

**HALF-TRUTHS, MISTAKES, AND EMBARRASSMENTS:
THE UNITED STATES GOES TO THE FIFTH MEETING OF THE
SPECIAL COMMISSION TO REVIEW THE OPERATION OF THE
HAGUE CONVENTION ON THE CIVIL ASPECTS OF
INTERNATIONAL CHILD ABDUCTION**

Merle H. Weiner*

I.	INTRODUCTION	222
II.	OPACITY AT THE FIFTH MEETING	226
A.	<i>The Problem of National Legal Language for Diplomacy</i>	226
B.	<i>Half-Truths: The United States' Invocation of National Legal Language</i>	230
1.	<i>Separation of Powers and Specialized Courts</i>	231
2.	<i>Separation of Powers and Judicial Liaisons</i>	249
3.	<i>Federalism and Consent Forms for Travel</i>	259
4.	<i>Federalism and Divergent Interpretations of the Convention</i>	270
C.	<i>Reasons for the Half-Truths</i>	272
1.	<i>Ignorance</i>	272
2.	<i>Exerting Influence in the Domestic Sphere</i>	276
3.	<i>Cover for Policy Decisions</i>	279
III.	TRANSPARENCY AT THE FIFTH MEETING	281
A.	<i>The Context for the Policy Discussion on Domestic Violence</i>	282
B.	<i>Embarrassments: The U.S. Position on Domestic Violence Issues</i>	283
1.	<i>The Relevance of Domestic Violence to Article 13(b)</i>	283
2.	<i>The Use of Undertakings to Protect Domestic Violence Victims</i> ..	294
3.	<i>The Central Authority's Role in Helping Domestic Violence Victims and Their Children</i>	299
C.	<i>Reasons for the Embarrassments</i>	306
1.	<i>Ignorance</i>	307
2.	<i>Appeasing Domestic Constituents</i>	311
3.	<i>Institutional Self-Interest</i>	313
IV.	CONCLUSION	313

* Philip H. Knight Professor of Law, University of Oregon School of Law. I appreciate the comments given to me by Leslie Harris, Carol Bruch, Pam Brown, Michael Moffitt, Robert Tsai, and Garrett Epps. I also appreciate the wonderful research assistance provided by Catriona Penfield, Caitlin Lacy, Darci Van Duzer, Geoff Manley, Danielle Lordi, and Terry Miller. Finally, thanks again to Karyn Smith who helps me complete each and every project.

I. INTRODUCTION

For two weeks in October and November 2006, the Permanent Bureau of the Hague Conference on Private International Law hosted the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction (the Fifth Meeting).¹ I attended that session, not as part of the large U.S. delegation, but rather as an academic who had no vote, but who could observe and participate.² This Article sets forth some of my impressions of the United States' performance, arrived at after attending the two weeks of deliberations and reading the voluminous written material that was prepared by the Permanent Bureau in preparation for and after the event.

My overall conclusion is that the United States' participation was a failure of U.S. foreign policy. The United States repeatedly erected barriers to multi-lateral discussion and cooperation, thereby harming efforts to improve implementation of the Hague Convention. Keeping the treaty regime efficacious requires meaningful collaboration among the signatories; such collaboration depends upon mutual trust and effective communication. The United States undermined trust and understanding by taking positions at the meeting that were opaque, disingenuous, and based on false assertions of fact.

Specifically, the United States routinely threw out legal terminology such as separation of powers and federalism that inhibited discussion of important topics. The United States used these terms imprecisely and ignored the concepts' complexity. It often appeared that the language was invoked to avoid engaging in policy discussions about substantive issues. The language signaled that a proposed idea was unacceptable to the United States or that the United States did not want to explore the topic further. A close examination of the context in which the United States invoked these terms suggests that the delegation was strategic, but not forthright, in its use of this language.

The U.S. position on some substantive issues was also troubling and justifies a negative assessment of the United States' performance at the meeting. At times, the United States was rigid and dogmatic in defense of the status quo, disregarding compelling evidence that suggested the need for change. Undisputed evidence revealed that the vast majority of abductors subject to the Hague Convention apparatus are mothers³ and primary caretakers.⁴ Many of these abductors claim to

¹ Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11, 670, 1343 U.N.T.S. 89 [hereinafter Hague Convention]. Officially, the session was the fifth to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction and the first to review the practical implementation of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

² I was admitted as an observer under the auspices of the International Society of Family Law, a non-governmental organization.

³ Hague Conference on Private International Law, *A Statistical Analysis of Applications Made in 2003 Under the Hague Convention of 25 October 1980 on the Civil*

be fleeing from domestic violence.⁵ The Fifth Meeting was the first meeting at which the topic of domestic violence was prominently featured, with the topic even appearing on the official meeting agenda. The United States had an opportunity to take a leadership role in fashioning a response to these cases, but instead the United States exhibited hostility to the plight of women and children fleeing for reasons of safety. At various times, the U.S. position even mimicked the position of fathers' rights groups, thereby raising questions about who in fact is dictating U.S. foreign policy on international child abduction.⁶

I focus on the United States' participation in particular, instead of analyzing the meeting and its results as a whole, although my discussion reveals aspects of the meeting incidentally. My emphasis may disappoint those who want a news account of the Special Commission's proceedings, but several documents produced by the Permanent Bureau should satisfy those with a desire for a purely descriptive account: the published minutes of each day's activities, the Conclusions and

Aspects of International Child Abduction, at 21, Prelim. Doc. No. 3, pt. I (Oct. 2006) [hereinafter *Statistical Analysis*] (noting that 68% of the taking persons are mothers and 29% are fathers). Of course, this statistic does not mean that women necessarily abduct more than men. Men may be more willing, or perhaps more able, to invoke the Hague machinery to obtain the return of the child. For example, if the mother is fleeing for safety reasons, the father may pursue the remedy as a way to exert power and control over her. See MARILYN FREEMAN, INTERNATIONAL CHILD ABDUCTION: THE EFFECTS 39 (2006), available at <http://www.reunite.org/page.php?alias=research20> (follow "International Child Abduction—The Effects" hyperlink).

