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The Need for Concentrated Jurisdiction in Handling Parental Child Abduction Cases in the United States

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Abstract:

Parental child abduction is a serious crime that has long-term psychological and traumatic effects on children and left-behind parents. The Hague Convention on the Civil Aspects of International Child Abduction was created to protect children from the harmful effects of international abduction by encouraging their prompt return to their country of habitual residence. Unlike many other Contracting States to the Treaty, the United States provides a choice of forum for parents to file a case in either federal or state court. The United States' granting of concurrent jurisdiction has been criticized as being too vast. Currently, the global trend among Contracting States is to "shrink the bench" and concentrate jurisdiction to a limited number of judges. The benefits of concentration are numerous and in line with the urgent nature of the Hague Convention. Taking examples from the international community, this comment explores the arguments for and against changing jurisdiction in the United States. This comment also provides a discussion of judicial best practices and stresses the need to expedite the return of abducted children.

I. Introduction

The advancement of technology and travel has not only led to new world markets for goods and services, but also to the globalization of families.¹ Today people are more mobile than ever.² In 2014, over 14 million U.S. passports were issued for international travel.³ Transnational romance can spark with just a few key strokes on the internet. In the US, more than one-third of marriages now begin online.⁴ As such, the following scenario is not hard to imagine. Two individuals meet while studying abroad in college. They continue the relationship online, fall in love, and soon start a family. One parent wants to take the children to visit their native country. The other parent agrees to the visit, takes them to the airport, and waves goodbye as they make their way to the international terminal, not knowing that the intention of the trip was to keep the children abroad and never return.

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1. Ann Laquer Estin, *Families Across Borders: The Hague Children's Conventions and the Case for International Family Law in the United States*, 62 FLA. L. REV. 47, 98 (2010).
 2. Laquer Estin, *supra* note 2 at 48.
 3. U.S. Department of State Bureau of Consular Affairs, Passport Statistics, *available at* <http://travel.state.gov/content/passports/english/passports/statistics.html> (last accessed December 6, 2014).
 4. John T. Cacioppo et al., *Marital Satisfaction and Break-ups Differ Across On-line and Off-line Meeting Venues*, 110 Proceedings of the National Academy of Sciences of the United States of America 10135 (2013), *available at* <http://www.pnas.org/content/110/25/10135.full> (last accessed December 6, 2014).

This story is more common than one may expect. As many as 200,000 children are victims of family abduction each year.⁵ Although abductors may be other family members, in most cases the abductor is the child's parent. In 2008, 69 percent of the taking parents were mothers and 28 percent were fathers.⁶ Parental abduction is defined as the taking, retention, or concealment of a child by a parent in breach of the custody rights of another parent.⁷ In 2013, there were 702 new outgoing (wrongfully removed from the U.S.) and 364 incoming (wrongfully retained in the U.S.) child abduction cases, representing 1,004 and 518 children respectively.⁸ Abduction can have serious emotional, developmental, and psychological effects on the children and can be devastating for left-behind parents and their families.⁹

The Hague Convention on the Civil Aspects of International Child Abduction is an international treaty aimed at returning abducted children to their home country.¹⁰ It is the primary civil law remedy for left-behind parents to get their children back. Countries that are parties to the Convention agree that a child who has been removed to or retained in another Convention country, in violation of a parent's custodial rights, shall be promptly returned to the child's habitual residence.¹¹ The focus of the Convention is not to decide which parent should have custody, but to determine the home country where the child should be returned and the merits of the custody case should be adjudicated.¹² As the Hague Convention approaches its thirty-fifth anniversary, the discussions surrounding the issue of international child abduction remains very active with legislation passing just a few months prior to this writing.¹³

This comment considers the original intent of the Hague Convention to return children as expeditiously as possible and how it has been frustrated by a lack of judicial expertise. The comment first offers an overview of the problem and outlines why parental abduction occurs. The comment then presents a legal background of the Hague Convention and related laws in the United States. Analysis

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5. *The Crime of Family Abduction: A Child's and Parent's Perspective*, Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice (2010).
 6. Hague Conference on Private International Law, *A Statistical Analysis of Applications Made in 2008 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, at 14, Prelim. Doc. No. 8, pt. III (Nov. 2011), available at <http://www.hcch.net/upload/wop/abduct2011pd08ae.pdf>.
 7. Janet Chiancone, Linda Girdner, and Patricia Hoff, *Issues Resolved Cases of International Child Abduction*, Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice (2001) (hereinafter "Juvenile Justice Bulletin").
 8. Hague partner country data (2013), available at <http://travel.state.gov/content/childabduction/english/legal/compliance/statistics.html> (last accessed December 6, 2014).
 9. *Crime of Family Abduction*, *supra* note 6.
 10. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89 (hereinafter Hague Convention).
 11. *Id.*
 12. Legal Analysis, 51 Federal Register 10494 et seq., available at <http://travel.state.gov/content/childabduction/english/legal/law-and-regulations.html> (last accessed December 7, 2014).
 13. See note 64.

follows with a comparison of the grant of concurrent jurisdiction by the United States to countries which have concentrated jurisdiction to a limited number of judges. Judicial expertise can be ensured through a concentration of jurisdiction. The end result is a legal process that is swift, just, and in line with the best interests of the child.

II. Background and History

A. Overview of the Problem

The problem of parental child abduction started to surface in the 1970s in correlation with rising divorce rates.¹⁴ The problem has gained increasing attention in recent media, including Dateline NBC and Today Show television interviews with left-behind parents and the release of a documentary film entitled *From the Shadows*.¹⁵ Yet despite the headlines, there remain several misunderstandings about the motives and effects of parental child abduction.

