

Testimony of Dick Thornburgh

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Respecting the Convention on
the Rights of Persons with Disabilities

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the United States Senate

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It is a distinct pleasure for to me to testify once again before this Committee in favor of the ratification of the Convention on the Rights of Persons with Disabilities (the Convention or Disabilities Treaty). The Disabilities Treaty is an important component of the worldwide effort to advance disability rights. Ratification would mark a major step forward in the effort to end discrimination and to promote the rights of some one billion men, women, and children with disabilities around the world who seek recognition of their pre-eminent human rights. It would also serve to confirm American leadership in disability rights on the world stage.

Today we are witnessing a new era of worldwide recognition of disability rights. To date, as I last looked, a total of 158 countries (including the United States) have signed the Convention and 138 have ratified its terms. It is significant that the language of the Convention closely follows U.S. law and our own pioneering efforts in the recognizing and enforcing disability rights. It is equally significant that the United States remains on the sidelines as countries around the world ratify and work to comply with the Disabilities Treaty. U.S. Senate ratification of the Convention will rectify this anomaly and provide a major leap forward in securing equal rights around the world for persons with disabilities.

I.

As many of you may know, I have been involved in the disability movement for many years. I was a founding director of the National Organization on Disability (NOD) back in 1982 and later served as Vice Chairman of its international arm, the World Committee on Disability. I am also the father of a man with intellectual and physical disability – my son, Peter who was seriously injured at the age of four months in a 1960 automobile accident that tragically took the life of his mother, my first wife.

As Governor of Pennsylvania and Attorney General of the United States, I have had the privilege of working in official capacities for the inclusion of people with disabilities in all aspects of life. Indeed, it was my special privilege to serve as the point person for the administration of President George H. W. Bush in the bi-partisan effort to secure the passage of the Americans with Disabilities Act (ADA) in 1990.

This work has become a family affair, as my wife, Ginny, whom I married in 1963, founded NOD's Religion and Disability Program, designed to insure spiritual and religious access to persons with physical, mental, sensory and intellectual disability. She is now the Director of the Interfaith Initiative at the American Association of People with Disabilities

coordinating efforts by leaders of many faiths to advance the cause of disability rights. As the Convener of the Interfaith Disability Advocacy Coalition (IDAC), she has transmitted support for the Convention from 41 national religious or religiously-affiliated organizations to members of this Committee. We have thus had the great privilege of merging our personal and career objectives in this worthy cause.

I know first hand from my service as an Under-Secretary General at the United Nations in the immediate post-Cold War era of the long struggle to obtain passage of this Convention. The effort had its genesis in the 1981 Year of Disabled Persons, followed by the Decade of Disabled Persons and the promulgation of the World Programme of Action Concerning Disabled Persons, all providing focal points for efforts to internationalize concerns about disability rights. I particularly recall attending the historic gathering in Montreal in October of 1992 of the very first International Conference of Ministers Responsible for the Status of Persons With Disabilities where leaders of 73 governments throughout the world met for the first time to exchange ideas and fashion strategies which ultimately led to the adoption of the Convention.

The Convention represents important principles that as Americans we hold dear – basic recognition and equal protection of every person under the law, non-discrimination, the fundamental importance of independent living, and the right to make basic choices about our lives. We pioneered these basic principles under American law through passage of the ADA. We in the United States are demonstrating that people with disabilities can participate fully in our democracy. We are demonstrating that society, as a whole, is richer and better off when people with disabilities are included fully in every aspect of life. It is my hope and expectation that the United States will assume an equally important leadership role in helping to promote these basic principles worldwide by the ratification of this Convention.