⁴ The 2003 survey indicated that 68% of the taking persons were primary or joint caregivers. *Statistical Analysis*, *supra* note 3, at 22–23. In England and Wales, for which rather complete information existed, "86% of mothers who were taking persons were the primary or joint primary carer but only 14% of fathers were." *Id.* at 23.

⁵ In the pre-meeting questionnaire, country after country, including the United States, recognized that domestic violence is frequently raised as an issue by the respondent in Hague proceedings. See, e.g., Hague Conference on Private International Law, *Collated Responses to the Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, at 309–319, Prelim. Doc. No. 2 (Oct. 2006), available at http://www.hcch.net/upload/wop/abd_pd02efs2006.pdf [hereinafter *Collated Responses*] (Argentina, "often allege these doings"; British Columbia, "routinely raised"; Quebec, "increasingly"; Colombia, "almost always is alleged by the party opposing reunification"; Ecuador, "often used"; Finland, "quite frequently used arguments"; France, "frequently invoked"; Iceland, "often raised"; Ireland, "used increasingly"; Israel, "often raised"; Netherlands, "frequently invoked"; New Zealand, "often raised"; Paraguay "these are the allegations most made by removing mothers to justify the act"; Poland, "frequent occurrence"; Romania, "frequently invoked"; Slovakia, "raised almost in every case"; South Africa, "vast majority"; Sweden, "quite frequently"; Spain, "[e]very day there are more cases in which international removal of minors is produced as a result of domestic violence"; United Kingdom (Scotland), "growing incidence of such allegations"; United States, "frequently raised."); see also text accompanying *infra* notes 315–318 (stating that countries at the session recognized that many of the abductors alleged being subjected to domestic violence).

⁶ See text accompanying *infra* notes 486–491.

Recommendations of the Special Commission, and the Permanent Bureau's Report of the Fifth Meeting. Rather, I have chosen to focus solely on the United States' role in order to encourage more honest, principled, and transparent participation by the United States in the future.

My focus on the United States is not meant to suggest that other countries' participation was flawless; in fact, I make no comparative observations at all and leave for others the task of analyzing the performance of the other participants. Rather I focus on the U.S. role in the proceedings because of my own background: I speak English, teach U.S. law, and feel better able to evaluate my own government's role than other governments' roles. In addition, I focus on the United States' performance because the United States has the largest number of Hague Convention cases and is therefore an influential actor on the international stage.⁷

Part II of this Article analyzes the United States' use of national legal concepts at the meeting. Drawing upon the insights of rhetoricians and international studies scholars, subpart A provides a general description of the potential problems that result from using this type of language. Subpart B looks at specific instances when the United States invoked national legal language in response to particular proposals, and argues that each invocation of the terminology reflected a half-truth. The references to domestic law were used in such a way as to foster incorrect inferences by listeners.⁸ Often a more nuanced application of the concepts supported a conclusion contrary to the one urged by the United States. Specifically, this Article argues that the United States chose to invoke—but need not have invoked—separation of powers and federalism with respect to whether the United States could concentrate Hague Convention jurisdiction in a limited number of courts, whether the United States could appoint

⁷ In 2003, the United States received 23% of the total applications overall; England and Wales had the second highest number at 11%. *Statistical Analysis*, *supra* note 3, at 14. The United States also initiated the most return applications, with 13% coming from the United States. *Id.* at 15–16. England and Wales were again in second place with 10% of the total applications. *Id.*

⁸ The U.S. employed false implicature, i.e., an intentional effort to communicate something that is untrue by making a statement that is either true or false. See Elizabeth Fajans & Mary R. Falk, *Shooting From the Lip: United States v. Dickerson, Role [Im]morality, and the Ethics of Legal Rhetoric*, 23 U. HAW. L. REV. 1, 16 (2000) (explaining that false implicature allows the listener to draw a false inference). “Implicature” means a speaker is communicating something by making a statement that is not literally true. *Id.* at 2, 15. “When a contribution seems to be deliberately and blatantly unresponsive, the audience assumes the contributor has a reason for being indirect, has a reason, that is, for violating a maxim. The audience then tries to figure out why the contributor is being indirect and what is being implicated.” Elizabeth Fajans & Mary R. Falk, *Linguistics and the Composition of Legal Documents: Border Crossings*, 22 LEGAL STUD. F. 697, 723 (1998) (citing H.P. Grice, *Logic and Conversation*, in 3 SYNTAX AND SEMANTICS 41, 49–50 (Peter Cole & Jerry L. Morgan, eds. 1975)). For implicature to work, it must be intentional. “Writers and speakers must not only know they are ‘flouting’ a maxim . . . but they must make sure their audience also knows they are flouting a maxim.” *Id.*

a liaison judge, whether the United States could adopt a mandatory consent form for children's travel, and whether the United States could ensure a more uniform application of the Hague Convention within the United States. Subpart C discusses why the United States might have chosen this strategy. The Article rejects the possibility that the half-truths were merely innocent mistakes about complicated doctrine. Although this view finds support in the United States' mistaken description of some basic aspects of the U.S. legal system, the explanation is unsatisfying, in part, because many lawyers were part of the U.S. delegation.⁹ The Article also rejects the possibility that the half-truths reflected an attempt to influence the United States judiciary's interpretation and implementation of the Convention. Even though some evidence supports this explanation, it seems unlikely given the nature of the issues that provoked the half-truths. Finally, the Article posits that the United States' answers may have been given to stymie international debate on the U.S. position with regard to the substantive issues under discussion. This explanation has considerable traction and suggests that the United States' performance was tactical.

