. You will accept these principles, and then we will decide the *Lane* case based on these principles. After that, we will determine what it means for the future.

1. That the civil war amendments were passed to take power away from the state and give it to the federal government is not in debate. It has been the law for centuries.

2. That Section 5 of the Fourteenth Amendment is an affirmative grant of power to the federal government to regulate the states. That is not in debate.

The debate is centered on the standard used to shift power. Chief Justice Marshall expressed his standard by stating, “Let the end be legitimate and all means are appropriate.” This sentiment was the beginning of what we call the “rational means” test. The test asks “are Congress’ actions a rational means to accomplish its goals?” For almost two centuries, the rational means test had been the law. A more modern example of this rational means test can be found in *Katzenbach*.⁴ In 1966, the Supreme Court held that the legislative choice is not subject to courtroom fact-finding and may be based on a rational speculation, again as long as what Congress does is by rational means.

Now if you take that constitutional test and apply it to the *Lane* situation, is what Congress did rational? I think almost everybody has to come to the conclusion that it is rational.

⁴ *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

So why is that not the end of the case? Because in 1997 the Court adopted a “congruence in proportionality” test. What does that mean? We talked about some of the cases—*City of Boerne*, *Kimel*,⁵ and *Garrett*.⁶ These cases held that there needs to be a very close match between what is in the legislative record and how Congress chooses to regulate it.

What does that do? It has the courts examining the legislative record.

I believe there are a lot of things wrong with the “congruence of proportionality.” Unfortunately, it is clear from the current jurisprudence that this Court is not going to move away from it. So we are trying to convince the Court that when they say “congruence in proportionality,” what they really mean is “rational means.” We need to because the new test ignores how Congress works. Congress is not a courtroom; it is not a factfinder. For any of you who have done legislative work, it resembles a sausage factory. You do not want to see what goes in there and probably cannot imagine what goes into it. So, trying to look at the record and come up with a coherent pattern is really tying Congress’ hands in two ways.

One way is to justify statutes that have already been passed, which the solicitor’s office is going to have to fight continually. It limits Congress in what they can do in future legislation, like in areas of sexual orientation or other areas of controversial legislation. Second, determine what kind of record Congress has to adopt to move into controversial areas. It is virtually impossible for them to adopt this test.

Where does *Tennessee v. Lane* fit in this? Obviously it is a victory for Ms. Jones, Mr. Lane, and Mr. Brown. I think it is a tremendous victory to get the Court

⁵ *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000).

⁶ *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001).

to use the “as applied” test. The Plaintiffs took an extremely hard case against an extremely hard jurisprudence and won it.

Where does *Lane* fit in the larger constitutional area? For us, it is another step along the way that the Court here said, “Yes, as applied here, it is constitutional.”

Why was it constitutional? Because we are dealing with one of the most fundamental rights we have, the access to courts.

What does this case say about the hockey rink or the ice skating rink? We are not sure and that will be the problem with the case moving forward. It guarantees each and every one of these issues will continue to be litigated.

There was a comment made earlier, I think it was by Mr. Lane, that we are taking a ton of money and putting it in litigation and defending it. We could take a lot of money and put it in disability rights issues and solve these issues. It is not a hypothetical concern, and given our time I will quickly move through this. Right now the courts are grappling with it. You used the example of a skating rink. I am not sure a skating rink will survive the same constitutional challenge that we did here.

Recently, in the case of *Association for Disabled Americans v. Florida International University*,⁷ the Eleventh Circuit Court said education did survive the test, and that it was different from other rights that are only subject to rational review. Again, focusing on either classifications like race or sex, they are subjected to a higher level of scrutiny or a fundamental right. But in *Cochran v. Pinchak*,⁸ the Third Circuit held that a disabled prisoner was not denied a fundamental right when he was not allowed access to books, a talking watch, and a usable

⁷ 405 F.3d 954 (11th Cir. 2005).

⁸ 401 F.3d 184 (3rd Cir. 2005). Note, after this symposium, rehearing was granted and the judgment vacated. See 412 F.3d 500 (3rd Cir. 2005).

walking cane. Therefore, the *Tennessee v. Lane* analysis did not apply.

The Fourth Circuit in 2004, in another claim by a prisoner that he was not provided with timely refills of his prescriptions, went to the *Lane* decision.⁹ The quote was, “it appears that the actual holding [in *Lane*] is fairly narrow and is limited to the class of cases implicating the fundamental right of access to the courts.”¹⁰ A district court case took the opposite view in education and said the right to education was not a fundamental right. Another case, out of the Southern District of New York, held that a person with disability seeking admission to the bar did not pose a challenge implicating a fundamental right, and therefore, *Tennessee v. Lane* did not apply. So what we are left with is unfortunately litigating a lot of these issues on a case by case basis unless the Supreme Court can somehow be pushed back into some rational means of review where they are not second guessing the wisdom of Congress.

Unfortunately, given today’s climate and where we are going, I do not see it happening. I would hope that the states decide, rather than putting the money into the litigation of these cases, to put it into improving accessibility. The need for these cases would hopefully evaporate as we move forward. Thank you very much.

