Testimony of C. Boyden Gray

Before the Foreign Relations Committee of
The United States Senate

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It is a pleasure for me to testify in favor of the ratification of the Convention on the Rights of Persons with Disabilities (the Convention or the Disabilities Treaty). Ratification of the Disabilities Treaty will constitute a major step forward in the effort to end discrimination against more than one billion persons with disabilities around the world. It will protect the rights and dignity of all people with disabilities and export core American values that have been codified in U.S. law in the Americans with Disabilities Act. It will serve Americans well. Our active participation in the implementation of this Convention will continue strong American leadership; it will assist the ease with which Americans with disabilities, including our wounded warriors, travel, work, and study abroad; and it will help American businesses expand their role in the international, global economy.

My direct involvement on disability rights issues began with my bridge partner, Evan Kemp, a disability rights leader, head of the EEOC during the Administration of George H.W. Bush, and a friend. At the start of the Reagan Administration I worked with the Presidential Task Force on Regulatory Relief, which was considering the scope and nature of government regulations required by the 1978 Amendments to Section 504 of the Rehabilitation Act of 1973. That Act required all Executive branch agencies to issue regulations implementing the nondiscrimination requirements of Section 504.

During this time, the Reagan Administration engaged in extensive outreach and negotiations with the disability community, led by Mr. Kemp and his cohorts at DREDF, the Disability Rights Education and Defense Fund. Together with the Justice Department, then under the leadership of Edwin Meese and with the Civil Rights Division under William Bradford Reynolds, we hammered out the basic and balanced concepts of what constitutes discrimination on the basis of disability.

We introduced the concepts that the disability law did not require actions that resulted in undue financial and administrative burdens and that entities covered by the law would not have to engage in conduct that resulted in a fundamental alteration of the nature of their programs. We also worked out an appropriate definition of disability for the implementation of the law, giving significant regulatory guidance to the statutory definition. We provided a fair, effective approach to disability nondiscrimination, carefully balancing the rights and needs of persons with disabilities with the costs to businesses and government agencies of providing access. In the ensuing years, each Federal agency ~~adopted~~ issued disability rights regulations adopting these principles and worked to open their own programs to persons with disabilities. Programs at the National Parks Service became accessible and local Social Security offices began the necessary steps to make their offices and programs accessible.

Several years later, while serving as the Legal Counsel to President George H. W. Bush, I was once again involved with disability rights issues. The project this time in the development of what would become the Americans with Disabilities Act, one of the premiere achievements of the Bush Administration. Not surprisingly, we turned to the terms and concepts that we had first adopted in Section 504 and turned them into a new comprehensive disability rights law, the Americans with Disabilities Act.

I recount this history today because the concepts and principles that were developed during the Reagan Administration and then codified in the ADA during the Bush 41 Administration are now at the heart of the Convention on the Rights of Persons with Disabilities. The U.S. delegation that worked at the UN during the Administration of President George W. Bush made sure that the new Disabilities Treaty followed the time-tested approaches of American disability law. The Disabilities Treaty is the next logical step after the ADA.

Thus, the concepts of equality of treatment and nondiscrimination are the primary principles of both U.S. domestic law and the Disabilities Treaty. The Disabilities Treaty seeks to ensure that persons with disabilities enjoy the same rights as everyone else and are able to lead their lives as do other individuals, if given the same opportunities. By requiring equal treatment and reasonable accommodation for persons with disabilities, the Convention is rooted in the principles of U.S. disability law. As with the comprehensive network of U.S. federal disability law, the Convention expresses the principles and goals of inclusion, respect for human dignity and individual autonomy and choice, accessibility, and equal enjoyment of rights -- including political participation, access to justice, respect for home and the family, education, access to employment and health care, and freedom from torture and other cruel, inhuman or degrading treatment.

Now I am aware that the Disabilities Treaty is an expansive, sometimes hortatory document that does, in some instances, go beyond what we have developed here in the United States. Thus, it is essential that we include reservations, understandings, and declarations, or RUDs, to tailor this treaty to our concepts of equal opportunity and nondiscrimination. Last year the Obama Administration included just such a series of RUDs in its submission of the Disabilities Treaty to the Senate . And this Committee wisely added additional RUDs to the treaty. These RUDs are an appropriate and needed addition to the Disabilities Treaty and I encourage this Committee to include similar RUDs in this session of Congress. In doing so, the Committee must remember that no matter what RUD language you develop, the underlying and most important principle here is that this is a nondiscrimination treaty. Any new RUD language must not undermine the principles of U.S. disability law: nondiscrimination and equality of opportunity.