Part III then examines the U.S. position on an issue where the delegation did not hide behind questionable claims about federalism or separation of powers: the Hague Convention's application to domestic violence victims who flee transnationally with their children for safety. Subpart A discusses the world-wide consensus regarding the underlying facts, in particular, that many abductors claim to be fleeing from abusive situations. Subpart B analyzes the U.S. position in light of these facts. It specifically describes the U.S. position on whether domestic violence is relevant to an article 13(b) defense, whether undertakings can be used

⁹ The members of the U.S. delegation were the following: Catherine Barry, Deputy Assistant Secr'y for the Bureau of Consular Aff., U.S. Dept. of State; Kathy Ruckman, Deputy Dir., Office of Child. Issues, U.S. Dept. of State; Mary Sue Conaway, Chief, Abduction Unit, Office of Child. Issues, U.S. Dept. of State; Corrin Ferber, Att'y Advisor, U.S. Dept. of State; Mariano Banos, Att'y Advisor, Office of the Assistant Legal Adviser for the Consular Aff., Office of the Legal Adviser, U.S. Dept. of State; Mary Helen Carlson, Att'y Adviser, Office of the Assistant Legal Adviser for Private Int'l L., Office of the Legal Adviser, U.S. Dept. of State; Susan Rohol, Supervising Att'y, Int'l Missing Child. Div., Nat'l Ctr. for Missing and Exploited Child.; Raquel Gonzalez, Deputy Att'y Gen., Office of the Att'y Gen., Cal. Dept. of Just.; Elaine Tumonis, Deputy Att'y Gen., Statewide Child Abduction Coordinator, Cal. Att'y Gen. Office, Cal. Dept. of Just.; Ramona Gonzalez, Cir. Ct. Judge, La Crosse, Wis.; Stephen Cullen, Att'y, Miles & Stockbridge; Adair Dyer, Att'y, Austin, Tex.; Linda Silberman, Martin Lipton Professor of Law, New York University; Robert Spector, Glenn R. Watson Chair, Centennial Professor of Law, University of Oklahoma; Andrew Rearick, Extern, Embassy of the U.S.A. See Hague Conference on Private International Law, *Report on the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Practical Implementation of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (30 October–9 November 2006), at 8–9 (March 2007) [hereinafter *Report on the Fifth Meeting*].

to help achieve safety for victims, and whether the Central Authority should have expanded obligations to ensure the safe return of the child and an accompanying parent. As will be seen, an observer is left with the impression that the United States is insensitive to the plight of domestic violence victims. Subpart C speculates on the reason for the U.S. position. It notes that those responsible for the United States' position may be insufficiently educated about the dynamics of domestic violence and basic U.S. family law. Alternatively, the Article suggests that the U.S. position may be influenced by institutional self-interest or the fathers' rights lobby, and not by a concern for victims and children.

The Article concludes by noting the irony of the United States' performance. The United States should be criticized for its invocation of federalism and separation of powers to show disinterest in various initiatives, although it should be commended for its refusal to support the same initiatives (the consolidation of jurisdiction in the United States, the appointment of a judicial liaison, the adoption of consent forms for travel, and the enactment of statutory provisions to obtain uniform interpretations of the Hague Convention in the United States). In contrast, the United States should be commended for its willingness to debate the merit of reforms designed to help domestic violence victims, although it should be criticized for its opposition to the reforms. The United States' openness about its views on domestic violence allows citizens and scholars to question the United States' position, including the United States' assumptions, conclusions, and sources of influence. The juxtaposition of the United States' approach to the various substantive issues discussed in this Article demonstrates the central message of this Article: the use of national legal language at international meetings impoverishes dialogue about policy issues and should be avoided.

II. OPACITY AT THE FIFTH MEETING

A. *The Problem of National Legal Language for Diplomacy*

State parties to the Hague Convention recognize that “[c]o-operation is enhanced by good communication: communication which is timely, clear, and responsive to the matter raised.”¹⁰ They have memorialized this message in their *Guide to Good Practice*.¹¹ The *Guide* does not include a specific admonition against the use of national legal language, but perhaps it should. The invocation of this type of vocabulary at an international meeting is antithetical to “good communication.” National legal language can cloud transnational dialogue and hinder transnational problem-solving for a number of reasons.

¹⁰ Hague Conference on Private International Law, *Guide to Good Practice Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I—Central Authority Practice*, § 1.2.2 (2003) [hereinafter *Guide to Good Practice, Pt. I*].

¹¹ *Id.*

To begin with, the meaning of a legal term can differ among nations. Professor David J. Gerber calls this a “lack of conceptual correspondence between the legal language of the . . . systems.”¹² He explains,

Each legal language contains its own concepts, structures (relationships among concepts), and meaning units, and they do not necessarily correspond to those of any other system. When an outsider uses her own legal language to interpret information from another legal system, she naturally processes that information in the categories of her own system. In effect, she translates the concepts, structures and institutions of the foreign system into her own legal language, and this inevitably creates distortions.¹³

Distortion can also occur because many legal terms are idioms and hard to translate.¹⁴ For example, several Spanish legal dictionaries either contain no translation for the phrase “the rule against perpetuities”¹⁵ or fail to capture the phrase’s essence in the translation.¹⁶ As one writer put it, “[S]ome expressions are simply untranslatable.”¹⁷ If the goal of communication is to “put ‘pictures’ . . . in another person’s head [that] are not confusing,”¹⁸ national legal terminology frustrates that goal.

