



## What Does Victory Mean?

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The United States House of Representatives, in a 235 -184 vote in the early evening of November 7, passed the Employment Non-Discrimination Act (ENDA), which provides federal protection barring workplace bias against gays and lesbians.

The vote marked the first time that either house of Congress has approved a gay rights measure, and came 32 years after the first gay civil rights measure, more comprehensive than ENDA, was introduced by the late Bella Abzug, then a congresswoman from Manhattan's West Side.

Despite the historic nature of Wednesday's vote, the victory is likely not to calm the deep divisions that emerged within the LGBT community in the preceding six weeks. Many will judge the win Pyrrhic, at best, perhaps even a setback in the longer term.

The measure approved this week did not include the provisions barring discrimination based on gender identity and expression that were in the bill as originally introduced in February by Democrats Barney Frank of Massachusetts and Tammy Baldwin of Wisconsin, the House's only two openly LGBT members.

In fact, although an amendment to restore the transgender protections introduced by Baldwin - who broke with Frank over his recommendation to strip those provisions out of the bill in late September - was introduced and debated on the floor for 10 minutes, it was withdrawn without a vote. During that debate, Baldwin acknowledged that she had been unable to muster a majority for her amendment. Advocates for transgender rights had earlier voiced concerns that if the amendment were defeated resoundingly it would only complicate their efforts to widen ENDA's scope in the future.

The course of Senate action on the bill is unclear; Massachusetts Democrat Ted Kennedy, the lead sponsor, has not yet formally introduced it. And in a written statement several weeks ago outlining both policy and constitutional objections to ENDA, including the assertion that it would threaten the 1996 federal Defense of Marriage Act, the Bush administration made clear the president will veto the measure if it makes its way to his desk.

Given the near certainty that ENDA will not become law until a new president is in office, gender rights advocates hope to press the Democratic leadership to reconsider the exclusion of transgender protections when the bill is taken up again in 2009. A group of nearly 300 LGBT organizations, including all the major transgender advocacy groups and nearly all the broader community organizations as well, has been asking since Frank first announced the scaling back of the measure six weeks ago what the rush was to pass a bill that was imperfect and had no immediate prospects for becoming law anyway.

That group, organized under the name United ENDA and led by the **National Gay and Lesbian Task Force** (NGLTF) and the National Center for Transgender Equality (NCTE), worked first to restore the fully inclusive version of the bill before it was approved by the Education and Labor Committee, and - once Speaker Nancy Pelosi's office announced on October 12 that Frank's revised language would be what the committee considered - to convince House members to

support Baldwin's amendment, and if that failed, to vote no on the full bill.

The Human Rights Campaign, the community's lead lobbyist on Capitol Hill, however, stood distinctly apart from United ENDA, and in that sense was isolated through much of the past six weeks. In the immediate wake of Frank's decision to strip the bill of transgender protections, HRC's board voted that the group could not support a non-inclusive bill, but also that it would not actively oppose any gay rights measure that the Democratic leadership brought to the floor.

That highly nuanced stance created considerable tensions within the community's leadership; many voiced doubts that HRC would hold firm to its commitment not to formally bless Frank's narrow version of ENDA. As United ENDA struggled to win votes for the Baldwin amendment, doubts were raised publicly, especially on the Internet, about how committed HRC was on that score, and whether it wasn't in fact already urging House members to support ENDA in whatever form it took at the time it reached the floor.

On Tuesday of this week, November 6, HRC did in fact alter its posture - urging the House to pass the measure by then set for imminent floor consideration. For leaders of United ENDA that represented an unexpected change in course by HRC, a betrayal motivated by a desire to get a win that trumped any larger goal. And at least one key transgender leader, Mara Keisling, NCTE's executive director, said that HRC's conduct during the entire six-week scramble to the finish line was characterized by an abandonment of the trans community and by "lies."

HRC's new position was announced in a November 6 letter to House members written in tandem with some of the most prominent civil rights and labor organizations outside of the LGBT community.

In an interview with Gay City News that day, Joe Solmonese, HRC's president, said the group shifted its position in the wake of action Monday evening by the House Rules Committee to move the measure forward for a floor vote. The group effectively changed from a passive "won't block" posture to one of affirmative support.

Now that the measure will get a House vote, Solmonese said, "we felt that in the long-term interest of the community and the movement it should not be defeated."

