

**Testimony of Curtis A. Bradley  
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**Before the Senate Foreign Relations Committee  
Regarding the UN Convention on the Rights of Persons with Disabilities**

**Thursday, November 21, 2013**

Thank you for this opportunity to appear before you. I am a strong supporter of protection for the rights of the disabled, and I am proud of the strong laws that Congress has enacted in this area, including most notably the Americans with Disabilities Act. I have no doubt that the United States will continue to be a world leader on these issues regardless of whether it joins the Disabilities Convention. I come here not as an opponent of the Convention, but rather as someone who believes that when the United States ratifies treaties it should be very attentive to how the treaties relate to U.S. constitutional standards and traditions.

I have studied this relationship during almost twenty years of teaching, and also during my service as Counselor on International Law in the Legal Adviser's Office of the U.S. State Department. I have also written extensively about issues relating to treaties and their implementation in law journal articles as well as in my recent book, *INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM* (Oxford University Press 2013). In addition, I currently have the privilege of serving as one of the Reporters for the treaty portion of the American Law Institute's new Restatement (Fourth) project on U.S. foreign relations law.

**Potential for Intrusion on State and Local Authority**

The Disabilities Convention, like other human rights treaties, was negotiated among a large group of countries and thus is not focused on the constitutional standards and traditions of the United States. It should not be surprising, therefore, that there might be discontinuities between the approach of the Convention and the overall framework of American law. Of particular concern, in my view, is the potential that the broad and vague terms in the Convention could be applied in a manner that would be inconsistent with the federal nature of the U.S. constitutional system. The Convention refers, for example, to the standards governing the care of children, a family law topic traditionally regulated in the United States under state rather than federal law. In addition, in its accessibility and other provisions, the Convention addresses private as well as governmental conduct, without any of the limitations that would normally apply to federal regulation of private conduct—such as a requirement of a connection to interstate commerce.

The federal government already has broad authority in the absence of the Convention to protect the rights of the disabled, most notably under its power to regulate commerce and its power under Section 5 of the Fourteenth Amendment to address certain

state-sanctioned discrimination, and it has already enacted a number of important laws that protect such rights. Nevertheless, there are constitutional limits to how far Congress can go with respect to the regulation of matters normally addressed by state and local governments or left to private decisionmaking. As a result of the Supreme Court's 1920 decision in *Missouri v. Holland*, 252 U.S. 416 (1920), however, Congress is allowed to exceed its normal legislative powers, including its commerce power, if it is implementing a treaty. A concern has therefore been raised that Congress could in the future invoke the Disabilities Convention as a basis for intruding on state and local authority beyond what would be permitted in the absence of the Convention. I believe this is a legitimate concern.

The importance of this issue was highlighted recently during the Supreme Court argument in *Bond v. United States*. In that case, the federal government prosecuted a local poisoning case—something normally within the province of state law—under the statute that implements the Chemical Weapons Convention. A number of the Justices on the Supreme Court were surprised that the government had decided to use the statute in this way, given that the case did not concern the United States' international affairs and was of no particular interest to the other parties to the treaty. When the Solicitor General told the Court that it would be “unimaginable” that the Senate would agree to a treaty allowing the federal government to exercise a general police power, Justice Kennedy replied that “[i]t also seems unimaginable that you would bring this prosecution.”<sup>1</sup> Justice Breyer also expressed concern that the government's broad reading of the treaty power “would allow the President and the Senate, not the House, to do anything through a treaty that is not specifically within the prohibitions of the rights protections of the Constitution,” something that Breyer “doubt[ed] . . . the Framers intended to allow.”<sup>2</sup>

It is possible, in my opinion, to address the federalism concern that is raised by the Disabilities Convention by including an appropriate reservation in the Senate's resolution of advice and consent. The two reservations that were proposed last year, however, are not adequate. Those reservations state:

(1) This Convention shall be implemented by the Federal Government of the United States of America to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the obligations of the United States of America under the Convention are limited to the Federal Government's taking measures appropriate to the Federal system, which may include enforcement action against state and local actions that are inconsistent with the Constitution, the Americans with Disabilities Act, or other Federal laws, with the ultimate objective of fully implementing the Convention.

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<sup>1</sup> Transcript of Oral Argument, *Bond v. United States*, No. 12-158, at 28 (Sup. Ct., Nov. 5, 2013).

<sup>2</sup> *Id.* at 48.

