CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Testimony
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Most Americans want to help people with disabilities. So a treaty promising to do that generates immediate sympathy. But a treaty is a solemn international commitment. We should not embrace a new international commitment on the basis of emotional identification with its aims. Ratifying this convention would commit the United States to obligations we cannot now foresee. An international treaty is a bad vehicle for determining what we should do to help people with disabilities.

Let me start with the most general premise of this convention, that a coordinated global policy in this area is a good thing in itself. Our own Constitution rests on the opposite premise – that centralizing and standardizing our public policies is not a good thing. Our Constitution confers special responsibilities on the federal government, then leaves broad areas of policy to states and localities. We call this system federalism. It rests on the common sense premise that we will have better policy and more effective implementation of policy, if we let people decide matters locally, where immediately affected communities know more about their own problems, their own resources, their own competing needs. If we insisted on

"one size fits all," we would end up with a lot of ill-fitting policy, because circumstances vary from place to place.

Of course, we still have a lot of debate about which policies can be left to state and local government and which need to be directed by the federal government. That has been a large part of the current debate on how to improve our system of health insurance. And the same concerns apply to protections for persons with disabilities: if Washington can't manage the regulation of health insurance, why suppose that Geneva can be trusted to oversee a global scheme of protections for people with disabilities? When you agree to have your policies regulated by some higher authority, you inevitably risk losing control of your own policies.

When it comes to protection for people with disabilities, there have been undeniable benefits to national regulation. Among other things, national programs, like the Americans with Disabilities Act and the Rehabilitation Act, won greater attention and more funding for disability rights. That does not mean, however that we can expect to secure even better results by now pushing policy responsibility from the national to the international level.

We certainly won't get international funding for American programs to help people with disabilities. If there is sharing of resources, we will end up as net contributors to programs in other countries. We can't even expect that participation in an international program will deliver visibility and prestige for efforts to assist the disabled in this country. Our own national government – home to institutions and personalities we see on the news every day – has far more visibility than any UN forum in Geneva or even at Turtle Bay in New York. Our own

national government has the prestige of an entity that we depend on, in the last resort, to secure our freedom and independence. Americans won't be more impressed by admonitions from international bureaucrats or second rank diplomats.

So, taking direction from international officials won't elevate our own efforts to help persons with disabilities. It will simply complicate our own efforts, entangling them in remote international deliberations, which will be far less informed than our own domestic debates about proper policy. We have no reason to embrace the underlying premise here, that global policies are inherently better than national or local policies.

This brings me to my second point. This is not just any international convention but precisely the type of convention that the United States has, until now, generally eschewed. Advocates for ratifying this convention often say the United States has long been a leader in the movement for international human rights, so embracing CRPD now will honor our own traditions. Framing the issue in this way, however, leaves out some important qualifications.

Since the late 1940s, when the United Nations first began proposing international human rights standards, there has been a debate about how to define human rights. Some advocates emphasized restraints on government to protect individual liberty – the sorts of restraints enshrined in our own Bill of Rights. Others disparaged such limiting principles as outdated. They called for expanding the powers of government to assure economic security and well-being to the people at large. People who urged such viewpoints often said that the Soviet Union and

other socialist countries provided more meaningful human rights guarantees than countries with capitalist economies, where individuals had to worry about unemployment and material deprivation.

The UN responded to this debate by proposing two different conventions on fundamental human rights. One addressed "Civil and Political Rights" (free speech, religious freedom, due process and so on); the other dealt with "Economic and Social Rights" (guarantees of employment, health care, higher education, etc.). The United States has ratified the first convention but not the second. Our government has advocated for civil and political rights in various ways and in various international forums. Advocacy for "economic and social rights" is most often the cry of repressive governments, which boast of food subsidies but can't tolerate personal freedoms.

In a similar spirit, the United States has ratified the Convention Against Racial Discrimination and the Convention Against Torture. We have thus endorsed the basic principle that respectable governments can never engage in torture, never perpetrate race discrimination. The United States has not, however, joined the Convention on the Elimination of Discrimination Against Women (CEDAW) nor the Convention on the Rights of the Child. These conventions don't just prohibit discrimination but go on to demand a series of government commitments to remake society in the service of particular egalitarian agendas.