State parties to the Hague Convention recognize that national legal concepts can cause problems for non-nationals. Difficulties have arisen in individual cases because country-specific legal concepts are relevant to the Convention’s application. A petitioner seeking to invoke the Convention’s remedy of return must have “rights of custody” under the law of the child’s habitual residence.¹⁹ The various national meanings of “rights of custody” have caused confusion and

¹² *Id.*

¹³ David J. Gerber, *Authority Heuristics*, 79 CHI.-KENT L. REV. 959, 964 (2004).

¹⁴ LARRY A. SAMOVAR & RICHARD PORTER, *COMMUNICATION BETWEEN CULTURES* 282 (2d ed. 1995). Is there much difference between “separation of powers” and “he’s got an ax to grind,” “dilly-dally,” “affirmative action,” or “sexual harassment,” all examples of idioms that the authors say are to be avoided? *Id.* at 282–83.

¹⁵ HENRY SAINT DAHL, DAHL’S LAW DICTIONARY/DICCIONARIO JURIDICO DAHL 434, 859 (4th ed. 2006).

¹⁶ DICCIONARIO DE DERECHO, ECONOMIA Y POLITICA 344 (Ramon Lacasa Navarro & Isidro Diaz De Bustamante eds., 1980) (describing the rule as “principio que limita la inalienabilidad de bienes,” i.e., “a principle limiting the inalienability of goods” or perhaps real estate).

¹⁷ Rose Kennedy, *Much Ado About Nothing: Problems in the Legal Translation Industry*, 14 TEMP. INT’L & COMP. L.J. 423, 428 (2000) (giving as an example the phrase “habeas corpus”).

¹⁸ Samovar & Porter, *supra* note 14, at 282.

¹⁹ See Hague Convention, *supra* note 1, art. 3 (stating “rights of custody” are to be determined “under the law of the State in which the child was habitually resident immediately before the removal or retention”).

delay.²⁰ In fact, the Fifth Meeting mentioned in its very first conclusion that legal concepts are “mistranslated” and “misunderstood.”²¹

Just as foreigners may misunderstand whether “rights of custody” exist in another country, so too foreigners may misunderstand what “separation of powers” and “federalism” mean in another country. In fact, legal language that is shorthand for aspects of a country’s governmental structure is apt to be the most opaque type of legal language. Professor Vicki Jackson has explained that the concept “federalism” poses difficulty even for jurists engaged in comparative constitutional law because federalism “permeates structural arrangements” in the constitutional order.²² As she says, it is a “package deal.”²³ Jackson explains that “allocations and prohibitions of powers” can differ significantly between systems,²⁴ as can “the organization of the governmental structures of federal systems” and the “constitutional commitments to federalism.”²⁵ Professor Martha Field has explained that “people seem to be talking about very different things, and with very different assumptions” when they use the word federalism, even if both speakers are from the United States.²⁶ Sometimes two Americans can even mean the exact opposite when they use the term.²⁷

²⁰ See Merle H. Weiner, Notes of Proceedings (Oct. 31, 2006) [hereinafter Notes of Proceedings] (on file with author); see also *Report on Fifth Meeting*, *supra* note 9, ¶¶ 24, 26 (discussing language difficulties that Central Authorities have encountered).

²¹ Hague Conference on Private International Law, *Conclusions and Recommendations of the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 Oct. 1980 on the Civil Aspects of International Child Abduction and the Practical Implementation of the Hague Convention of 1 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, § 1.1.1, at 3 (Oct. 30 –Nov. 9, 2006) [hereinafter 2006 Conclusions and Recommendations]. The Conclusions and Recommendations recommended that a requesting Central Authority provide a summary of the relevant law concerning rights of custody, in addition to a translation or copy of the relevant law. *Id.*

²² Vicki C. Jackson, *Comparative Constitutional Federalism and Transactional Judicial Discourse*, 2 INT’L J. CONST. L. 91, 103 (2004).

²³ *Id.* at 102–03 (listing components of the package).

²⁴ *Id.* at 104. For example, in the United States, the common understanding is that family law issues are typically allocated to the states. However, “in Germany, Canada, and Australia some aspects of family law are within national government powers.” *Id.*

²⁵ *Id.* at 105. Some states “treat[] their federal nature as essentially unamendable,” while others “permit substantial central government control over the existence, boundaries, and government structure of the constituent parts.” *Id.*

²⁶ Martha A. Field, *The Meaning of Federalism*, 23 OHIO N.U. L. REV. 1365, 1365 (1997).

²⁷ Field, *supra* note 26, at 1365. See also John O. McGinnis & Ilya Somin, *Federalism vs. States’ Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 95–96 (2004) (describing the low number of American adults who understand the basic elements of the political system including federalism).

The challenges of understanding a country's legal terminology is compounded by "authority heuristics."²⁸ Professor Gerber explains that outsiders often do not know the weight to attach to a pronouncement about the law in another system.²⁹ The outsider is likely to provide the heuristics from his or her own system and is "not likely to be aware of the distorting effects of using such heuristics."³⁰ Gerber identifies several factors that affect the extent of cognitive distortion, including "the complexity of the text's influence."³¹ Greater complexity leads to greater distortion.³² In the context of the Fifth Meeting, treaty partners may have given far more weight to the U.S. delegation's conclusions about the law in the United States than was warranted, especially given the complexity of the concepts. As statements of the U.S. government, the statements of the U.S. delegation may have appeared particularly authoritative. Domestically, however, the statements would be classified as non-binding statements of the Executive Branch. A court would attribute little, if any, legal significance to an Executive Branch statement, for example, that "federalism prohibits us from doing that."