(2) The Constitution and laws of the United States of America establish extensive protections against discrimination, reaching all forms of governmental activity as well as significant areas of non governmental activity. Individual privacy and freedom from governmental interference in certain private conduct are also recognized as among the fundamental values of our free and democratic society. The United States of America understands that by its terms the Convention can be read to require broad regulation of private conduct. To the extent it does, the United States of America does not accept any obligation under the Convention to enact legislation or take other measures with respect to private conduct except as mandated by the Constitution and laws of the United States of America.<sup>3</sup>

In my view, neither of these reservations adequately addresses the constitutional concerns. The federalism reservation refers vaguely to “measures appropriate to the Federal system,” but that might include measures allowed under *Missouri v. Holland*, and the reservation specifically states that the federal government can take enforcement measures against state and local actions that are inconsistent with “other Federal laws,” which might include laws that Congress enacts in the future under the authority conferred by *Missouri v. Holland*. Similarly, the private conduct reservation says that the United States is not accepting any obligation to regulate private conduct “except as mandated by . . . laws of the United States of America.” Those laws could include statutes enacted in the future pursuant to the authority allowed under *Missouri v. Holland*.

### **Proposed Federalism Reservation**

To adequately address the constitutional concerns, I believe that the Senate should instead include a reservation with its advice and consent that makes clear that the Convention will not expand the authority of the federal government to regulate matters that would otherwise fall outside of Congress’s regulatory authority. The reservation could refer specifically to Article 4(5) of the Convention, which states that “[t]he provisions of the present Convention shall extend to all parts of federal states without any limitations or exceptions.” I am including an appendix with my testimony that proposes language for such a reservation. By limiting U.S. obligations to matters that fall within the constitutional authority of the federal government in the absence of the Convention, this reservation would ensure that the Convention does not change either the federal-state balance or expand the ability of the federal government to regulate private conduct.

There is precedent for what I propose. During the mid-2000s, the Senate included with its advice and consent to two treaties—the UN Convention Against Corruption and the UN Convention Against Transnational Organized Crime—a reservation that withheld consent to certain obligations that would normally be addressed by state and local law. In that reservation, the Senate made clear that federal criminal law applies only to conduct that involves “interstate or foreign commerce, or another federal interest,” and that the

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<sup>3</sup> See S. Exec. Rep. 112-6, Convention on the Rights of Persons with Disabilities, 112th Cong., 2d Sess. 14-15 (July 31, 2012).

United States was not assuming obligations to address “highly localized activity.”<sup>4</sup> An even closer precedent occurred in connection with the U.S. ratification of the Charter of the Organization of American States in 1951, when the Senate included with its advice and consent a reservation stating that none of the Charter’s provisions “shall be considered as enlarging the powers of the Federal Government of the United States or limiting the powers of the several states of the Federal Union with respect to any matters recognized under the Constitution as being within the reserved powers of the several states.”<sup>5</sup> A similar example is the statement issued by the Senate when giving its advice and consent to the Convention on the Organization for Economic Cooperation and Development in 1961, which makes clear that “nothing in the convention . . . confers any power on the Congress to take action in fields previously beyond the authority of Congress.”<sup>6</sup> A reservation with comparable language is needed here.

If issued as a reservation, and included in the Senate’s resolution of advice and consent, I believe that what I am proposing would be viewed as binding by U.S. courts if the federal government ever attempted to implement the Convention in a way that exceeded Congress’s preexisting constitutional authority. In addition, the package of proposed reservations, understandings, and declarations for the Convention already includes a declaration of non-self-execution, which will have the effect of preventing the Convention from being judicially enforceable on its own terms. Such a declaration has been issued by the Senate in connection with its ratification of a number of other human rights treaties, and courts have consistently deferred to the declaration.

In order to obtain the requisite two-thirds senatorial advice and consent, proponents of the Convention should be willing to accept this proposed reservation. The Obama administration has stated that existing U.S. law is sufficient to meet the obligations that the United States would have under the Disabilities Convention. For example, in transmitting the treaty to the Senate in May 2012, President Obama stated that “the strong guarantees of nondiscrimination and equality of access and opportunity for persons with disabilities in existing U.S. law are consistent with and sufficient to implement the requirements of the Convention as it would be ratified by the United

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<sup>4</sup> For each of these two treaties, the federalism reservation was included by the Senate at the request of the Executive Branch. It appears from the UN treaty database that these reservations triggered only one objection from another country. The Netherlands objected to the U.S. reservation to the UN Convention Against Corruption, noting that the reservation left it “uncertain to which extent [the United States] accepts to be bound by the obligations under the treaty,” while also making clear that its objection “does not constitute an obstacle to the entry into force of the Convention between the Kingdom of the Netherlands and the United States.”