Our past practice has a sound logic behind it. It is fine (most of us think) for government to help the most vulnerable with particular programs. But as soon as you turn from fundamental limits on government to considering such additional

commitments, you have opened a very different kind of debate. The question is no longer, "Should government have this power *at all*?" To that sort of question, you might give a concise, clear answer, set out in the charter of government. When you turn to specialized programs of public assistance for vulnerable groups, you must instead ask, "*How much* should we spend and regulate for this benefit and how should we do it?" We have not previously regarded such programs as proper subjects of international human rights commitments.

We set down basic constitutional limits on governmental power – civil and political rights – for generations to come, "for ourselves and our posterity" as the Preamble to the Constitution says. We might think that international human rights treaties on those subjects simply reaffirm our longstanding constitutional commitments. When, by contrast, our legislatures enact particular protective programs to help particular groups, we expect there will be debate and ongoing compromise and adjustment. So, for example, most of us may agree that government should do more to help people with chronic diseases – but that doesn't necessarily mean we embrace the Affordable Care Act in its current form. We reserve the right to change our minds, to adjust and improve that new program – perhaps to repeal large parts of it, if they do not function as advocates for it had hoped.

The Convention on the Rights of Persons with Disabilities is not a treaty that simply elaborates fundamental limits on government, akin to those set out in the International Covenant on Civil and Political Rights. Instead, the CRPD exemplifies the activist governing philosophy behind the International Covenant on Economic

and Social Rights. The CRPD explicitly echoes general provisions of the International Covenant on Economic, Social and Cultural Rights. The latter imposes an obligation on states to protect the "right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions." (Art. 11, Par. 1) In just these same terms, the CRPD demands that governments "recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing and to the continuous improvement of living conditions …." (Art. 28, Par. 1)

If we acknowledge that government has this obligation toward persons with disabilities, why not toward others? Why not for "everyone," as the Covenant on Economic and Social Rights has it? If we embrace international supervision of our efforts to help persons with disabilities, why not accept international supervision for all other policies? Surely, we will have forfeited the capacity to say that any other convention extends to policies outside our own understanding of human rights. If we support this convention, we say helping people with disabilities is good and we aim to do good. We thus endorse the premise that if something is good, it should rightly be managed, directed or supervised on a global basis.

Advocates for CRPD may reply that it does not really commit us to anything because we are already in compliance with all its requirements. Therefore, they say, subscribing to this treaty just gives us an opportunity to encourage others to emulate us. In fact, our own laws are not so sweeping and comprehensive as the CRPD. And we cannot now know what this convention may be interpreted to

require down the road. I will come back to that objection in a moment. But let us stipulate, for the sake of argument, that the Convention will not constrain us, but only impose new obligations on other nations. Even if that were true, ratifying this convention would not be at all wise, given the kind of convention it is.

As with other human rights conventions, the CRPD makes no provision for enforcement, in the sense of formal sanctions for non-compliance. Some parties to this treaty may disobey all its requirements, as brutal governments have done with other human rights conventions. Saudi Arabia is a party to the Convention on the Elimination of All Forms of Discrimination Against Women. The Soviet Union subscribed to the Covenant on Civil and Political Rights. If there is hope for enforcement, it must come from third parties who hector or cajole non-compliant states.

We did do some of that to the Soviet Union, in its last years – regarding free speech and religious freedom. Secretary of State John Kerry recently made clear we are not prepared to do that against Saudi Arabia, regarding its treatment of women. Asked about the Saudi law prohibiting women from driving cars, he said, "I think that debate is best left to the Saudi Arabian people." But the United States is not a party to CEDAW.

If we ratify CRPD, we would be taking on the moral responsibility to help enforce it. Are we really prepared to hector and admonish other countries to implement all the provisions in this very ambitious treaty? We would then be demanding that even very poor countries expend considerable resources to make public transportation and public buildings accessible to wheel chairs, schools

equipped to accommodate blind people, factories to accommodate people with limited mobility. Such accommodations often require very large sums of money. Advocates say that if CRPD requirements are implemented everywhere, Americans with disabilities will find it easier to navigate wherever they travel. But money for this purpose may mean less money for schools in countries with limited literacy, less money for inoculation programs in countries still facing epidemic disease, less money for food programs in countries with mass malnutrition.

Do we really want to badger poor countries to cut spending on these other things in order to make life more comfortable for American tourists, who will probably be few in number and brief in their visits? Do we really want to insist that convenience for traveling Americans must take priority over basic human needs in developing countries – just because there happens to be an international convention addressing "rights of persons with disabilities"? If we say that, we say that what international diplomats think is most important must be taken as such by all the world, even when it comes to matters of internal governance. Why would we want to sign up for that view of global policy?