1. Why Parental Child Abduction Occurs

A common motive for a parent to abduct a child is the growing frustration with the marital relationship, divorce, or custody dispute and belief that the other parent is bad for the child.¹⁶ In this case, the abductor seeks to “rescue” the child from the “bad parent.”¹⁷ The abductor may also be trying to get back at the other parent for something they have done in the marital relationship by taking away something the other parent wants (the child); thus, in a way, the child becomes the property or chess piece in the negotiation process.¹⁸

Parental child abduction could also occur by mistake, such as when a parent misinterprets a visitation order, or out of necessity, such as in cases involving domestic violence. For example, a mother fleeing from her abuser may take her children with her in an effort to protect herself and/or her children from future harm.¹⁹ Paradoxically, battered women who flee across borders to escape violence

14. Smita Aiyar, *International Child Abductions Involving Non-Hague Convention States: The Need for a Uniform Approach*, 21 EMORY INT'L L. REV. 277, 278 (2007); Family Abduction: Prevention and Response 107.

15. For example, the case of a boy abducted from the U.S. to Brazil attracted considerable media attention in 2011 and 2012. See, e.g., Father and Son Dateline NBC, BRING SEAN HOME FOUNDATION, <http://bringseanhome.org/goldman-case/tv-interviews/dateline-msnbc-may-2011/>; *From the Shadows* premiered at the Philadelphia Film Festival in 2012. It documents the lives of five left behind parents, <http://www.fromtheshadowsmovie.com/about-the-film>.

16. *Crime of Family Abduction*, *supra* note 6 at 17.

17. Juvenile Justice Bulletin, *supra* note 8.

18. Cara L. Finan, Comment, *Convention on the Rights of the Child: A Potentially Effective Remedy in Cases of International Child Abduction*, 34 SANTA CLARA L. REV. 1007 (1994).

19. Noah L. Browne, *Relevance and Fairness: Protecting the Rights of Domestic Violence Victims and Left-behind Fathers Under the Hague Convention on International Child Abduction*, 60 DUKE L. J. 1193, 1195 (2011).

are treated as both the victim and the villain.²⁰ As the victim, they are encouraged to leave their abuser and criticized if they “choose” to stay in the abusive relationship. Simultaneously, if they flee with their children, they are treated as the abducting parent and villainized for leaving.

2. Parental Child Abduction is a Serious Crime

Generally, family disputes are regarded as domestic issues and there is reluctance to interfere within this private sphere.²¹ The phrase “child abduction” is associated with haunting images of strangers kidnapping children from their parents.²² There is no doubt that *this* kidnapping is a crime. However, when parents are the kidnapers themselves, a different picture is painted. The situation is minimalized as a domestic, private issue and not considered a crime requiring legal intervention.²³ In a survey conducted by the American Bar Association (ABA) Center on Children and the Law, it was found that more than two-thirds of left-behind parents encountered individuals and organizations who regarded parental abduction as a “family problem that did not require legal intervention” and one-third of parents reported that law enforcement refused to take information about their cases.²⁴ Generally it is assumed that children cannot be “kidnapped” by family members. If one parent takes a child away, the child is not being “abducted” and is not “missing” because the child is with a parent. One former abducted child describes the situation as follows: “A great many people around me responded to the abduction by thinking that it was perfectly okay – thinking, in fact, that the person who took me and hid me for 2 years had a right to do so. Because the person was my own mother.”²⁵

In the United States, parental child abduction is a crime in all 50 states and in the District of Columbia.²⁶ The crime is distinguished from a typical custody battle in which a parent may make it difficult for the other parent to access the child. The distinguishing characteristics are: concealment of the abduction, intention to deprive the parent with contacting the child for an indefinite period of time, and flight out of state or out of the country.²⁷ Parental child abduction should be treated for what it is – a serious crime that can be as physically dangerous and deadly for the victim as any other form of child abduction.²⁸

20. Jeffrey Edleson and Taryn Lindhorst, Battered Mothers Seeking Safety Across International Borders: Examining Hague Convention Cases involving Allegations of Domestic Violence, 28 *The Judge’s Newsletter* 24.

21. Finan, *supra* note 19 at 1009; *Crime of Family Abduction*, *supra* note 6 at 1.; *Juvenile Justice Bulletin*, *supra* note 6 at 6.

22. Browne, *supra* note 20 at 1194.

23. *Crime of Family Abduction*, *supra* note 6 at 21.

24. *Juvenile Justice Bulletin*, *supra* note 8 at 6.

25. *Crime of Family Abduction*, *supra* note 6 at 1.

26. *Id.* at 2.

27. *Id.* at 1.

28. *Id.* at ix.

Additionally, parental child abduction may result in long-term psychological and traumatic effects on victims and family members. The effects of abduction on a child often include feelings of loneliness or alienation, fear, depression, and lack of trust.²⁹ Depending on the length and circumstances of the abduction, children may experience a loss of identity and confusion about who they are and where they come from.³⁰ Left behind parents may experience feelings of shame, guilt, anxiety, anger, frustration, and an overwhelming sense of helplessness.³¹

Searching for a missing child is also financially stressful. The cost of search and recovery efforts, including travel costs and litigation, are estimated to reach as much as \$75,000 or higher depending on the case.³² Unlike several Contracting States, including the United Kingdom and Australia for example, the United States does not provide free legal aid to left behind parents.³³ Article 26 of the Hague Convention provides that Contracting States cannot require left behind parents to pay legal fees incurred as a result of litigating their case. However, the U.S. has opted out of this provision and bears no responsibility for the legal costs.³⁴ American left behind parents, without means to pay, must rely on legal aid and volunteer attorneys. The Department of State facilitates the International Child Abduction Attorney Network (“ICAAN”), a list of lawyers who consider taking Hague Convention cases on a pro bono or reduced fee basis.³⁵ For parents facing the nightmare of having their child abducted to a foreign country, of which they have little knowledge or experience with the language, culture, or laws, these legal aid services are invaluable.