Perhaps most significant are the proposed reservations on Federalism and private conduct and the declaration that the treaty is non-self-executing. I note with approval that the Obama Administration made its Federalism provision a reservation, rather than an Understanding. In this country's earlier human rights treaties, for example, the Convention on the Elimination of Racial Discrimination, or CERD, the Federalism provision was an understanding. Making this provision a reservation means the United States is only undertaking obligations to the extent consistent with our Federalist system. Those powers and responsibilities that are the province of the individual States will remain so under this Convention. The important reservation on federalism ensures that the obligations that we undertake under the Convention are limited to actions within the authority of the Federal Government and do not reach areas of sole state and local jurisdiction.

The reservation regarding private conduct is equally important. It will ensure that the US. does not accept any obligation except as mandated by the Constitution and the laws of the United States, such as the ADA and others like the Individual with Disabilities Education Act. Thus, as with our current law, religious entities, small employers, and private homes would be exempt from any new requirements.

Similarly significant is the declaration that the Convention on the Rights of Persons with Disabilities is non-self-executing. This declaration ensures that the treaty itself does not give rise to individually enforceable rights and cannot be directly enforced in the U.S. courts. It ensures the primacy of U.S. domestic law and remedies on disability issues. Simply put, no one will be able to use the Disabilities Treaty to bring an action in the U.S. courts. If persons in this country seek a redress of what they perceive to be violations of their rights, they must continue to use the tools that are in place for them now, including the ADA, the civil rights provisions of the Rehabilitation Act, the disability provisions of the Fair Housing Act, and the many other ~~fine~~ laws that we have put in place to protect Americans with disabilities at home.

With these reservations, understandings, and declarations, the Senate will ensure that ratification of the Disabilities treaty will require no new federal laws, and will not require the individual States to revise their own laws. Inclusion of these RUDs will confirm that the United States will rely on its compliance with our existing, rich panoply of disability laws to constitute compliance with the treaty and that we can continue to use our expansive and recently amended definition of disability. These reservations are eminently reasonable and are compatible with the object and purpose of the treaty. And once included in the Senate Resolution of Advice and Consent, these reservations become the law and no nation nor any international body has the ability or power to sever, amend, or overturn such reservations.

I understand that some persons have challenged the long-accepted practice of using RUDs in treaties. Such claims are not correct and, quite simply, extraordinary. When the U.S. Senate attaches conditions to any treaty during its advice-and-consent process, these conditions are binding on the President and the President cannot proceed to ratify a treaty without giving them effect. These conditions become part of the treaty and have the force and effect of law. The various courts of the United States, including the Supreme Court, have upheld the validity of reservations, understandings, and declarations. Further, Administrations of both political parties have uniformly throughout our history upheld this view.

The claims that somehow ratification of the Disabilities Treaty will undermine U.S. sovereignty are simply false. Some have raised alarms by mischaracterizing the role of the Disabilities Committee created by the treaty. This committee, a group of 18 experts elected by the nations that have ratified the treaty, meets twice each year to review the reports submitted by those countries that have ratified the treaty. The persons on this Committee are not employees of the governments that they represent. They are civilians, ordinary citizens from around the world with extensive expertise on disability rights. Among the 18 Committee members, 15 are themselves persons with disabilities.

By the terms of the treaty itself this committee is advisory only. The committee is authorized only to respond to reports with "suggestions and general recommendations." The Committee's suggestions, observations, and opinions are not binding and cannot compel any action in the United States. The treaty provides no vehicle for the UN or any UN officials to interfere in American jurisprudence.

Further, the concerns that Committee's interpretations of the Disabilities Treaty will become customary international law and thus be binding on the United States are misplaced. The Committee's non-binding recommendations by themselves do not rise to the level of international law. Even if the non-binding recommendations of the Committee are adopted by other nations, they cannot and will not become binding on the United States if the United States consistently objects to any such interpretations during their emergence. The persistent objector doctrine ensures that the United States will have a say in any future treaty interpretation. Of course, the one way to ensure that the United States has a role in the interpretation of the treaty is to ratify the treaty and seek to serve on the Convention's Disabilities Committee.