National legal language can inhibit effective transnational cooperation for other reasons too. Apart from the listener not understanding the speaker's point, or giving too much weight to the speaker's conclusion, a listener may "withdraw from the communication event"³³ because the listener may be frustrated by an inability to reduce the uncertainty inherent in the speaker's statement.³⁴ Uncertainty can cause "bewilderment, detachment, and alienation [and] . . . a common response to disaffection is to retreat from rather than confront the cause of the separation."³⁵ Withdrawal impoverishes the discourse: "We can no longer learn from, support or persuade people who have withdrawn."³⁶

Perhaps because domestic legal terminology is so full of complex meaning and so susceptible to misunderstandings, it is a useful tool for those who seek to confuse or obfuscate. A legal term can simply be invoked as a legal conclusion (for example, "We can't do that because of federalism").³⁷ The listener may accept the conclusion because conversationalists usually assume that the statements made by

²⁸ Gerber, *supra* note 13, at 969–70.

²⁹ *Id.* at 969.

³⁰ *Id.*

³¹ *Id.* at 973.

³² *Id.* Gerber talks of "text," but his observations also apply to verbal pronouncements of the law.

³³ SAMOVAR & PORTER, *supra* note 14, at 271–72.

³⁴ Charles Berger & Richard Calabrese, *Some Explorations in Initial Interaction and Beyond: Toward a Developmental Theory of International Communication*, HUM. COMM. RES., Jan. 1975, at 99, 100 (explaining that listeners seek to reduce uncertainty and increase predictability about future behavior).

³⁵ SAMOVAR & PORTER, *supra* note 14, at 272.

³⁶ *Id.*

³⁷ Fajans & Falk, *supra* note 8, at 3 (explaining "legal rhetoric encourages oversimplification and over-certainty in complex situations and promises exemption from moral agency").

others are truthful.³⁸ Rejecting a conclusion requires a complicated analysis of statutes, case law, policy, and politics, and the listener may not have the knowledge to challenge the speaker's assertion. Time constraints at international meetings also make it hard for other nations to probe the meaning and veracity of the speaker's words. If a listener recognizes that the speaker's conclusion is false, or even debatable, he or she may believe the speaker is deliberately misleading the audience. The listener may then view the position as immoral (because the speaker is trying to affect another's actions with a lie),³⁹ a perspective that could certainly inhibit further communication.

The opacity of legal discourse suggests that states should not invoke domestic legal terminology in a transnational meeting except when it is absolutely necessary. Even then, it should be used accurately and honestly—the gaps, ambiguities, and exceptions inherent in a concept must be acknowledged if they might matter to the speaker's analysis. Such an approach would be consistent with the spirit of the *Guide to Good Practice*, which recommends transparency and “clear information” from Central Authorities.⁴⁰ It would also further international cooperation. As one scholar noted, “In international politics, uncertainty and lack of information are pervasive. . . . By increasing the distribution of information and promoting transparency, institutions reduce the uncertainty faced by states and improve the environment for cooperation.”⁴¹

B. Half-Truths: The United States' Invocation of National Legal Language

The United States' participation at the Fifth Meeting was notable for the United States' decision to invoke national legal language to suggest that the delegation was constrained because of domestic law. The United States said, or implied, that certain Convention reforms, strategies, or initiatives were impossible for the United States to accept because of the U.S. Constitution. In particular, the

³⁸ H.P. Grice has identified four maxims that conversationalists assume about another's statements: “Quantity (the statement will be informative as required), Quality (the statement will be truthful and based on sufficient evidence), Relation (the statement will be relevant), and Manner (the statement will be clear and orderly).” See Fajans & Falk, *supra* note 8, at 15 (citing H.P. Grice, *Logic and Conversation*, in 3 SYNTAX AND SEMANTICS 41, 45–46 (Peter Cole & Jerry L. Morgan eds., 1975)).

³⁹ See Fajans & Falk, *supra* note 8, at 15–16 (citing Robert Audi's motivational principle that holds “it is morally undesirable to offer reasons that do not carry the conviction of the speaker, because motivating reasons show respect for persons, effect the actions rooted in them, are expressive of character (rhetoric's *ethos*), are predictive of future behavior, provide a basis for social cooperation, and serve truth”).

⁴⁰ See *Guide to Good Practice*, Pt. I, *supra* note 10, § 1.6, at 21; Hague Conference on Private International Law, *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Pt. II—Implementing Measures, § 1.6, at 8 (2003) [hereinafter *Guide to Good Practice*, Pt. II].

⁴¹ William J. Aceves, *Institutionalist Theory and International Legal Scholarship*, 12 AM. U. J. INT'L L. & POL'Y 227, 250–51 (1997).

United States used federalism and separation of powers to signal the United States' lack of support for concentrating Hague jurisdiction in specialized courts, appointing a judicial liaison, adopting a consent form for international travel, and unifying the Hague case law in the United States. In fact, none of the four reforms were impossible because of federalism or separation of powers, although the proposals might have been difficult to accept for other reasons.

The discussion below illustrates that some statements by the U.S. delegation made the law in the United States appear much different than it actually is. The U.S. delegation's conclusions about the constitutional permissibility of various reforms contradicted judicial decisions that suggested otherwise. Admittedly, the U.S. delegation did not have to defer to the judiciary's interpretations of the Constitution, despite *Marbury v. Madison*,⁴² because none of the relevant judicial decisions were directly on point and the Executive Branch itself is a legitimate interpreter of the U.S. Constitution.⁴³ Nonetheless, judicial decisions suggest that the Executive Branch's interpretations of separation of powers and federalism were not preordained, but were much more contingent than acknowledged by the U.S. government. The U.S. government's responses are best viewed, therefore, as political choices by a branch that is not a "disinterested arbiter," but rather one with some desire "to favor [its] own institutional position."⁴⁴ In short, the U.S. delegation's position on the constitutionality of various proposals was debatable.