B. Historical Overview

1. History of Parental Child Abduction Laws

Early on, child abduction in the U.S. occurred partly as a means to secure a favorable forum in custody disputes. Because the parent who had physical possession of the child could choose the forum to make or modify custody orders, parents had a legal incentive to abduct.³⁶ In 1968, the Family Law Section of the ABA and the Commissioners on Uniform State Laws, drafted the Uniform Child Custody

29. *Id.* at 44-45.

30. *Id.*

31. *Crime of Family Abduction*, *supra* note at 22-29; Juvenile Justice Bulletin, *supra* note 8 at 1.

32. *Id.* at 6-7.; Browne, *supra* note 20 at 1217.; Michelle Boykin, *A Comparison of Japanese and Moroccan Approaches in Adopting the Hague Convention on the Civil Aspects of International Child Abduction*, 46 FAM. L.Q. 451, 452 (2012-2013).

33. Browne, *supra* note 20 at 1218.

34. 42 U.S.C. § 11607(b).

35. U.S. Department of State Attorney Network, *available at* <http://travel.state.gov/content/childabduction/english/legal/for-attorneys.html>.

36. Patricia Hoff, *The Uniform Child-Custody Jurisdiction and Enforcement Act*, Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice 2 (2001).

tody Jurisdiction Act (UCCJA) to require enforcement of out-of-state custody decrees and prevent forum shopping.³⁷ Congress subsequently passed the Parental Kidnapping Prevention Act (PKPA) to close gaps left open in the UCCJA.³⁸ Under the PKPA, the home state is given priority in initial custody cases and is granted exclusive, continuing jurisdiction to modify its own order to the exclusion of all other States.³⁹ In addition, PKPA makes the federal Fugitive Felony Act applicable to interstate child abductions. It enables the Federal Parent Locator Service, a tool designed to help child support agencies locate case participants, to be used for custody cases and has been granted jurisdiction in both federal and state courts.⁴⁰

These laws provided no mechanisms for children abducted outside the United States. Recognizing a need for international cooperation to protect children from “the harmful effects of their wrongful removal and retention,” the Hague Convention was created in 1980.⁴¹ The U.S. ratified and implemented the Hague Convention in 1988 through the enactment of the International Child Abduction and Remedies Act (ICARA), which incorporated all provisions of the Convention and provided the procedural framework for its enforcement in the U.S.⁴² ICARA established the Department of State Office of Children’s Issues as the Central Authority responsible for handling all cases.⁴³

The Hague Convention and parallel ICARA provisions are civil remedies which provide procedural safe guards. In 1993, the U.S. took the issue a step further by enacting the International Parental Kidnapping Crime Act (IPKCA).⁴⁴ By criminalizing the wrongful removal of children outside of the country, the U.S. sends a message to the international community that it considers parental kidnapping a serious crime.⁴⁵

Furthermore, the Uniform Child Custody and Jurisdiction and Enforcement Act (UCCJEA) was drafted by the National Conference of Commissioners on Uniform State Laws and approved by the ABA in 1997.⁴⁶ UCCJEA maintained the full faith and credit provisions of the earlier UCCJA and PKPA, but added provisions that expressly recognized the responsibility of state district attorneys

37. Finan, *supra* note 19 at 1010.

38. Hoff, *supra* note 37 at 3.

39. 28 U.S.C. § 1738A (1980).

40. Finan, *supra* note 19 at 1011; 18 U.S.C §1073 (1934).

41. Legal Analysis, *supra* note 13.

42. Eric Lesh, *Jurisdictional Friction and the Frustration of the Hague Convention: Why International Child Abduction Cases Should be Heard Exclusively by Federal Courts*, 49 FAM. CT. REV. 170, 173 (2011); 22 U.S.C. § 9001 et seq. (formerly 42 U.S.C. § 11601 et seq.).

43. *Id.*

44. Katrina M. Parra, *The Need for Exit Controls to Prevent International Child Abduction from the United States*, 31 WHITTIER L. REV. 817, 821 (2010).

45. *Id.*

46. Enacted by 49 states, District of Columbia, and U.S. Virgin Islands. Introduced to Massachusetts in 2014. available at <http://www.uniformlaws.org/Act.aspx?title=Child%20Custody%20Jurisdiction%20and%20Enforcement%20Act> (last accessed December 16, 2014).

and law enforcement to “take any lawful action” to locate and recover abducted children pursuant to the Hague Convention.⁴⁷

In 2006, Congress enacted the Uniform Child Abduction Prevention Act (UCAPA) to help judges identify children at risk of abduction.⁴⁸ UCAPA provides a list of risk factors that a parent can present to the court when requesting an order to restrict the ability of the non-custodial parent to travel with or move the child.⁴⁹