Any concern that this Committee can have any role other than an advisory one was further allayed by the understanding adopted by the Committee last year that made clear that the Committee has no authority to compel any U.S. actions and that its conclusions, recommendations, or general comments were not legally binding on the United States in any manner.

I would also like to address what has become known as the homeschooling issue. I myself am a longtime advocate for parental choice in education decisions. I note that homeschooling has blossomed in the United States at the same time that we have embraced the concepts of the ADA and of the parental role in education decisions in the Individuals with Disabilities Education Act (IDEA). In fact, many parents with children with disabilities have chosen homeschooling as an option to provide an appropriate education for their children.

I would align myself with the testimony before this Committee of former Attorney General Dick Thornburgh. I agree that nothing in this treaty prevents parents from homeschooling or making other decisions for their children. As I understand the concern, it rises from the inclusion of the phrase "best interests of the child" in the Disabilities Convention. While I do not believe considering the best interests of the child is threatening to parental rights, last year, the Committee included an understanding that made clear that the use of the phrase "the best interest of the child" would be interpreted in a manner consistent with use of that concept in U.S. law, a result that would have the purpose or effect of maintaining parental authority in making homeschooling decisions. While not necessary, Inclusion of an understanding this year that merely said that nothing in the treaty limits the ability of parents to homeschool ~~their~~ children would eliminate any legitimate concerns on this issue.

Some have found it troubling that the Disabilities Convention does not contain a definition of disability and that it recognizes that disability is an evolving concept that results from the interaction between a person's impairment and the physical and environmental barriers around them. The implication of this criticism is that it is a weakness in the Convention that each nation State will have to adopt its own definition in its national legislation. The flexibility that the Convention allows here is its strength, not its weakness; and it follows our own precedent on the definition of disability. We in the United States have moved away from the medical model to the integration model of disability in our own definition of disability. The medical model defines individuals with disabilities as sick and focuses on medical treatment and health services. The integration model recognizes the abilities of individuals with disabilities and emphasizes removing barriers to full participation in society for individuals with disabilities. The culmination of this 40-year history, which started with 1973's Rehabilitation Act, was the ADA Amendments Act of 2008, signed by President George W. Bush. We will be able to use our own definition of disability to implement the Disabilities Convention.

An argument made by some opponents of U.S. ratification of the Disabilities Convention is that we should not enter into treaties that do not directly enhance national security. The U.S. has ratified numerous treaties, including multi-lateral trade agreements, that do not bear directly on national security. The

benefits to Americans from ratification of the Disabilities Convention are significant. In our global economy, U.S. employees need to travel and work abroad freely, unencumbered by inaccessibility. Every U.S. worker starting a career now and in the future should expect to be called upon to travel abroad to enhance his own career and to maintain a competitive edge for his U.S. employer. There is no better way for our government to support the long-term economic self-sufficiency of the millions of Americans with disabilities than to participate in the global commitment to accessibility that is enshrined in the Disabilities Convention.

U.S. business supports the Disabilities Convention because the globalization of disability non-discrimination and accessibility will promote U.S. business in international markets and advance equal access and opportunity for employees. Business groups that favor U.S. ratification include the Chamber of Commerce, the U.S. Business Leadership Network, and the Information Technology Council. The Disabilities Treaty can level the playing field abroad for U.S. industries that have been required by the ADA since 1990 to design and manufacture accessible products. The Disabilities Convention provides the pre-eminent forum for disability rights and accessibility internationally. If we are not there, the leadership vacuum will be filled by other countries in Europe or Asia. This could result in less clout for Americans in standard setting bodies and multiple, incompatible accessibility standards. If the world follows standards based on European or Asian accessibility standards, it could limit access for Americans, including vets working, studying, or travelling abroad. It could also hurt American businesses trying to sell their accessible products abroad. There are at least 1.2 billion persons outside the U.S. who can benefit from these goods and services.

The U.S. owes a duty to our wounded veterans to ratify the Disabilities Convention. There are approximately 5.5 million disabled American veterans, more than 3.5 million of whom are receiving compensation for a disability. There are also at least 126,000 military family members with special needs. More than 325,000 American service members and their families are stationed abroad, many in countries with accessibility standards significantly lower than our own. Our disabled veterans and military families want to work, study, serve and travel abroad with the same dignity and opportunity as other Americans. Doing so can be difficult, if not impossible, in countries with poor accessibility standards.