<sup>5</sup> The Senate Foreign Relations Committee explained in its report on the OAS Charter that the reservation was designed “to make perfectly clear that the provisions of the Charter do not enlarge the authority of the Federal Government with respect to the reserved powers of the States.” Report of the Comm. on For. Rel., Exec. A 81st Cong., 1st Sess. 12 (Aug. 24, 1950).

<sup>6</sup> The Senate Foreign Relations Committee explained that it wished to make clear that “nothing in the Convention enlarges, diminishes, or alters the powers of the President or the Congress in respect to any substantive actions taken or that may be taken by the Organization for Economic Cooperation and Development.” Report of the Comm. on For. Rel., Exec. E 87th Cong., 1st Sess. 13 (Mar. 8, 1961).

States.”<sup>7</sup> Similarly, this Committee concluded last year, as reflected in one of its proposed declarations for the Convention, that “in view of the reservations 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.”<sup>8</sup> As a result, proponents of the Convention should not be in a position to claim that the federal government needs authority to enact not only new laws, but also laws that exceed the normal (and quite broad) regulatory powers of Congress. In any event, in order to protect the U.S. federal system, it is my view that the Senate should not give its advice and consent to the Convention without a reservation along the lines of what I am proposing.

### Other Issues

Another concern that has been expressed about the Convention relates to its establishment of the Committee on the Rights of Persons with Disabilities. Monitoring committees established under the Disabilities Convention and other UN human rights treaties are authorized to issue nonbinding conclusions, recommendations, and general comments to states parties. These committees have sometimes issued statements that appear to assume new authority or that reflect expansive interpretations of the underlying treaty. In at least one instance, a committee purported to have the authority to determine whether reservations attached by the United States to its ratification of the treaty were valid. In addition, the positions taken by these committees are sometimes cited as evidence of “customary international law” that might bind the United States without its express agreement.<sup>9</sup> As a result, the Senate should consider including an “understanding” with its advice and consent that confirms the limited authority of the Disabilities Committee.

Last year, the Senate Foreign Relations Committee sought to address concerns relating to the Disabilities Committee with this proposed “understanding”:

The United States of America understands that the Committee on the Rights of Persons with Disabilities, established under Article 34 of the Convention, is authorized under Article 36 to “consider” State Party Reports and to “make such suggestions and general recommendations on the report as it may consider appropriate.” Under Article 37, the Committee “shall give due consideration to ways and means of enhancing national capacities for the implementation of the present Convention.” The United States of America understands that the Committee on the Rights of Persons with Disabilities has no authority to compel actions by states parties, and the United States of America does not consider conclusions, recommendations, or general comments issued

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<sup>7</sup> Letter of Transmittal from President Obama to the Senate (May 17, 2012).

<sup>8</sup> S. Exec. Rep. 112-6, *supra* note 3, at 17.

<sup>9</sup> Customary international law is the law of the international community that “results from a general and consistent practice of states followed by them from a sense of legal obligation.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

by the Committee as constituting customary international law or to be legally binding on the United States in any manner.<sup>10</sup>

If something like this is included, it could be redrafted to address more specifically what I understand to be the relevant concerns. For example, the understanding does not currently mention the concern about the Committee passing judgment on reservations. In addition, technically the United States cannot control the development of customary international law, so merely saying that the Committee's positions do not constitute customary international law may be ineffective. Professor Timothy Meyer testified earlier this month about the role of the Disabilities Committee and usefully suggested some language that could be used to supplement the understanding that was proposed last year.<sup>11</sup>

In any event, regardless of what the Senate ultimately says about the role of the Committee, I believe that it would be desirable for the Senate to emphasize the non-severability of its reservations, including the federalism reservation proposed above. The United Nations' International Law Commission has concluded that if a reservation is found by a monitoring committee to be invalid (for example, because it is inconsistent with the object and purpose of the treaty), the ratifying nation continues to be bound to the treaty without the benefit of the reservation, unless it is clear that the reservation was integral to the country's ratification.<sup>12</sup> To ensure that the United States will not lose the benefit of its reservations, understandings, and declarations, the Senate should consider including a declaration in its resolution of advice and consent stating something like the following: "The United States declares that its intention to be bound by this Convention depends on the continuing validity and effectiveness of its reservations, understandings, and declarations, except to the extent that such reservations, understandings, and declarations have been withdrawn by the United States pursuant to its constitutional processes."