2. Hague Convention Today

Thirty-four years have passed since the Hague Convention was created. As of October 2014, a total of 93 countries, known as “Contracting States,” have signed the treaty.⁵⁰ The most recent countries to join are: Singapore, Morocco (2012); Trinidad, Tobago, and Republic of Korea (2013); Iraq and Japan (2014).⁵¹ Japan was the last of the original seven industrialized nations to sign the Convention.⁵² It did so after decades of political pressure and several high-profile cases which garnered its reputation as the “black hole for abduction, from which no child ever returns.”⁵³ Approximately 40 percent of abduction cases involve children taken from the U.S. to countries that are not parties to the Hague Convention.⁵⁴ A major obstacle to acceptance of the Convention is religion.⁵⁵ For instance, the automatic return of the child to the country of habitual residence would require Islamic nations to disregard laws of the Sharia, which grants ultimate custody of the children to the father.⁵⁶ Desperate parents whose child has been abducted to a non-Convention country may resort to dangerous self-help remedies such as attempting re-abduction.⁵⁷ The U.S. Department of State continuously

47. Uniform Child Custody and Jurisdiction and Enforcement Act, §§ 315-16.

48. Parra, *supra* note 45 at 822.

49. *Id.*

50. 28: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, HCCH, http://www.hcch.net/index_en.php?act=conventions.status&cid=24 (last accessed December 16, 2014).

51. U.S. Hague Convention Treaty Partners, U.S. DEPARTMENT OF STATE, <http://travel.state.gov/content/childabduction/english/country/hague-party-countries.html> (last accessed December 16, 2014).

52. Boykin, *supra* note 33 at 456.

53. *Id.* at 455, 458-59.; Statement of Paul Toland, Commander, United States Navy before the United States House of Representatives Tom Lantos Human Rights Commission. December 2, 2009. (In 2003, Paul Toland’s daughter was taken from Negishi Navy Family Housing in Yokohama, Japan by her mother, who subsequently died. As of today, his daughter remains in Japan under the care of her maternal Grandmother.)

54. The Sean and David Goldman International Child Abduction Prevention and Return Act, P.L. 113-150 § 2 (a)(8) (2014).

55. Aiyar, *supra* note 15 at 292.

56. *Id.* at 293.

57. *Id.* at 298.

engages foreign officials in non-Convention countries, including Egypt, Kazakhstan, India, Tunisia, Ghana, Philippines, and Vietnam for example, through various public diplomacy activities to encourage more countries to sign.⁵⁸

Each year, the U.S. Department of State's Office of Children's Issues submits a report on Convention compliance.⁵⁹ The report "identifies the Department's concerns about those countries in which implementation of the Convention is incomplete or in which a particular country's executive, judicial, or law enforcement authorities do not appropriately undertake their obligations under the Convention."⁶⁰ The 2013 report found Costa Rica, Guatemala, and Honduras to be "Not Compliant."⁶¹ Furthermore, left behind parents in the U.S. have not been able to secure prompt enforcement of court orders in Brazil, Mexico, Romania, and Ukraine.⁶² The U.S. had 111 unresolved return applications open and active for more than 18 months after the date of filing, as of December 31, 2013.⁶³

The Sean and David Goldman International Child Abduction Prevention and Return Act was signed into law on August 8, 2014.⁶⁴ The Act provides a hammer for the Department of State to use when a foreign country fails to take appropriate steps to solve abduction and access cases involving American children. For instance, under the Act, the Department may suspend foreign assistance to a country in which an access or abduction case is pending or remains unresolved for a significant period of time.⁶⁵ The Act was sponsored by New Jersey Congressman Chris Smith who helped David Goldman secure the return of his son from Brazil in 2009.⁶⁶ This recent legislation sends yet another message to the international community that the U.S. considers child abduction a serious issue.

III. Legal Overview

Article 6 of the Hague Convention requires each Contracting State to establish a Central Authority, to carry out Convention duties necessary to secure the safe return of children.⁶⁷ The Department of State is the U.S. Central Author-

58. 2014 Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction 5, *available at* <http://travel.state.gov/content/childabduction/english/legal/compliance.html> (last accessed December 16, 2014) (bilateral discussions were held with government officials in these countries in 2013) (hereinafter "Compliance Report").

59. 42 U.S.C. § 11611(a) Report on compliance with the Hague Convention on International Child Abduction.

60. Compliance Report Methodology <http://travel.state.gov/content/childabduction/english/legal/compliance/report-method.html> (last accessed December 16, 2014).

61. Compliance Report, *supra* note 59 at 3.

62. *Id.* at 6.

63. *Id.* at 7.

64. The Sean and David Goldman International Child Abduction Prevention and Return Act, P.L. 113-150 § 2 (a)(8) (2014), <https://www.govtrack.us/congress/bills/113/hr3212>.

65. *Id.* at § 202.

66. *Id.* at § 2(a)(1).

67. Legal Analysis, *supra* note 13 at 24.

ity and the Department's Office of Children's Issues within the Bureau of Consular Affairs is charged with the day-to-day functions.⁶⁸ Determination under the Convention requires a consideration of whether the child is covered under the conditions for filing an application to seek return of the child and if any of the discretionary exceptions apply to retain the child.⁶⁹ These inquiries are discussed below.