But now I want to address the claim that the United States is already in full compliance, so the convention makes no demands of us. That view rests on the very questionable assumption that you can scan a legal document and know from your own initial reading what it will mean in the future. Americans should be the last people to accept that naïve view. We are often enough surprised by what our own judges tell us is in our own Constitution. Who knew, before last year, that our Constitution prohibited the federal government from forcing people to buy health

insurance -- unless the forcing was implemented by something which judges could categorize as a tax?

Many commentators openly affirm that our Constitution is a "living document," constantly evolving to meet new concerns. Is the CRPD more fixed? The Preamble actually proclaims that "disability is an evolving concept" (Par. e). Unless the convention is simply a collection of empty platitudes, advocates will surely insist that it is meant to function as something like a global constitutional standard – which can be made to answer precise questions despite the seeming generality of its language. The drafters evidently thought the Convention would be subject to precise interpretation. It establishes a committee of "experts" to hand down such interpretation. (Art. 34)

What is the status of the committee's determinations? The Convention is sketchy about that. It says, for example, that reservations contrary to "the object and purpose of the convention shall not be permitted." (Art. 46) The Convention does not say who will determine which reservations do and which do not meet that test. The parallel committee for the International Covenant on Civil and Political Rights (the so-called "Human Rights Committee") claimed it had the authority to rule on which reservations are and which are not valid. It then claimed that invalid reservations should simply be treated as void, reinstating any provision of the Covenant which might otherwise have been suspended by a reservation. The Clinton administration disagreed, but the Human Rights Committee did not abandon its claims.

At minimum, we should expect the CRPD committee to assert its own authority to say which reservations are valid and which can be discounted as improper. The Human Rights Committee claimed this authority even though the ICCPR makes no provision for limiting reservations. The CRPD goes to the trouble of making such limitation explicit – after setting up the committee to monitor each signatory state's compliance. Maybe a future American administration will challenge the authority of CRPD rulings and refuse to comply with their admonitions. But that will now be harder in future years than it was in the 1990s. In that era, we had only subscribed to a few basic principles which we could see as analogous to our Bill of Rights. In ratifying the CRPD we will have taken a long further step toward committing to international supervision of the whole range of our domestic policies.

In its present form, the CRPD does not provide for a right of individual appeal to the committee. That is provided in an optional protocol, as it has been in optional protocols to other human rights conventions. The United States has always rejected such protocols, even for conventions we have embraced (as with the ICCPR). If the monitoring committee can hear personal complaints from named individuals, it is hard for the affected nation to say the committee is just offering speculative advice. Why allow individual complaints if decisions on the merits of those complaints can be entirely disregarded? Yet the CRPD provides that two thirds of the signatory states can make amendments, binding on all the others, for specialized topics – among which are the role of the committee in hearing reports (Art. 47, Par. 3). So we might think we had signed up for a general discussion of general policies and

then discover that we were committed to a quasi-judicial procedure generating a whole new body of case law.

And it's not as if the Convention doesn't extend to disputed policies. Our own federal laws were the outcome of careful political bargaining, so they make provision for limits and exceptions. The Americans with Disabilities Act, for example, requires public buildings to provide access for wheelchairs, but the requirement does not apply to purely residential buildings. There are also ADA exemptions for private clubs and religious institutions. Schools receiving federal financial assistance are regulated under Sec. 504 of the Rehabilitation Act, but homeschooling is not. The CRPD acknowledges none of these limits or exceptions. It thus threatens to overturn all these jurisdictional compromises, subjecting everyone and everything to its demands.

Then there will be knotty questions on the substance of policy. What counts as a disability? Should alcoholism count? Drug addiction? Sexual addictions? Can employers take into account that a job applicant has been convicted of unlawful behavior (regarding drugs or some form of sexual abuse)? Or should propensity to such conduct be considered a disability, so that employers would be guilty of discrimination if they did take this into account? The convention says employers must provide "equal remuneration for work of equal value" (Art. 27, Par. 1b). Who determines whether a particular job, performed by a person with a disability, does or does not have the same financial "value" as a different job, which could not be performed by that person? Employers must provide "reasonable accommodation … in the workplace" to "persons with disabilities" (Art. 27, Par. 1i). How much extra

cost must an employer bear before "accommodation" would no longer be "reasonable"? Would a full-time personal assistant to read or translate directives into sign language be "reasonable accommodation" for an unskilled blind or deaf person?