Speaking later Tuesday on Michelangelo Signorile's Sirius Satellite Radio program, Solmonese acknowledged a key element in this shift. Because the group was now calling on House members to vote for ENDA, those who opposed the measure, even those voting on the principle that transgendered Americans should not be left behind, would take a hit on HRC's "scorecard." The group is the only national LGBT organization that keeps such a tally on members of Congress; a scorecard penalty from HRC, therefore, is all the more potent.

According to Keisling, the shift in HRC's posture consequently reversed progress that United ENDA had made in pressing members to vote no if the Baldwin amendment did not succeed. She said the scorecard "threat" by HRC caused her side to lose "a bunch of votes."

The final tally ENDA majority included 200 Democrats and 35 Republicans versus 159 members of the GOP and 25 Democrats voting no. Only seven of the no votes, all Democrats, were expressions of opposition to excluding transgender protections.

Five of the no votes came from New York City- Jerrold Nadler, Anthony Weiner, Yvette Clarke, Nydia Velázquez, and Ed Towns. The other dissenters were Rush Holt of the Princeton, New Jersey area and Mike Michaud, one of Maine's only two House members.

Two Democrats who voted no when ENDA was approved by the Education and Labor Committee - Dennis Kucinich of Cleveland and Linda Sanchez from the Los Angeles area - reversed themselves on Wednesday, voting aye.

The scorecard issue was particularly galling to Keisling, who said that United ENDA had been assured for the past six weeks that HRC would not score the vote.

"Yes, they totally abandoned us," she said, "but even worse was all the lies." Keisling added, "I can tell you that HRC has aggressively been pushing for passage of the non-inclusive ENDA since the end of September. We got an e-mail yesterday from one congressional office describing their letter as HRC's new new position. They went from, 'We don't support the bill,' to 'We don't support the bill but we support you if you support the bill,' to 'Forget trans people, we need a win.'"

Keisling also questioned what actions took place on HRC's board prior to the organization's announcement of its new posture. HRC did not by press time return a call seeking comment on its board's actions or on what representations it made to other LGBT groups regarding its scorecard.

From NCTE's vantage point the intervention of leading non-LGBT civil rights and labor organizations in co-signing the letter HRC sent to House members was also critical. The pro-ENDA position was laid out in a letter from the Leadership Conference on Civil Rights (LCCR), a coalition of progressive organizations, and signed by the American Federation of State, County, Municipal Employees, the NAACP, the National Education Association, the National Employment Lawyers Association, and the Religious Action Center of Reform Judaism, as well as LCCR and HRC.

LCCR has an executive committee with members drawn from a broad range of groups including the ACLU, the American Federation of Teachers, People for the American Way, NOW, and the League of Women Voters.

In the letter, the signers pressed the House to also pass the Baldwin amendment, noting that their decision to support a bill not fully inclusive was an "extraordinarily difficult" one. By the time the letter went out, however, the Rules Committee had already laid out a process in which the amendment would be withdrawn prior to a vote.

The groups noted that many civil rights advances, beginning with the Civil Rights Act of 1957, have been incremental. Solmonese said that in a recent conversation with Georgia Democratic Congressman John Lewis, a leading figure in the 1960s African-American rights struggle, the two discussed much the same topic.

Incrementalism became something of a mantra in the final days of the ENDA debate; in her floor speech, Pelosi used the words "small steps."

Other non-LGBT progressive groups also jumped in with separate statements echoing the HRC-LCCR posture - the AFL-CIO in a letter dated October 23 and the United Auto Workers in a November 6 statement that voiced support for ENDA, but made no mention of the gender identity issue. On November 7, the day of the vote, the ACLU sent House members a letter endorsing ENDA in its current form and urging those who disagreed with the narrowing of the bill to vote "present" rather than no.

"For people who are lions in the Civil Rights movement and were prepared to vote no, the LCCR letter threatened a huge blemish on their entire career," Keisling complained. She said, however, that she would not name any members who had been inclined to lodge a protest vote, but pulled back.

**Among other members of the United ENDA coalition, NGLTF's Matt Foreman came the closest to Keisling in his expression of frustration.**

**"We are deeply disappointed that House leadership decided to ignore the position of a**

**vast majority of LGBT organizations, ignore the legal assessment that this bill may not even provide adequate protections for gays, lesbians, and bisexuals, and ignore the fact that this vote might make it more difficult to persuade members of Congress to support a fully inclusive bill in the future," he said in a statement released after the vote.**

**The previous day, Foreman described the fight over gender identity as "an ugly, divisive incident," and challenged the incrementalism argument head-on.**

**"At no time during the African-American Civil Rights movement were light-skinned African Americans or dark-skinned African Americans left behind," Foreman told Gay City News. "What is being lost is that we need to be working for the best law, not a bill that can be passed today."**

Other groups took care to note the historic nature of Wednesday's vote before voicing their disagreements with the House action. Alan Van Capelle, in a written statement, termed the decision to go ahead with the vote on the non-inclusive ENDA "a mistake," while lauding the New York representatives who stood with United ENDA.