A. Conditions to Filing a Hague Application for Return of the Child

First, the Convention must have been in force between the two countries when the wrongful removal or retention occurred: the country of habitual residence and the country to which the child was taken or retained. It does not apply unless both countries are Contracting States.⁷⁰

Second, the Convention only applies when a child was removed from the child's state of habitual residence. The Convention purposely leaves the term "habitual residence" undefined, thus allowing the court to determine the degree to which the child feels settled or acclimated in the country.⁷¹ The fact that habitual residence is not based on citizenship alone is helpful for transnational families by ensuring a neutral basis for jurisdiction and eliminating the need to determine which nationality should be treated as dominant.⁷²

Third, the removal or retention must be considered "wrongful" pursuant to Article 3. Removal or retention of a child is considered wrongful if it was in violation of custodial rights attributed to a person, an institution, or another body, either jointly or alone.⁷³ The person, institution, or body must have been exercising the custodial rights at the time of the removal or retention, or would have been exercising them, but for the removal or retention.⁷⁴

Fourth, protection under the Convention is strictly limited to children under age 16. Pursuant to Article 4, once the child reaches age 16, the Convention ceases to apply, regardless of whether the application was filed prior to a child's sixteenth birthday.⁷⁵

B. Exceptions to a Country's Obligation to Return a Child

If the above conditions have been met and less than one year has passed between the time of the wrongful removal or retention and the time the application has been filed, then there is an obligation to return the child under the Hague

68. *Id.* at 1.

69. Browne, *supra* note 20 at 1200-01.

70. Legal Analysis, *supra* note 13 at 7.

71. Aiyar, *supra* note 15 at 285-86.

72. Laquer Estin, *supra* note 2 at 99-100.

73. Legal Analysis, *supra* note 13 at 9.

74. *Id.*

75. *Id.* at 6, 19; Finan, *supra* note 19 at 1026.

Convention.⁷⁶ There are few affirmative defenses that an abducting parent may plead to retain the child: grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation in his or her country of habitual residence (Article 13); child objects to being returned and has reached an age and degree of maturity at which the court can take account of the child's views (Article 13); or return would violate the fundamental principles of human rights and freedoms of the country where the child is being held (Article 20). Article 13 is the most litigated provision while Article 20 is rarely applied.⁷⁷ These exceptions must be narrowly construed so as to not undermine the objective of the Convention.⁷⁸ Even if the party opposing the return meets the burden of persuading the court that an exception applies, the court retains discretion to return the child.⁷⁹

IV. Analysis

Globally, judicial orders to return a child are reached in 166 days and judicial refusal orders are reached in 286 days.⁸⁰ Sadly, the U.S. averages 202 days for a judicial return orders and 421 days for judicial refusal orders.⁸¹ The U.S. is also slow in sending return applications to the court. The global average for a Central Authority to send an application to a court is 76 days while the U.S. average is 207 days.⁸² This delay is partly due to the circuitous pathway for an incoming application. The application begins at the U.S. Central Authority at the Department of State's Office of Children's Issues, is routed to the State Attorney General's Office, and then sent to the district attorney child abduction unit in the county where the child is presumed to be located.⁸³ These facts are concerning given that the expeditious return of children is at the very heart of the Convention's purpose. Article 11 explicitly states that "judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children" and encourages determinations to be reached "within six weeks from the date of the commencement of proceedings."

76. Elaine F. Tumonis, *When Children Cross Borders: How California Prosecutors Resolve International Child Abduction Cases*, available at <http://travel.state.gov/content/dam/childabduction/When%20Children%20Cross%20Borders.pdf> (last accessed December 18, 2014); Art. 12; 42 U.S.C. § 11603(e)(2)(b).

77. Aiyar, *supra* note 15 at 288-89.; Browne, *supra* note 20 at 1207-09.

78. Lesh, *supra* note 42 at 172; Browne, *supra* note 20 at 1201.

79. Tumonis, *supra* note 77.

80. Hague Conference on Private International Law, *A Statistical Analysis of Applications Made in 2008 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, at 206, Prelim. Doc. No. 8, pt. III (May 2011), available at http://www.hcch.net/index_en.php?act=publications.details&pid=5421&dtid=32.

81. *Id.*

82. *Id.* at 207.

83. This section is largely based on an article which appeared in the California District Attorneys Association Prosecutor's Brief in 2003 and was updated in 2012, *supra* note 77.

The cases of Sean Goldman and *Chafin v. Chafin* are examples of this delay. In 2004, Mrs. Goldman's took her four-year old son, Sean, on a two-week vacation to her home country Brazil. Upon arrival, she called Mr. Goldman to tell him that she and her son would not be returning to the U.S. and she was filing for divorce. Proceedings for the return of the child to the U.S. were initiated and not complete until five years later. Sean's mother remarried to a Brazilian citizen, but due to complications during birth of a second child, passed away in 2008. Her husband was granted temporary custody of Sean by a family court in Rio de Janeiro. The Secretariat for Human Rights of the Presidency of the Republic of Brazil, the Brazilian Central Authority for the Hague Convention, issued a letter finding that the temporary custody order violated the Convention. Sean was returned to Goldman in December 2009, five years after he was abducted.⁸⁴ In *Chafin v. Chafin*, Mr. Chafin challenged a district court's ruling that Scotland was his daughter's country of habitual residence.⁸⁵ The Eleventh Circuit dismissed his appeal as moot since the child subsequently returned to Scotland with her mother. In 2013, the U.S. Supreme Court ruled unanimously that the case was not moot because significant issues remained in dispute. In a separate opinion stressing the need to decide Convention cases as expeditiously as possible, Justice Ginsburg, joined by Justices Scalia and Breyer, noted that the child, E.C., was four years old at the time the Hague application was filed and was now six years old: "Cases in American courts often take over two years from filing to resolution; for a six-year-old such as E.C., that is one-third of her lifetime."⁸⁶

A. Judicial Delay and the International Movement towards Concentrated Jurisdiction

The delay in judicial proceedings is often cited to stem from a general lack of knowledge and experience with the Hague Convention itself.⁸⁷ According to Sir Mathew Thorpe, former Lord Justice of Appeal (England and Wales), "to list a return application before a judge who has never before tried a Hague Case is a recipe for error."⁸⁸ Judges and lawyers unfamiliar with the Convention are likely to assume the "best interest" standard is appropriate to apply.⁸⁹ This legal standard considers the best interests of the child and is the dominate standard in determining an award for custody. Indeed, it is natural human impulse to do what is in the best interest of the child.⁹⁰ However, Convention cases are not custody

84. This story is documented in David Goldman's book: *A Father's Love: One Man's Unrelenting Battle to Bring His Abducted Son Home* (2011), <http://bringseanhome.org>.