Over 20 years ago, while serving as U.S. Attorney General, I testified before House and Senate Committees of the U.S. Congress in support of the ADA. During those hearings I acknowledged that no piece of legislation could alone change the long-standing misperceptions that many people have about disability – misperceptions based largely on stereotype, ignorance, and fear of what is different. Any reshaping of attitudes would have to be the gradual result not of the words or ideas in the laws, but of

bringing people with disabilities from the margins of society into the mainstream of American life – in our schools and workplaces, on buses and trains, and in our courthouses, restaurants, theaters and congregations – where they not only have an absolute right to be but where we have an obligation as fellow human beings to welcome them as equals.

The effort to secure passage of the ADA was difficult. But, this legislation, with its innovative concepts such as the need for “reasonable accommodation,” is changing America. It has truly made us more representative, more democratic and more empowering by ending the unchecked exclusion of 54 million Americans from our daily lives.

Fortunately, the Disabilities Convention is an embodiment of the nondiscrimination principles developed in the United States. Its principles and, indeed, much of its language, come directly from U.S. law, adopting the successful and balanced approach of U.S. federal disability rights law. It embodies the traditional American ideals that form the basis of the Americans with Disabilities Act – the core principles of nondiscrimination and equality of opportunity. And the Convention adopts the U.S. balanced approach to accessibility. Each requirement is tempered by limitations that

reflect the difficulty and costs of achieving accessibility. Thus the obligation to make reasonable accommodation to employees is limited by undue hardship. Businesses do not have to make changes to their programs and services if they are too costly or would fundamentally change the nature of the program or service.

The comprehensive nature of the treaty also mirrors the U.S. approach to disability rights. Both U.S. law and the Disabilities Treaty recognize that persons with disabilities will not be able to enjoy equal opportunity unless there is broad coverage. Having an education loses its meaning if jobs are foreclosed to students with disabilities. Nondiscrimination in employment will not be meaningful unless persons can get to work on accessible transportation. Having a job will lose its meaning if persons are unable to enjoy the fruits of their labor, from dining at a restaurant, going to a movie, or traveling across the country. Thus, then, like U.S. law, the Disabilities Convention is comprehensive in its approach. It addresses access to facilities, political participation, access to justice, access to education, employment, health care, participation in public and cultural life, recreation, leisure activities, and sports. It upholds freedom of expression, access to information, the ability to live

independently in one's own community, and freedom from torture and other cruel, inhuman, or degrading treatment.

Because of our adoption of the ADA and other disability rights legislation, the United States is viewed internationally as a pioneering role model for disability rights. Disability activists from other countries have taken the ADA to their governments and said, "This is how it should be done. We need to do this here in our country." And governments around the world have responded. As one who worked hard to gain protection of these rights in the United States, I am very proud to see how these basic principles are now on the way to being established as a part of international law through the adoption of the CRPD. As we overcame so many barriers to the enactment and implementation of the ADA, I am confident that we can be part of an even greater coalition to bring about worldwide support for this Convention as well.

Despite progress already made, disability as a global issue remains near the bottom of the list of priorities in many governments and societies. People with disabilities remain among the poorest, least educated and most abused and excluded people on earth. We must recognize that the

challenges we face are intimately linked with the very circumstances of economic, social, and political marginalization that affect people with disabilities around the world.

II.

We find ourselves today in a different place than when I testified before this Committee last summer. We have had the benefit of extensive discussion of the provisions of the Disabilities Treaty and their impact on U.S. domestic law and on the nature of U.S. leadership in the world and, indeed, on the very nature of the treaty process itself.

Most important to me was the Committee's adoption of a series of reservations, understandings, and declarations (RUDs) that clarified the scope and meaning of the Convention. With the inclusion of these reservations, understandings, and declarations, the Disabilities Treaty will require no changes to US. Federal or state law and it will have no impact on the federal budget. The important reservation on federalism ensures that the obligations that we undertake under the Convention are limited to the authority of the Federal Government and do not reach areas of state and local jurisdiction. The reservation regarding private conduct will ensure

that the US. will 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.