1. Separation of Powers and Specialized Courts

For good reason, the Permanent Bureau has encouraged countries to limit the number of judges that adjudicate Hague Convention petitions.⁴⁵ The Permanent Bureau claims that concentrating jurisdiction in one or more specialized courts "has proved to speed up proceedings and to lead to a more coherent case law."⁴⁶ Having fewer judges permits the development of expertise more rapidly, and also facilitates communication between judges located in different countries. A number of countries concentrate jurisdiction,⁴⁷ and speak favorably of it.⁴⁸ The idea is

⁴² 5 U.S. (1 Cranch) 137 (1803).

⁴³ See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 32–42 (2d ed. 1988) (1978); Keith E. Whittington, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 209 (1999) ("nonjudicial actors engage in constitutional deliberation"); see also U.S. CONST. art. VI (directing the actors in the other branches "to support" the Constitution).

⁴⁴ WHITTINGTON, *supra* note 43, at 210–11.

⁴⁵ See *Guide to Good Practice*, Pt. II, *supra* note 40, § 5.1, at 28.

⁴⁶ Hague Conference on Private International Law, *Enforcement of Orders Made Under the 1980 Convention—Towards Principles of Good Practice*, § 2.1, at 11, Prelim. Doc. No. 7 (Oct. 2006) (prepared by Andrea Schulz) [hereinafter *Enforcement of Orders*].

⁴⁷ *Collated Responses*, *supra* note 5, § 2, at 62–71 (listing Australia, Austria, Finland, Ireland, Sweden, and the United Kingdom).

⁴⁸ *Id.* at 66, 70 (listing Finland and Sweden).

popular enough among State parties that the Special Commission at the Fourth Meeting recommended that countries concentrate jurisdiction.⁴⁹

The United States does not have specialized courts for Hague cases. Instead state and federal courts have concurrent jurisdiction under the International Child Abduction Remedies Act (ICARA),⁵⁰ making the U.S. system particularly diffuse. As the State Department stated, “literally thousands of judges” can hear these cases. The U.S. Central Authority faces the “continuous challenge” of providing “training and outreach materials to all of the judges who need such information.”⁵¹

When asked whether the United States was considering concentrating jurisdiction in a limited number of judges, the United States gave a curious answer that suggested such an arrangement would not be forthcoming. The State Department wrote,

The U.S. implementing legislation, International Child Abduction Remedies Act, 42 U.S.C. 11601–11610 (ICARA) grants concurrent jurisdiction to state and federal courts. Currently, Hague return applications are not limited to particular judges or courts. In our federal system, family law cases are traditionally heard in State or local courts, and many Convention cases are heard in state-level courts. The USCA, as part of the executive branch of the government, lacks the authority to limit the number of courts or judges hearing Hague cases under the doctrine of “separation of powers.”⁵²

No one can quarrel with the answer up until the last sentence. Nor can one really even quarrel with the truth of the last sentence. Yet the last sentence suggests that the U.S. government could not limit the number of courts or judges hearing Hague cases because of “separation of powers,” and that assertion is certainly false. The last sentence is an example of the rhetorical technique of false impudication.⁵³ Subsection (a) below explains why separation of powers is not an obstacle to the concentration of Hague Convention jurisdiction in a smaller number of U.S. courts.

The U.S. delegation also claimed that it was “impossible” to centralize jurisdiction and explained that the United States “can’t tell a parent in Guam or California to go to Wisconsin to litigate a case.”⁵⁴ The delegation’s objection is rooted in its understanding of the Due Process Clause to the U.S. Constitution.

⁴⁹ See Hague Conference on Private International Law, *Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention on 25 October 1980 on the Civil Aspects of International Child Abduction*, § 3.1, at 10 (March 22–28, 2001) [hereinafter 2001 Conclusions and Recommendations], available at http://hcch.e-vision.nl/upload/concl28sc4_e.pdf.

⁵⁰ 42 U.S.C. § 11603(a) (2006).

⁵¹ *Collated Responses*, *supra* note 5, at 138.

⁵² *Id.* at 71.

⁵³ See *supra* note 8 and accompanying text.

⁵⁴ See Notes of Proceedings, *supra* note 20, Nov. 7.

Subsection (b) below explains that the delegation's interpretation is at odds with the judiciary's interpretation of that same clause.

(a) *Congressional Control of Hague Convention Jurisdiction in the United States*

If it chose to do so, the U.S. Congress could limit the number of judges hearing Hague cases. Congress could divest state courts of their jurisdiction in these matters, thereby concentrating jurisdiction in the federal bench.⁵⁵ Congress's power to create an exclusive federal forum for matters over which the federal government has authority was acknowledged in 1866 by the U.S. Supreme Court in *The Moses Taylor*,⁵⁶ and has been affirmed subsequently.⁵⁷

⁵⁵ At one time, one might have thought that Congress was actually constitutionally compelled to invest the federal courts with exclusive jurisdiction in some matters. In *The Moses Taylor*, the Court suggested, in fact, that such an outcome was constitutionally mandated for admiralty cases, by quoting Article III, § 2 of the U.S. Constitution (though mistakenly citing Article II). See *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 428 (1866). Article III, § 2, states that the judicial power of the United States

shall extend to *all* cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to *all* cases affecting ambassadors, other public ministers, and counsels; to *all* cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State or the citizens thereof and foreign States, citizens, or subjects.

U.S. CONST. art III § 2, cl. 1 (emphasis added). The Court entertained the idea, as had Justice Story in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 334 (1816), that this section invoked the term "all" inconsistently, suggesting that in certain specified cases Congress cannot invest state courts with jurisdiction. *The Moses Taylor*, 71 U.S. at 428–30. Yet this interpretation is not consistent with the current allocation of jurisdiction by Congress on many of the topics mentioned in the first half of the quotation. For example, cases arising under federal law often are heard in state or federal court.