85. *Chafin*, 133 S.Ct. 1017 (2013).

86. *Id.* at 1028.

87. Juvenile Justice Bulletin, *supra* note 6 at 7; Lesh, *supra* note 43 at 175.

88. *The Judges' Newsletter on International Child Protection*, 20 Hague Conference on International Law 26 (2013).

89. Tumonis, *supra* note 77.

90. *Id.*

cases. They do not require obtaining evidence through expert opinions or entering into in-depth considerations on the best interests of the child.⁹¹ As explained by Superior Court of California (Ret.) Judge D. James Garbolino, “[t]he Convention addresses a far more limited issue: whether the child should be returned to his or her habitual residence, enabling the courts of that nation to assess issues relating to custody and best interests of the child. In this sense, proceedings under the Convention may be viewed as akin to a *provisional remedy*.”⁹² Thus, educating and persuading a judge that the “best interests” standard does not apply in international child abduction cases may be the lawyer’s most difficult task.⁹³

To increase familiarity, understanding, and expertise with the Hague Convention, many Contracting States have concentrated jurisdiction.⁹⁴ Unlike the United States, which grants concurrent jurisdiction to both federal and state courts, over 40 Contracting States have limited jurisdiction to specialized courts or designated judges to hear child abduction cases.⁹⁵ For example, jurisdiction in Australia is concentrated to 23 justices of the Family Court, a specialized court which sits directly below their supreme court, the High Court of Australia.⁹⁶ In Finland, jurisdiction is concentrated in the Court of Appeal of Helsinki.⁹⁷ All Convention applications are allocated to one chamber within the Court of Appeal and allocated to a judge specially trained in abduction law.⁹⁸ According to Justice Elisabeth Bygglin, “the fact that the judges who handle the return proceedings are specialised in the subject matters ensures that the application of the Convention is efficient and speedy in practice.”⁹⁹

The Republic of Bulgaria has been a Contracting State since 2003.¹⁰⁰ To meet the deadlines for return applications set forth in the Convention, Bulgaria attempted to direct applications to the Sofia Regional Court.¹⁰¹ All first instance judges of the Sofia Regional Court were granted authority to hear child abduction cases.¹⁰² During 2007-2009, judges applied the return mechanism set forth by the Convention in only five cases.¹⁰³ In the other 21 cases during that period, the judges used a variety of exceptions and criteria to deny return.¹⁰⁴ It became ap-

91. The Judges’ Newsletter, *supra* note 89 at 16.

92. Hon. James D. Garbolino, *The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges*, Federal Judicial Center, 3 (2012) (emphasis added).

93. Tumonis, *supra* note 77.

94. The Judges’ Newsletter, *supra* note 89 at 2.

95. *Id.*; Lesh, *supra* note 43 at 175.

96. The Judges’ Newsletter, *supra* note 89 at 3.

97. *Id.* at 14.

98. *Id.*

99. Justice Elisabeth Bygglin, Helsinki Court of Appeal, Helsinki, Finland, The Judges’ Newsletter, *supra* note 89 at 14.

100. The Judges’ Newsletter, *supra* note 89 at 6.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

parent that the attempt to concentrate jurisdiction failed. Judges in the Sofia Regional Court did not understand the Convention's objectives and "found it difficult to find the right solution."¹⁰⁵ As a result, the organization of the Court was changed to carve out a special section for family law matters.¹⁰⁶ This double concentration – first to a single court and second to a specialized section of the court – has proven successful. The judges have a better understanding of the need to decide cases as quickly as possible and have begun to use unified criteria to do so.¹⁰⁷

Similar approaches were taken by courts in Germany and the Netherlands. When Germany first became a Contracting State in 1990, jurisdiction for Convention cases was vested in all 620 family courts.¹⁰⁸ Under this broad jurisdiction, which included over 1,000 judges, court proceedings often lasted for over a year because they were treated like custody cases.¹⁰⁹ Nine years later, jurisdiction was concentrated to 24 family courts.¹¹⁰ By 2008, 43 percent of return applications were resolved within just six weeks.¹¹¹ In addition to reducing delay, the concentration has led to a better use of resources for training and implementation of mediation into court proceedings.¹¹² Historically, the Netherlands vested jurisdiction in 19 District Courts.¹¹³ Under this structure, child abduction cases took 18 months or more.¹¹⁴ After deciding that this length of time was not in the best interests of the child, the Dutch International Child Protection Implementation Act was introduced to speed up the process.¹¹⁵ In 2012, jurisdiction was concentrated in the District Court of the Hague and the length of proceedings was reduced to a period of six weeks or less.¹¹⁶

B. Lessons for American Judges

Presently, Convention cases in the U.S. can be heard in both federal and state courts. The petitioner has a choice of forum to initiate a child's return, subject only to the limitation that "the child be located within the geographical boundaries of the particular court's jurisdiction."¹¹⁷ If a petitioner filed in state

105. *Id.*

106. The Judges' Newsletter, *supra* note 89 at 6.

107. *Id.* at 7.