It would still be open to the United States to decide voluntarily at some point to withdraw a particular reservation, understanding, or declaration. In my view, the best interpretation of the U.S. Constitution is that new senatorial advice and consent would be required for such a withdrawal. This action would, after all, undo something that was subject to the senatorial advice and consent process and, depending on what was being withdrawn, could have the effect of increasing U.S. treaty obligations, which themselves require senatorial advice and consent. It is possible to imagine a situation, however, in which either the Executive Branch or a majority of Congress would attempt such a withdrawal. In doing so, the Executive Branch might invoke its general authority to act

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<sup>10</sup> S. Exec. Rep. 112-6, *supra* note 3, at 16.

<sup>11</sup> See Testimony of Professor Timothy Meyer, Hearing on the Convention on the Rights of Persons with Disabilities, U.S. Senate Comm. on For. Rel. (Nov. 5, 2013), at [http://www.foreign.senate.gov/imo/media/doc/Meyer\\_Testimony.pdf](http://www.foreign.senate.gov/imo/media/doc/Meyer_Testimony.pdf).

<sup>12</sup> See Report of the International Law Commission, 63d Session, ch. IV: Reservations to Treaties, Section 4.5.3 (2011).

on behalf of the United States in foreign affairs,<sup>13</sup> or Congress might analogize to its well-settled authority to override the domestic effects of a treaty under the “last-in-time rule.”<sup>14</sup> To help preclude that possibility, the Senate might want to include a declaration in its resolution of advice and consent stating something like the following: “These reservations, understandings, and declarations may not be withdrawn by the United States without passage of a new resolution that receives the advice and consent of two thirds of the senators present.” Although I am not aware of any specific precedent for this sort of declaration, a number of scholars have concluded that a somewhat analogous declaration requiring senatorial advice and consent for the termination of a treaty would be constitutionally valid,<sup>15</sup> and this Committee itself stated—during the debate over President Carter’s termination of the Taiwan defense treaty—that it was “clear beyond question” that the Senate could validly limit the President’s authority to terminate a treaty by placing a condition on such termination in the Senate’s advice and consent to the treaty.<sup>16</sup>

### Conclusion

The United States’ commitment to federalism depends on maintaining a national government of limited and enumerated powers. Human rights treaties, because they concern the internal relationship of a nation to its own citizens, pose unique challenges to this constitutional structure. These challenges are especially apparent with respect to the Disabilities Convention in light of its overlap with matters traditionally regulated by state and local law and its failure to distinguish sufficiently between public and private spheres of action. The possibility that human rights monitoring bodies such as the Disabilities Committee will seek to expand their authority naturally raises additional concerns. Nevertheless, I believe that a well-crafted set of reservations, understandings, and declarations would allow the United States to join the Convention while preserving its constitutional values.

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<sup>13</sup> See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (referring to “the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations”).

<sup>14</sup> See, e.g., *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (“[I]f there be any conflict between the stipulations of the treaty and the requirements of the law, the latter must control.”).

<sup>15</sup> See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 9, § 339, reporters’ note 3; Michael J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 156 (1990); Kristen E. Eichensehr, *Treaty Termination and the Separation of Powers*, 53 VA. J. INT’L L. 247 (2013). See also Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. (forthcoming 2014).

<sup>16</sup> Treaty Termination Resolution, S. Rep. No. 119, 96th Cong., 1st Sess. 11 (1979).

## **Appendix to Testimony of Curtis A. Bradley**

### **Proposed Federalism Reservation for the Disabilities Convention**

The Federal government has substantial authority to regulate issues relating to the rights of persons with disabilities, and it has exercised this authority in connection with a number of important statutes, including the Americans with Disabilities Act. The Federal government's authority is not unlimited, however, and some matters that relate to the Convention would typically be addressed by state and local law. The United States expects that the combination of existing Federal law and state and local laws will be sufficient to meet or exceed the obligations of the United States under the Convention as ratified by the United States. Because the United States does not intend to alter the existing scope of Federal authority, it is not assuming obligations under this Convention that would exceed the constitutional authority that the Federal government would have in the absence of the Convention, notwithstanding Article 4(5) of the Convention. Furthermore, nothing in the Convention shall be considered as conferring on the Congress of the United States the authority to enact legislation that would fall outside of the authority that it would otherwise have in the absence of the Convention, or as limiting the powers of the several states of the Federal Union with respect to any matters recognized under the United States Constitution as being within the reserved powers of the several states.