I also call to your attention the important understanding on what are called economic, social, and cultural rights. This understanding makes clear that, even if any of the Convention's provisions could be read to establish new rights, the U.S. recognizes that its obligations under the Convention are limited to those of nondiscrimination and that the treaty only requires that the U.S. will guarantee persons with disabilities rights under U.S. law to the same extent that such rights are recognized with regard to persons without disabilities and will do so on a nondiscriminatory basis.

I understand that some persons have challenged the long-accepted practice of using RUDs in treaties. Such claims are misguided 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 have upheld the validity of reservations, understandings, and declarations¹. Further, Administrations of both political parties have uniformly held this view. In 1995, the United States stated that “reservations are an essential part of a State’s consent to be bound. They cannot simply be erased. This reflects the fundamental principle of the law of treaties: obligation is based on consent. A State which does not consent to a treaty is not bound by that treaty. A State which expressly withholds its consent from a provision cannot be presumed, on the basis of some legal fiction, to be bound by it.”²

Significantly, the Disabilities Treaty itself, by its own terms, allows nations to add its own reservations during the ratification process. The only limitation on the reservation process being that such reservations shall not be incompatible with the object and purpose of the Convention. In Article 1, the Convention states that its purpose is to “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.” Because the object and purpose of the Disabilities Treaty is to

¹ See *Sosa v. Alvarez Machain*, 542 U.S. 692 (2004)(Self-executing declaration); *Auguste v. Ridge*, 395 F.3d 123 (3d Cir. 2005)(Understanding); *Buell v. Mitchell*, 274 F.3d 337 (6th Cir. 2001)(Reservation); *Beazley v. Johnson*, 242 F.3d 248 (5th Cir. 2001)(Reservation and self-executing declaration);

² “Observations by the Governments of the United States and the United Kingdom on Human Rights Committee General Comment No. 24(52) relating to reservations,” U.N. document A/50/40, March 28, 1995, p.1.

recognize and provide disability rights for persons with disabilities, the RUDs included by the Committee last year fall well within this legal standard. Any criticism that the wide-ranging laws of the United States in the disability rights arena, recognized even by opponents of the treaty as the “gold standard” for the world, somehow do not meet the object and purpose of the treaty is fanciful at best.

Similarly the extended body of law on how the Disabilities Treaty affects U.S. sovereignty bears revisiting. Exercising our Constitution’s treaty-making power is itself a declaration of our sovereignty. In this instance, where the treaty adopts American ideals and legal principles and encourages the nations of the world to follow our model of equal opportunity and nondiscrimination, U.S. interests and influence is being extended. The Convention embodies the traditional American ideals that form the basis of our own ADA – empowering persons with disabilities to be independent, to claim responsibility for their own lives, and to be able to make their own choices. Ratification presents us with the opportunity to reaffirm these values and to export American ideals around the world.

The claims that somehow ratification will undermine U.S. sovereignty are misplaced. Some have raised alarms over the existence of the Disabilities Committee created by the treaty. This committee, a group of 18 experts elected by the nation's that have ratified the treaty, meets twice each year to review the reports submitted by those countries that have ratified the treaty. 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. 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.

It is correctly noted that by ratifying the Convention, the United States agrees to report regularly to an international advisory body. We have nothing to hide. We can only gain from participating in the process of

international review. Moreover, we should not be so proud as to think that we cannot learn from other countries about how to meet the challenge of providing even better opportunities for people with disabilities.

As with other treaties entered into by the United States, the Disabilities Convention will include a declaration that the treaty is not self-executing. Thus, the treaty does not of itself give rise to individually enforceable rights and cannot be directly enforced by courts in the United States. The fact that the Disabilities Treaty is not self-executing actually means something. No one will have standing to use the treaty in a court in the United States nor can any U.S. court interpret the treaty. Simply put, U.S. sovereignty with regard to domestic decision-making will be fully respected and preserved.