⁹ See *Spencer v. Easter*, 109 Fed. Appx. 571 (Va. 2004).

¹⁰ *Id.* at 573.

Appendix

Tennessee Judicial Branch Americans with Disabilities Act Policy Regarding Access to Judicial Programs

I. Introduction

The Americans with Disabilities Act, 42 U.S.C. 12131 *et seq.*, prohibits discrimination against any qualified individual with a disability. Pursuant to the provisions of the ADA and 28 C.F.R. 35.130, the Judicial Branch of the State of Tennessee does not permit discrimination against any individual on the basis of physical or mental disability in accessing or participating in its judicial programs. Consistent with this policy, the Judicial Branch for the State of Tennessee shall conduct its services, programs or activities, when viewed in their entirety, in a manner that is readily accessible to and usable by qualified individuals with disabilities. This standard does not require that each existing facility be accessible, but rather ensures “program accessibility” which may be provided by methods including alteration of existing facilities, acquisition or construction of additional facilities, relocation of a service or program to an accessible facility, or provision of services at alternate sites. In choosing among available methods for meeting this requirement, the State of Tennessee shall give priority to those methods that offer the services, programs and activities of the Judicial Program in the most integrated setting appropriate. In furtherance of this policy and to ensure that those responsible for the administration of justice have a set of guidelines from which they will be able to execute this policy, the following guidelines and principles are hereby adopted.

II. Standards For Access To The Judicial Program Of The State Of Tennessee

1. The Tennessee Judicial Branch will provide reasonable modifications in its rules, policies, services and practices, when necessary, to provide effective access to a qualified individual with a disability. A “reasonable modification” may include, but is not limited to, making a change in or exception to policies, practices, and procedures; furnishing, at no charge, to the qualified individual with disability auxiliary aids and services, which include but are not limited to equipment, devices, materials in alternative formats, and qualified interpreters or readers; and relocating judicial programs, services or activities to alternate accessible facilities or alternate accessible sites; or making each service, program or activity, when viewed in its entirety, readily accessible to be usable by qualified persons with a disability requesting modifications.

2. In the event that the reasonable modification requires relocation of a judicial program, service or activity to an alternate facility or site, the alternate facility or site shall comply with the requirements of the Americans with Disabilities Act and the Tennessee Public Buildings Accessibility Act. The alternate facility or site shall also comply with Tennessee law concerning the location of county courthouses.

3. The Local Judicial Program ADA Coordinator in a county where the county courthouse is not ADA compliant, shall maintain a list of alternate facilities or sites that may be used for relocation of judicial programs, services and activities. An up to date copy of the alternate facility or site list shall be submitted to the Tennessee Judicial Program ADA Coordinator.

4. The following terms are relevant to the operation of this policy. These definitions are derived from the provisions of 28 C.F.R § 35.104. Other definitions material to the operation of this policy but not otherwise contained herein may be found at 28 C.F.R § 35.104.

(a) Disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.

(b) Facility means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure or equipment is located.

(c) Individual with a disability means a person who has a disability.

(d) Qualified individual with a disability means an individual with a disability who, with or without reasonable modification to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

5. The Tennessee Judicial Branch has Judicial Program ADA Coordinator, employed by the Administrative Office of the Courts (AOC), who oversees the administration of this policy, any complaints associated with issues raised by this policy, and Requests for

Modification under the Americans with Disabilities Act within the Judicial Branch, and will have the ultimate responsibility for compliance with this policy. . . .

6. The Tennessee Judicial Program ADA Coordinator will designate a Local Judicial Program ADA Coordinator for each county in a judicial district, who will be responsible for handling all Requests for Modification to access judicial programs, activities and services within that county. The Local Judicial Program ADA Coordinator should be involved with or familiar with the judicial program of the county.

III. Request For Modification For Access To Judicial Programs

7. Submission of Request. Persons requiring modification to obtain access to judicial programs, services or activities at any facility used for such purposes should contact the Local Judicial Program ADA Coordinator (Coordinator). A written Request for Modification is preferred. However, this request may be made by telephone to the Coordinator. In such instances, the Coordinator shall commit such requests to writing. The Coordinator shall maintain a record of all Requests for Modification. A Request for Modification form is available and may be obtained from the Local Judicial Program ADA Coordinator, the Tennessee Judicial Program ADA Coordinator, any court clerk's office, or online at www.tsc.state.tn.us. If appropriate or upon request, the Local Judicial Program ADA Coordinator or the Tennessee Judicial Program ADA Coordinator will provide assistance with writing and submitting the written request for Modification. Large print and Braille versions of the Request form are available upon request.

If appropriate, other personnel associated with the judicial program, service or activity may assist the

applicant in the submission of a completed Request for Modification to the Coordinator.