108. *Id.* at 16.

109. *Id.*

110. *Id.*

111. *Id.* at 17.

112. The Judges' Newsletter, *supra* note 89 at 17.

113. *Id.* at 20.

114. *Id.*

115. *Id.*

116. *Id.* at 21.

117. Merle H. Weiner, *Shrinking the Bench: Should United States Federal Courts have Exclusive or Any Jurisdiction to Adjudicate Icarus Cases?* 9 J. OF COMPARATIVE L. (U.K.) 192, 195 (2014).

court, however, the respondent can elect to remove the case to federal court, pursuant to 28 U.S.C. § 1331, which gives federal courts jurisdiction to hear “all civil actions arising under the Constitution, laws, or treaties of the United States.”¹¹⁸ A study of federal and state dockets from 2005 to 2013, found that the preference among petitioners initiating a Convention case was federal court.¹¹⁹

A review of the legislative history of ICARA shows that “Congress never seriously vetted the idea of exclusive federal jurisdiction.”¹²⁰ At the time ICARA was being debated on the House and Senate floor, almost no one discussed the possibility of shrinking the bench.¹²¹ One individual, Phillip Schwartz of the International Academy of Matrimonial Lawyers recommended exclusive federal jurisdiction because federal courts were likely to adjudicate cases faster than state courts and had more experience in interpreting treaties.¹²² Since ICARA’s adoption, judges have not tried to change jurisdiction, but rather have accepted Congress’s choice.¹²³ The lack of any serious consideration to the option of exclusive federal jurisdiction at the time ICARA was adopted, and the international movement towards concentrating jurisdiction to a limited number of judges, suggests that Congress may be amenable to change.¹²⁴

Some commenters argue that ICARA’s jurisdictional provision should be amended to make federal jurisdiction exclusive.¹²⁵ Congress has already made federal jurisdiction exclusive in cases involving admiralty, patent, copyright, bankruptcy, and cases arising under the Securities Exchange Act and Employment Retirement Income Security Act.¹²⁶ Thus, contrary to some arguments claiming exclusive federal jurisdiction is impossible because it would violate tenets of federalism, there appears to be no constitutional impediment to concentrating jurisdiction.¹²⁷ Supporters of concurrent jurisdiction claim that the constitutional doctrine of Separation of Powers makes concentration impossible and that historically, family law is a matter reserved for the states.¹²⁸ However, Convention cases are not concerned with applying family law standards or engaging in fact-finding roles reserved for state courts. The Hague Convention is a provisional remedy which focuses strictly on determining the appropriate forum and providing for the safe return of the child.¹²⁹

Central to the argument for concentrating jurisdiction to a limited number of judges is the advantage of having judges become repeat adjudicators and

118. *Id.* at 195, 205.

119. *Id.* at 198.

120. *Id.* at 203-04.

121. *Id.* at 193.

122. *Id.* at 211.

123. Weiner, *supra* note 117 at 193.

124. *Id.* at 211.

125. *Id.* at 194.

126. *Id.*

127. *Id.* at 195.

128. Lesh, *supra* note 43 at 179-80.

129. *Id.*

thus develop expertise that, in turn, speed up proceedings. Smaller jurisdictions foster “a cadre of judges with mastery of Hague Convention jurisprudence, and thereby, improv[e], if not guarant[ee], the professionalism and the quality of the Hague decisions emanating from that country.”¹³⁰ Concentration could reduce the length of proceedings which supports the underlying objective of the Convention and helps minimize the harmful effects on children and their families. The potential benefits of exclusive jurisdiction include:

enhanced expertise, a better understanding that Hague Abduction cases are not custody disputes, expeditious adjudications, uniformity of interpretation, enhanced due process from interpreter services and pro bono representation, and more efficient processes involving the Central Authority and liaison judges.¹³¹

Exclusive federal jurisdiction has been argued to benefit victims of domestic violence who are fleeing across borders to protect themselves and their children.¹³² At least one commenter has argued that the benefits of increased speed, expertise, and uniformity are overstated and that the U.S. should maintain the status quo.¹³³

Given the thousands of American judges authorized to hear Convention cases, many will confront only a single case in their judicial careers.¹³⁴ There are approximately 677 federal district court judges and 179 federal appellate court judges, and 11,860 state court judges and 1,369 state appellate court judges.¹³⁵ Although there are fewer federal judges than state court judges, the number is still too large to permit expertise. Therefore, if ICARA was amended to limit jurisdiction to federal courts, additional consolidation measures would be necessary.¹³⁶ Moreover, given that a large part of the delay in the U.S. is attributed to the length of time an application is sent to court, vesting federal courts with exclusive jurisdiction is unlikely to make a significant difference.¹³⁷ Additional study into the cause of delay attributable to the U.S. Central Authority is necessary to understand potential measures to streamline this process. Still, federal courts have the advantage over state courts to easily reform procedures to ensure expeditious treatment of cases.¹³⁸ Reforming state procedures would require each

130. The Judges' Newsletter, *supra* note 89 at 19.

131. *Id.* at 213.

132. *Id.* at 194.

133. *Id.*

134. *Id.* at 214.

135. *Id.* at 215.

136. The Judges' Newsletter, *supra* note 89 at 215.

137. *Id.* at 226.