Others have raised concerns that the treaty-making power of the United States should be limited to matters of national security, that somehow we should proscribe entering into treaties on human rights issues. I know of no subject matter limitation on our treaty-making powers in the U.S. Constitution. Further, the United States has long entered into treaties well beyond this suggested narrow reach, including, for example,

treaties providing for the protections of inter-country adoptions, defining the ability of American parents to recover child support in foreign countries, protecting intellectual property, or recognizing the elimination of racial discrimination. Most importantly, such a crabbed view of our treaty-making power will seriously undermine our standing as a champion of human rights and undercut our credibility to advocate for changes in human rights in regimes across the globe that do not adhere to basic American principles.

Let me address for a moment the painful and, I must admit, somewhat puzzling question of the seeming reluctance of some in our own nation to continue our lead role in this international effort. To begin with, it has been argued that disability rights are more appropriately addressed as solely a domestic concern, given the complexity of the issues involved. In other words, this really isn't an appropriate subject for international protection. Certainly, good domestic legislation in every country would be the ideal solution. But since many countries don't have such protections, it does not seem reasonable to expect that this will change dramatically without international pressure. The fact is, for many countries, international conventions have already served as a catalyst for the development of important domestic protections in many other areas.

Nor will the Disabilities Treaty require a national registration of all children born with disabilities. Article 18 of the Disabilities Convention requires nations to register children with disabilities at birth. This provision recognizes the horrible practice of denying personhood status for infants with disabilities, which leads directly to the practice of infanticide in cultures across the globe that do not recognize the value of all human life. In the United States the individual states require the registration of each child at birth through State and local birth certificate processes. Here the Disabilities Treaty and U.S. moral leadership will provide much-needed protection in other countries where there is no provision for a birth certification process.

Nothing in this treaty prevents parents from homeschooling or making decisions for their children. The Convention embraces the principles of our IDEA, the Individuals with Disabilities Education Act, which emphasizes the importance of the role of parents of children with disabilities making decisions on behalf of their children. In fact, many parents of children with disabilities choose to homeschool their children in order to provide an appropriate level of care and attention. In fact, the Convention specifically

recognizes and protects the important role of the family and protects children from being separated from their parents on the basis of a disability. Last year, the Committee included an understanding that made clear that the use of the phrase “the best interest of the child” would not have the purpose or effect of limiting parental authority in making homeschooling decisions. While not necessary, inclusion of a similar understanding this year would eliminate any concerns on this issue.

As a practical matter, the United States will have much more authority to speak out about these and other forms of discrimination against people with disabilities worldwide if we agree to abide by the same international scrutiny at home. We already have laws in place that are consistent with the CRPD.

The Convention provides governments with core, minimum standards needed to make essential reforms without locking different countries into one particular approach or another. This approach is a strength of the Convention, not a weakness. This approach addresses the unwarranted criticism that the Convention itself does not contain a specific definition of disability. Instead the Convention recognizes in its preamble that disability

is an evolving concept that results from the interaction between a person's impairments and the attitudinal and environmental barriers that hinder the full and effective participation in society. The Convention then allows each nation state to pursue its own definition of disability under this rubric.

We in the United States have worked over the years to refine our own definition of disability for our nondiscrimination laws. The original definition in the ADA, which was drawn from the definition of disability in the Rehabilitation Act of 1973, was reworked in the ADA Amendments Act of 2008. We have a strong, workable definition of disability in the United States. This Committee recognized this definition in an understanding that defined disability for the Disabilities Treaty as it is defined and used under the Americans with Disabilities Act. This approach is sound and lays to rest any concerns about lack of clarity or potential misunderstandings.