⁵⁶ 71 U.S. at 429–30 (upholding the permissibility of granting exclusive jurisdiction to federal courts for contract claims in admiralty cases). By statute, some admiralty cases are routinely heard in state court. See *American Dredging Co. v. Miller*, 510 U.S. 443, 446 (1994) (discussing the "saving to suitors clause" found in the Judiciary Act of 1789 and 28 U.S.C. § 1333(1), which allows state courts to hear disputes where the litigant has a common law remedy; mentioning that "[federal-court jurisdiction over such [admiralty and maritime] cases . . . has never been entirely exclusive"; and ultimately holding that state court's refusal to apply *forum non conveniens* defense was not preempted by federal law); *see also Rodich v. Am. Barge Lines*, 71 F. Supp. 549, 550 (E.D. Mo. 1947) (rejecting constitutional challenge to remand of Jones Act case to state court on the ground of

Congress has in fact granted exclusive jurisdiction to federal courts in a variety of subject areas, including bankruptcy,⁵⁸ patent and copyright,⁵⁹ and some areas of environmental law.⁶⁰ The prudential reasons for limiting jurisdiction to federal courts in those areas arguably exist in the Hague context too. The Supreme Court has explained, “The factors generally recommending exclusive federal-court jurisdiction over an area of federal law include the desirability of uniform interpretation, the expertise of federal judges in federal court, and the assumed greater hospitality of federal courts to peculiar federal claims.”⁶¹

Expertise and uniformity are particularly important in Hague cases.⁶² Abductors can exploit loopholes created by differences in treaty interpretation. Congress explicitly recognized the need for uniformity when it enacted ICARA, the Hague Convention’s implementing legislation. The legislative declarations state: “In enacting this chapter the Congress recognizes—(A) the international character of the Convention; and (B) the need for uniform international interpretation of the Convention.”⁶³ In addition, Hague cases are connected to

diversity). In fact, Congress could limit jurisdiction in Hague cases to state courts, although this would not afford the same benefits in terms of consolidation. *See, e.g., id.* at 550 (discussing constitutionality of the Jones Act which mandates that actions brought in state court cannot be removed to federal court).

⁵⁷ *See Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 387 (1986) (“It is clearly within Congress's powers to establish an exclusive federal forum to adjudicate issues of federal law in a particular area that Congress has the authority to regulate under the Constitution.”).

⁵⁸ *See* 28 U.S.C. § 1334(a) (2006).

⁵⁹ *Id.* § 1338(a) (giving federal district courts original and exclusive jurisdiction “of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks”).

⁶⁰ *See, e.g.*, 42 U.S.C. § 9613(b) (all controversies under CERCLA).

⁶¹ *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 483–84 (1981) (rejecting that Congress intended federal courts to exercise exclusive jurisdiction over personal injury actions arising under the Outer Continental Shelf Lands Act of 1953, 43 U.S.C. § 1331 (2006)); *see also Florida Prepaid Postsecondary Ed. Expense Board v. College Savings Bank*, 527 U.S. 627, 650 (1999) (Stevens, J. dissenting) (explaining that the strong federal interest in uniform interpretation of patent statutes and familiarity with the extensive body of patent law were the overarching reasons for vesting exclusive original jurisdiction in district courts); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 162 (1989) (stating Congress vested exclusive jurisdiction of actions “arising under” patent laws in federal courts with the Patent Act of 1800 in order to promote the development of a uniform body of patent law).

⁶² *See* Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need for a Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 COLUM. HUM. RTS. L. REV. 276, 289–90 (2002) (explaining that a uniform interpretation of the Convention is important to achieve its goal of deterring child abduction because abductors will be unable to exploit divergent interpretations).

⁶³ 42 U.S.C. § 11601 (b)(3) (2006); *see also* Weiner, *supra* note 62 (discussing congressional intent for uniform interpretation).

diplomatic relations and commerce, areas where federal expertise and uniformity may be particularly crucial.⁶⁴ Consequently, Congress could, and arguably should, grant exclusive jurisdiction to the federal courts.

Congress could even go further and concentrate all jurisdiction in a specialized federal court. Article III, § 1 of the Constitution gives Congress the power to “ordain and establish” federal courts inferior to the Supreme Court; their establishment and structure is wholly at the discretion of Congress.⁶⁵ This power includes the ability to direct certain cases to particular courts, both of limited and general jurisdiction.⁶⁶ Congress has done this, for example, with the establishment of the federal Court of Claims⁶⁷ and the Court of International Trade.⁶⁸ Most recently, Congress enacted legislation that vests original and exclusive jurisdiction in the courts of the Southern District of New York for lawsuits relating to the tragedy of September 11, 2001.⁶⁹ Congress has even directed that appeals in certain areas, such as patents, be heard by just one appellate bench.⁷⁰ These specialized courts are often justified by their ability to foster a uniform interpretation of the law. For example, the Circuit Court for the District of Columbia noted “the value of uniformity in judicial review” of claims arising under the Foreign Trade Zones Act when it affirmed a district court’s decision that

⁶⁴ See *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 430–31 (1866) (citing Commentaries, § 1672).

⁶⁵ See *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943).

⁶⁶ *Id.* (noting that Congress has constitutional authority to limit jurisdiction for claims arising under the Emergency Price Control Act to the Emergency Court).

⁶⁷ See 28 U.S.C. § 1491(a)(1) (the “Tucker Act”); 28 U.S.C. § 1346(a)(2) (the “Little Tucker Act”) (granting Court of Federal Claims exclusive jurisdiction for damage claims against the United States that exceed \$10,000); *see also Pershing Div. of Donaldson v. United States*, 22 F.3d 741, 744 (1994) (holding that a district court’s supplemental jurisdiction could not overcome Congress’s express command of exclusive jurisdiction under the Tucker Act).