The written Request for Modification shall include a description of the person's disability, the role of the person in the judicial proceeding, the Modification sought, the date and time of the Modification requested, and the judicial proceeding for which the Modification is sought. Once a Request for Modification has been granted, the Local Judicial Program ADA Coordinator will advise the applicant of the procedure to be followed with regard to subsequent proceedings associated with the original Request. If necessary, the Local Judicial Program ADA Coordinator may require the applicant to provide additional information about the qualifying disability in order to determine the appropriate Modification to meet the applicant's needs, but only such information that may be required to make such a determination. Under no circumstances will the Local Judicial Program ADA Coordinator be permitted to request information regarding the applicant's disability that is not necessary for the evaluation of the Modification requested.

8. Who Should Submit a Request for Modification.

An application requesting Modification may be submitted by any lawyer, party, witness, juror or other individual with an interest in attending any judicial program, activity or service or another person on behalf of such interested person.

9. When to Submit a Request.

The Request for Modification should be submitted with as much advance notice as possible, but in any event should be made no less than five (5) business day prior to the date for which the Modification is sought. An immediate request for Modification should be made when urgent and/or emergency circumstances arise. In criminal cases where a defendant is confined to jail, the Request for Modification

should be made as soon as possible. However, it may be necessary that the Request for Modification may be made contemporaneously with his or her initial court appearance.

10. When There Is No Request. In the event that a person requiring a Modification has not made a timely Request for Modification, the court may, in its discretion, immediately grant such Modification without requiring an advance written request. In such a case, a request for Modification form shall be completed by either the person requesting Modification or court personnel for the court's records. Alternately, the court may, in its discretion, postpone, reschedule or otherwise delay the judicial program, service or activity affected. Under such circumstances, the individual requesting Modification shall be required to immediately submit a written request. If appropriate or upon request, court personnel will provide assistance with writing and submitting the request for Modification.

11. Provision of Reasonable Modification. The Local Judicial Program ADA Coordinator will, as soon as practicable, notify the requesting individual of the Modification to be provided. An alternate Modification may be offered instead of the requested Modification if the Local Judicial Program ADA Coordinator determines that another equally effective Modification is available.

12. Additional Time to Achieve Modifications. If the Local Judicial Program ADA Coordinator determines that additional time may be necessary in order to achieve and/or obtain Modification, the Local Judicial Program ADA Coordinator shall notify the judge presiding over the matter, who will determine an appropriate course of action.

13. Denial of a Request for Modification. A request for Modification may be denied only if the Local Judicial Program ADA Coordinator finds that:

- (a) The person making the request is not a qualified individual with a disability; or,
- (b) The requested Modification would create an undue financial or administrative burden; or,
- (c) The requested Modification would fundamentally alter the nature of the judicial program, service or activity; or,
- (d) Some other Modification would be as effective and involve less cost or inconvenience; or,
- (e) The applicant has refused to comply with this Policy; or,
- (f) The applicant's failure to comply with this Policy makes impossible or impracticable the ability to provide the requested Modification.

14. No employee of the Judicial Branch of the State of Tennessee shall retaliate against any person who exercises his/her rights under the Americans with Disabilities Act or who requests modification pursuant to this policy.

IV. Appeal Of An Adverse Decision As To A Request For Modification

15. Appeal to Presiding Judge of Judicial District. If a Request for Modification is denied or the offered alternate Modification is unsatisfactory to the applicant, the applicant may appeal the decision of the Local Judicial

Program ADA Coordinator to the presiding judge of the judicial district within ten (10) days of the denial of Modification or offer of alternate Modification. The judge shall rule on the appeal as soon as practicable, and where possible, in advance of the date of the hearing for which the Modification is requested.

16. Appeal to Administrative Office of the Courts. If an applicant is dissatisfied with the ruling of the presiding judge resulting from a request for review, the decision may be appealed to the Director of the Administrative Office of the Courts, or her designee, within ten (10) days of the ruling by the presiding judge on the request for review. A written request must include any reasons for disagreement with the previous determinations, as well as the remedy sought. The Director shall provide a ruling as to the request as expeditiously as possible.

V. Public Notice

17. A public notice shall be posted in visible places throughout each facility where judicial programs, services and/or activities are held, including but not limited to each court clerk's office, that identifies the Local Judicial Program ADA Coordinator and the Tennessee Judicial Program ADA Coordinator. Such public notice shall also provide a website address where a copy of this policy, implementation guidance, and Request for Modification form may be obtained electronically. Should the courthouse facility within which judicial programs, services and/or activities are provided be inaccessible, a public notice shall be posted on the outside of the building or at another such location at or near the building that is readily accessible.

VI. Notice On Documents Compelling Court Participation

18. When a summons, subpoena, juror summons or other pleading, order or document compelling participation in a judicial program, service or activity is issued, said documents shall provide notice of the identity of the Local Judicial Program ADA Coordinator, the Tennessee Judicial Program ADA Coordinator and a specific designation as to how each may be contacted, including telephone numbers and email addresses. Such notice shall also provide information about program accessibility and the procedure for submission of requests for reasonable modifications. Such notice shall also provide a website address where a copy of this policy and Request for Modification request form may be obtained electronically.