Jon Hoadley, executive director of the National Stonewall Democrats, voiced his group's disappointment but then noted, "We now look forward to continuing our work with Congressional Leadership, Congresswoman Baldwin, and Congressman Frank on passing the original Employment Non-Discrimination Act." PFLAG's executive director, Jody M. Huckaby, stated, "It is disappointing that the thousands of family voices supporting the original iteration of the bill were not heard," but also said he "applauds Congress for tackling GLBT workplace discrimination."

In sharp contrast, Solmonese's written statement opened by saying, "Today, we witnessed the making of civil rights history in the US House of Representatives by the passing of ENDA." Three paragraphs later, the group's release added, "HRC was disappointed that HR 3685 did not include protections for transgender Americans," and then devoted four paragraphs to a discussion of civil rights incrementalism.

The internecine warfare playing out in the LGBT community found no discernible echo among Democrats on opposite sides of the all-inclusive or what's possible divide during the floor debate, even though three of the seven who followed the urging of United ENDA - Holt, Nadler, and Weiner - spoke.

Holt was the most direct in his comments, noting that Congressman John Lewis, cited by Solmonese in making his case for incrementalism, often quoted Dr. Martin Luther King, Jr. in saying, "The time is always right to do the right thing" and "warning against the tranquilizing drug of gradualism."

In his comments, Nadler noted that transgendered Americans, especially, "desperately need protection from employment discrimination," and that based on the experience of the gay rights law in New York State, passed in 2002, but not yet expanded to include gender identity, it is always hard to add protections for the considerably smaller trans community later. He also challenged a central contention of Frank's argument-that it is morally wrong to deny "protection to millions of people because you can't give it to millions plus several hundred thousands" - by noting that the bill will not become law at this point anyway.

But Nadler closed with an olive branch to Frank, with whom he clashed sharply in recent weeks.

"While I may disagree with some of my colleagues on strategy, I assure you that we are united in support of the ultimate goal - protection from employment discrimination for the entire LGBT community," he said.

Weiner, in his statement, challenged Republicans to prove they were real conservatives by

supporting a measure that would improve the economic efficiency and rationality of the free market, and gave no indication of his intention to vote no.

Republican opponents of ENDA trotted out some usual arguments against gay rights measures - that they confer "privileged" status on gays and, more often in Wednesday's debate, that they threaten religious liberty. Despite an amendment to satisfy objections that the carve-out for religious institutions was not sufficiently broad and clear, several Republicans, most strenuously Indiana's Mark Souder, warned that companies that allowed their workers to espouse religious objections to homosexuality and religious bookstores without denominational affiliation would be hobbled by ENDA. Souder purported that only 14 percent of all Christian bookstores would be covered by the religious carve-out.

Republicans spent more of their time on newer objections - that the inclusion of language protecting workers "perceived" to be gay would open up the floodgates of frivolous litigation, largely benefiting trial lawyers, and that unlike the case with most amendments introduced on the floor, they would not be allowed to vote on Baldwin's proposal to restore transgender protections to the bill.

Clearly, Republicans were itching for the confrontation Frank had scrambled to avoid by revising his bill - a straight up or down vote on gender identity. Frank had argued that the GOP would undoubtedly force a vote on an amendment to strip trans provisions from an inclusive bill had that gone to the floor.

Noting that in the past Republican opposition to a gay rights bill would have been more flatly homophobic, Frank rose to say, "I am grateful for the obscurity of the opposition's argument. It is no longer fashionable to say that you are able to fire someone because they are gay or lesbian." He argued that deleting the term "perceived" would not win any additional Republican votes.

In making the case for ENDA, no one was more stirring than Lewis, perhaps the most prominent of the House's Civil Rights lions. Noting his work fighting Jim Crow laws in the 1960s, when signs indicating white drinking fountains, and those for Negroes or Coloreds, still prevailed, he said, "I have fought too long... not to stand up for our gay and lesbian brothers and sisters... Today we have the opportunity to take down more signs."