Of the nearly one million veterans and their beneficiaries who have taken advantage of the Post-9/11 GI Bill since its inception four years ago, about twenty percent have a disability. In general, students with disabilities participate in study abroad programs less than half as often as those without disabilities. Disabled veterans and military service members are among America's most elite athletes. Ten veterans and service members represented the U.S. at the 2013 International Paralympic Committee World Championships and more will compete for Team U.S.A. at the 2014 Paralympics Winter Games. International

competition often poses significant obstacles for many of these athletes because of inaccessibility in overseas venues, lodging, transportation and related facilities. Ratification of the Disabilities Treaty will help enable the United States to export its gold standard for non-discrimination and accessibility worldwide and make it easier for all our wounded warriors, disabled veterans, active duty members, and their families to take advantage of important opportunities abroad.

Some question why the U.S. should ratify a disabilities treaty that is modeled on American law that has been on the books for more than twenty years. As one who has been at the center of the development of domestic disability law and policy for forty years, I can tell you that the U.S. achieved its current position as the standard setter in the world for non-discrimination and equal access for individuals with disabilities through a long, painstaking process. We navigated through that process with a balanced approach to disability non-discrimination that has been and continues to be supported by strong, bi-partisan majorities of Congress and the American public and Presidents of both parties. It is time for the U.S. to export the model of the ADA to other countries as a leader of the official global initiative on disability non-discrimination. There is nothing more important to the ability of Americans with disabilities, including veterans and their families, to become full participants in the world economy than the leadership that the U.S. can provide only if it ratifies the Disabilities Convention. What are we afraid of? The Disabilities Convention is modeled on our existing domestic law. The U.N. Committee for the treaty is advisory only.

Our official imprint on the implementation of the Disabilities Convention is critical to our ability to give our citizens the protections they need to thrive in the 21st century. I wonder how many senators on this Committee have a son or daughter who has benefitted from travel abroad as part of his or her education? Students with disabilities often are excluded from these opportunities for lack of accessibility in the destination country. Approximately 4 out of 10 American travelers or their travel companions are people with disabilities that still face constant barriers and discrimination abroad.

There is another important reason for the U.S. to ratify the Disabilities Convention. Without laws like the ADA abroad, millions of children and adults are housed in institutions without the enrichment of family life, community resources, or access to the most basic civil rights like a birth certificate or even a name. Until the U.S. ratifies the Disabilities Convention, it is a bystander on these critical matters. Our leadership in fighting against these unconscionable practices can make an enormous difference.

At this Committee's previous hearing on ratification of the Disabilities Convention, some suggested that the case of Bond v. United States, recently argued and currently pending in the Supreme Court, should be decided before the Senate consents to ratification of the Disabilities Convention. I am familiar with the time-honored tactic of using a vaguely related court case as a basis for

delaying Congressional action on something that some Members would rather avoid. The Bond case is an unnecessary distraction from the important task of U.S. ratification of the Disabilities Treaty. The Bond case is a red herring. The outcome of the Bond case will not impact the Disabilities Convention nor the obligations of the U.S. to implement the treaty.

The Bond case involves a challenge to the legislation implementing the Chemical Weapons Convention. U.S. compliance with the Disabilities Convention will result from already existing laws, laws that were passed entirely independently of the Disabilities Convention, laws that do not rely upon the Constitution's treaty power but have already been found to have a constitutional basis by the Supreme Court. No implementing legislation will be necessary for the Disabilities Convention. This is confirmed in a declaration this Committee inserted into its proposed resolution of advice and consent last year, which states "The Senate declares that, in view of the reservation to be included in the instrument of ratification, current United States law fulfills or exceeds the obligations of the Convention for the United States of America."

I said earlier that the Disabilities Treaty was the logical next step after the Americans with Disabilities Act. On July 26, 1990, when President Bush signed the ADA on a sun-drenched ceremony on the White House law, he saw that we were entering a "bright new era of equality, independence, and freedom." It is time for the United States to stand with the rest of the world in fostering the core American values of equality, independence, and freedom. I urge you to ratify the Convention on the Rights of Persons with Disabilities and give international meaning to President Bush's call: "Let the shameful walls of exclusion finally come tumbling down."

Thank you