The CRPD says states have an obligation to "promote the participation, to the fullest extent possible, of persons with disabilities in mainstream sporting activities." (Art. 30, Par. 5a) Does that mean professional sports teams must allow disabled athletes to "participate" with motorized devices, even if that gives them an unfair advantage? Does it mean schools must allow students with disabilities to participate in contact sports, even if medical experts caution that such participation might pose special risks of injury? The Convention admonishes, "In all actions regarding children with disabilities, the best interest of the child shall be a primary consideration." (Art. 7, Par. 2) Does that mean state authorities should always be empowered to override parental decisions regarding schooling or proposed surgical intervention or pharmacologic treatment?

The CRPD imposes a state obligation to "adopt immediate, effective and appropriate measures … to combat stereotypes, prejudices and harmful practices relating to persons with disabilities." (Art. 8, Par. 1b) Neither here nor elsewhere does the convention provide exemptions for religious institutions. So far from exempting journalistic institutions, it admonishes states to adopt "measures … encouraging *all organs of the media* to portray persons with disabilities in a manner consistent with the purpose of the Convention." (8, 1c, emphasis added) So it might be understood to mean that states must compel even religious broadcasters

or actual churches to disseminate particular "messages" at odds with their own religious views, as on such questions as the propriety of mixed sporting activities between male and female students when some are disabled. (See Art. 8, Par. 1b, imposing a duty to "combat stereotypes, prejudices and harmful practices …. including those based on *sex* and age, *in all areas of life*" [emphasis added]).

The CRPD also imposes a duty to ensure that "laws protecting intellectual property rights do not constitute an unreasonable … barrier to access to persons with disabilities". (Art. 30, Par. 3) That might require that patents and copyrights be waived whenever doing so would help disabled persons gain readier access to otherwise protected products. The Convention requires states to take "all necessary measures to ensure the protection and safety of persons with disabilities in … situations of armed conflict". (Art. 11) That might impose very considerable extra burdens on our military.

My point is not that absurd or intolerable consequences will necessarily follow once we commit to the Convention. My point is that many provisions are open to a range of possible interpretations. We have no reliable way of predicting how the CRPD committee will interpret the Convention in future years. And we can't now predict whether the United States government will feel able or willing to reject those interpretations. If we start by insisting we will never be influenced by the committee's interpretations, we make the whole project appear to be pointless symbolism. If we are not influenced, why suppose any other country would be? Then what is the point? But if we say we are open to influence, we may find it hard to resist particular rulings, especially if domestic constituencies embrace them and

demand that we "honor our solemn treaty commitments" and show "due respect to the consensus of the international community" or defer to "internationally acknowledged experts in this field."

Nor can we assume that the CRPD monitoring committee will only offer interpretations acceptable to most of the world at that moment and therefore always quite modest. The Human Rights Committee of the ICCPR read sexual liberty into the "privacy" guarantee of that convention as long ago as the mid-1990s, when many states (including most American states) still had laws against same-sex sexual practices. The U.S. Supreme Court subsequently cited that ruling in interpreting the U.S. Constitution. No Muslim country seems to have felt compelled to follow nor has the UN made an issue of their restrictive regulation in this area. Even international conventions that seem to indicate universal prohibitions are, in practice, understood to apply differently to different countries. When it comes to costly adaptations to complicated social policy aims (such as assuring accessibility of public transportation to people in wheelchairs), differential requirements will be taken for granted. The Committee is quite capable of imposing requirements on the United States and other affluent countries which it does not press on less developed states.

Again, I am not saying the results will necessarily be onerous or outrageous. But I return to my initial point: why commit ourselves to a global partnership when deliberating on our own policies in this area? Why assume that a group of international "experts" (as the CRPD calls the committee) will necessarily know better than democratically elected representatives in countries that already have much experience with these policy questions?

Of course, we may still have things to learn from other countries. Let us, by all means, study their experience. Let us give grants to scholars to write up what they have learned from studying the experience of other countries. But why commit ourselves to do the same things they do and in the same way? Why is it so important for all nations to follow the same policy standards in this area?

What about liberty? What about independence? What about pursuing happiness in our own varied ways? Aren't those fundamental American commitments? To embrace this convention is to confess that we don't think we can decide these matters for ourselves. It is to confess that we don't think ourselves worthy of self-government. It is not, then, a fulfillment of our Declaration of Independence but a repudiation of its central premise – that we have a right, as an independent nation, to decide for ourselves how we will be governed.