One other issue caused considerable discussion in last year's debates on the CRPD, the issue of abortion. The CRPD is a disabilities treaty; it is a nondiscrimination treaty; it is not about abortion. In fact, the word abortion is not even in the treaty. The CRPD does not create new abortion rights nor does it require funding for abortion. Instead the Treaty

recognizes, plainly and baldly, the right of persons with disabilities to life. Article 10 reaffirms that “every human being has the inherent right to life” and calls upon nations to take all necessary measures to protect the lives of persons with disabilities on an equal basis with all other peoples. The Convention, for the first time in the international realm, specifically labels as an act of discrimination the denial of medical care or food and fluids on the basis of disability. The United States should ratify this language and assume a leadership role in ending the all-to-common and horrible practice of denying medical attention and food and water to newborns with disabilities, even to those with such disabilities as spina bifida. The Convention does use the phrase sexual and reproductive health programs in the Article on health. This phrase was included to dispel the stereotype that persons with disabilities are not sexual beings and to ensure that nations will address the practice of forced sterilization of persons with disabilities, often those with intellectual disabilities. A practice that was used and ratified in this country in the 19th century by the Supreme Court in *Buck v. Bell*, 274 U.S. 200 (1927).

Finally, some have said that, because of America’s comprehensive domestic protections, a treaty on disability would have no relevance in our

own country. But, let's hold on a minute. We are indeed at this time the most progressive country in the world when it comes to the domestic protection of disability rights. The universality of rights and fundamental freedoms – as expressed in our Declaration of Independence – is the foundation on which our entire society is based. Respect for human rights is also a stated principle of our foreign policy - precisely because we recognize that stability, security and economic opportunity in any society presuppose a social order based on respect for the rights of its citizens. Given this history and these values, it would seem natural for the United States to assume a *leading* role – not a passive one - in the effort to recognize and enforce an international treaty of this kind.

Ratification of the Disability Rights Convention is an opportunity to export to the world the very best we have to offer. This is a chance to use our rich national experience in disability rights – which has gained us the respect of the world community - to extend the principles embodied in the ADA to the hundreds of millions of people with disabilities worldwide who today have no domestic protection. This is worthy of our leadership. We have everything to gain and nothing to lose by playing the role the world expects of us. We must ratify the Convention so that we can fulfill that role.

III.

Just as in the case of the ADA, we must recognize that the Convention will not provide instant legal solutions that can effect immediate changes in attitudes and cultural perceptions; nor will it dispel the ignorance that leads to discrimination and human rights abuses of people with disabilities. What it will do is create a permanent place for disability within the human rights framework. It will put disability issues on the radar screen of governments and societies as a legitimate human rights concern to which they must pay heed. It will provide guidance and standards and create legal obligations for governments to respect the rights of this sizable population. It can serve as a powerful advocacy tool for the global disability movement to promote inclusion and equality of opportunity.

Before closing let me say a word, in particular, about the developing nations of the world wherein, it is estimated, some 80% of the world's disabled population lives. Most of these persons are at the margin of their respective societies. Priority concerns of just surviving – combating hunger, securing shelter and eking out a daily existence – unfortunately take present precedence over concerns for people with disabilities.

It is sometimes said that, in nations struggling with a full agenda of political and economic problems and the effort to achieve basic human rights for all their citizens, the interests of persons with disabilities are likely to be set to one side for “future consideration,” *i.e.*, when these other more important matters have been addressed.

On the contrary, I would suggest that what responsible leaders of developing nations need to realize is the unique opportunity they have to embed disability rights in their emerging institutions as part of their development efforts, to build an infrastructure of government, economy and human rights that includes and respects the interests of persons with disabilities from the very beginning. For it is no exaggeration to say that the way a society treats its citizens with disabilities is a valid measure of the quality of life and respect for human dignity in that society.

Even after ratification and implementation of the Convention, change will be gradual – and perhaps painfully slow, to be sure, but these represent important first steps we can take toward promoting change on a global scale. This Convention can help all of us to focus world attention on those worldwide whose rights have been ignored for far too long. Let’s be about the business of seeing that those rights are honored, and

implemented, now and forever more, by providing timely ratification of this important Convention.

Thank you for your attention.