138. *Id.* at 226-27.

state to adopt reform for their courts, whereas Federal Rules of Civil and Appellate Procedure can be changed by the Judicial Conference Advisory Committee on Appellate Rules.¹³⁹

In addition to focusing on efforts to concentrate jurisdiction, the U.S. should also seek to do what it can to prevent abductions from occurring in the first place and improve judicial communication. The dissolution of a marital relationship between persons from different countries creates a myriad of complexities. It is at this stage, when parents are separating or discussing issues of custody or visitation, that is most crucial in preventing abduction. Put in another way, “Parental awareness of abductions in progress, rapid response by relevant law enforcement, and effective coordination among Federal, State, local, and international stakeholders are critical in preventing such abductions.”¹⁴⁰

The *Family Resource Guide on International Parental Kidnapping*, prepared by the Office of Juvenile Justice and Delinquency Prevention, lists sample prevention provisions a parent can ask a court to include in its custody or visitation order.¹⁴¹ These include:

- A statement of the basis of the court’s jurisdiction and the manner in which notice and opportunity to be heard were given.
- Specified custody and visitation rights granted to each party which avoids language such as “reasonable visitation.”
- A statement that a violator of the order may be subject to civil and/or criminal penalties.
- Supervised visitation in clearly defined places and times.
- A no-removal clause that restricts the noncustodial parent’s right to remove the child from the State without prior written consent.
- Requirement that the noncustodial parent surrenders passports to a person designated by the court before visiting the child and prohibition of the noncustodial parent to apply for new or replacement passports of the child without prior written consent.

139. *Id.*

140. Goldman Act, *supra* note 85, § 2 (a)(14).

141. *A Family Resource Guide on International Parental Kidnapping*, Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice, 10-12 (2002).

- Declaration that the United States is the country of the child's habitual residence.
- Requirement that a parent give a noncustodial parent advanced notice of any plans to relocate with the child.
- Requirement that a parent posts a bond or gives some other security or guarantee to ensure compliance with the order.

In addition, parents should add the child's name to the Department of State's Passport Lookout System. The parent will be notified whenever someone makes a request for a passport in the child's name.¹⁴² Judges and lawyers should be well trained to recognize risk factors and implement prevention measures when appropriate. Six personality profiles that may be helpful in predicting which parents may pose a risk of abduction are identified by Girdner and Johnston in their research report *Prevention of Family Abduction Through Early Identification of Risk Factors*. Law enforcement, investigators, and other "front-line" personnel should also be trained to take abduction cases seriously and not as a private or domestic issue. The training should emphasize that child abduction is a crime and that swift initial response may be key to preventing or intercepting abduction overseas.

Reciprocity is essential to the success of the Hague Convention.¹⁴³ As such, communication and co-operation between Central Authorities, judges, and lawyers at the international level is crucial to ensuring the effective operation of the Convention. In 1998, the International Hague Network of Judges was created to facilitate these communications.¹⁴⁴ Since its creation, a number of judicial conferences have supported its expansion and emphasized the value of direct judicial communications in international child protection cases.¹⁴⁵

There are two functions exercised by member judges. First, members are responsible for "sharing of general information from the International Hague Network or the Permanent Bureau with his or her colleagues in the jurisdiction and assisting with the reverse flow of information."¹⁴⁶ Second, members are tasked with facilitating direct judicial communication in specific cases, the objective being to address any lack of information that the presiding judge has about the situation and legal implications in the State of the habitual residence of the child.¹⁴⁷ By working collaboratively, "communications will often result in considerable time savings and better use of available resources, all in the best interests of the

142. Parra, *supra* note 45 at 822.

143. Lacquer Estin, *supra* note 2 at 65.

144. *Direct Judicial Communication*, The Hague Conference on Private International Law, 6 (2013).

145. *Id.*

146. *Id.* at 7.

147. *Id.*

child.”¹⁴⁸ Without this Network of Judges, a sense of national superiority and lack of respect for the legal systems in other nations may surface.¹⁴⁹ Preventing this elitist attitude strikes at the reciprocity that the treaty is based on: “when mutuality between Convention countries breaks down, the Convention’s arrangements are likely to be defeated. Abduction is rewarded. The ultimate victims are the children.”¹⁵⁰

V. Conclusion

Unnecessary delay in the processing of applications or adjudication of cases, results in prolonging the harmful effects faced by abducted children. In an Open Letter to Secretary Clinton, parents of 117 American children who had been abducted and remained unlawfully in 25 countries wrote:

“The current system has failed us. While our children remain unlawfully in foreign lands, the number of new child abduction cases from the U.S. continues to grow at an alarming rate. There is an urgent need for change, not only to prevent more of our nation’s children from being abducted across international borders, but also to effectuate the expeditious and safe return of our abducted children.”¹⁵¹

The delay in processing return application is a failure in the U.S.’ implementation of the Hague Convention on the Civil Aspects of International Child Abduction. Prevention, training, and improving judicial communication will help. However, it may be time for Congress to reconsider its grant of concurrent jurisdiction for child abduction cases and join the high number of States that have concentrated jurisdiction.

148. *Id.*

149. The Hon. Michael Kirby, *Children Caught in Conflict – The Child Abduction Convention and Australia*, 24 INT’L J.L. POL’Y & FAM. 95, 100 (2010).

150. *Id.* at 105.

151. Read at the hearing before the Subcommittee on Africa, Global Health, and Human Rights of the Committee on Foreign Affairs, House of Representatives, 112th Congress, First Session (May 24, 2011), Serial No. 112-72.