⁶⁸ 28 U.S.C. § 1581 (a)–(h). The Court of International Trade is the former “Customs Court.” *See Customs Courts Act of 1980*, Pub. L. No. 96-417, Title II, § 201, 94 Stat. 1727 (1980).

⁶⁹ *See Air Transportation Safety and System Stabilization Act*, Pub. L. No. 107-42, 115 Stat. 230 (2001), *amended by* the Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001) (codified as a note to 49 U.S.C. § 40101 (2006)). The Air Transportation Safety and System Stabilization Act of 2001 (ATSSSA) vests original and exclusive jurisdiction in the U.S. District Court for the Southern District of New York for claims of “any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001.” *See ATSSA*, Pub. L. No. 107-42, 115 Stat. 230 (codified as a note to 49 U.S.C. § 40101). ATSSSA provides an exclusive remedy for claims that fall under it. *See Rodriguez v. Bush*, 367 F. Supp. 2d 765, 767 (E.D. Pa. 2005) (rejecting propriety of suit under ATSSSA in Eastern District of Pennsylvania).

⁷⁰ The Court of Appeals for the Federal Circuit exclusively hears all appeals in which the trial court’s jurisdiction was based “in whole or in part” upon any civil action “arising under any Act of Congress relating to [patents].” 28 U.S.C. § 1295(a)(1).

the district court lacked jurisdiction over a matter reserved for the Court of International Trade.⁷¹ Congress could better achieve a “uniform international interpretation of the [Hague] Convention” by concentrating jurisdiction in a single specialized federal court,⁷² even more so than concentrating jurisdiction in the entire federal bench.

Congress’s power to address international child abduction and to consolidate jurisdiction over these cases in the federal courts, either singly or severally, stems from the Necessary and Proper Clause of the U.S. Constitution (in combination with the President’s Treaty Power). Congress has the power to make all laws that are “necessary and proper” for carrying out “other Powers vested by [the U.S.] Constitution in the Government of the United States, or in any Department or Officer thereof.”⁷³ The President, with the advice and consent of the Senate, has the power to enter into treaties.⁷⁴ In *Missouri v. Holland*, the Supreme Court held that the treaty power gave Congress the authority to legislate in areas traditionally reserved to the states by the Tenth Amendment.⁷⁵ The principle in *Missouri v. Holland* has been subsequently reaffirmed.⁷⁶ Consequently, Congress can enact

⁷¹ Miami Free Zone Corp., Inc. v. Foreign Trade Zones Bd., 22 F.3d 1110, 1113 (D.C. Cir. 1994); *see also* United States v. Universal Fruits & Vegetables Corp., 370 F.3d 829, 836 (9th Cir. 2004) (holding Court of International Trade (CIT) had exclusive jurisdiction over government action against company based upon violation of the False Claims Act); Haddad Mfg. Co. v. Gucci, Inc., 651 F. Supp. 1277, 1280 (D. N.J. 1987) (mentioning that Congress was concerned about uniformity in establishing the CIT and dismissing action for declaratory judgment because CIT had exclusive jurisdiction); H.R. REP. No. 97-312, at 20 (1981) (explaining that exclusive jurisdiction was conferred on the Court of Appeals for the Federal Circuit in order to “provide nationwide uniformity in patent law”).

⁷² See text accompanying *supra* note 63.

⁷³ U.S. CONST. art. I, § 8, cl. 18.

⁷⁴ U.S. CONST. art. II, § 2, cl. 2. (giving the President the “Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur”).

⁷⁵ 252 U.S. 416, 432, 434 (1920) (“No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power.”).

⁷⁶ See, e.g., United States v. Lara, 541 U.S. 193, 203 (2004) (rejecting defendant’s double jeopardy challenge to his prosecution under 105 Stat. 646 (authorizing a tribe to prosecute Indian members of a different tribe), saying that the law was a constitutional act of Congress, in part pursuant to the President’s treaty power, and the act merely extended the tribe’s inherent tribal sovereignty); United States v. Yian, 905 F. Supp. 160, 165 (S.D.N.Y. 1995) (upholding the Hostage Taking Act, which was the implementing legislation for the International Convention Against the Taking of Hostages, and holding that Congress has the power to enact legislation to implement a treaty even if such legislation would otherwise violate the Tenth Amendment’s federalism principle). See generally David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1078 (2000) (explaining that the “dominant view” is the “nationalist view”).

Some scholars argue that *Missouri v. Holland* was wrongly decided and the treaty-making power cannot expand Congress’s powers beyond those that are enumerated in the Constitution. See Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L.

those laws that are necessary and proper for carrying out the Hague Convention, including vesting exclusive jurisdiction in the federal courts, even though state courts tend to address family law matters in the United States and even though the Tenth Amendment reserves to the states those areas not explicitly allocated to the federal government.⁷⁷

Congress also has the power to pass legislation implementing the treaty pursuant to the Commerce Clause,⁷⁸ and the Commerce Clause probably was a source of authority for the enactment of ICARA. Relatedly, courts have held that the International Parental Kidnapping Crime Act (IPKCA), a federal criminal law, is a valid exercise of Congress's power under the Commerce Clause because IPKCA regulates "the use of the channels of commerce"⁷⁹ and Congress has authority to keep these channels free from "immoral and injurious uses."⁸⁰ The

REV. 1867, 1868, 1937–38 (2005). Rosenkranz argues, among other things, that Congress only has the power to make laws that are necessary and proper for carrying into execution the power to make treaties, but not the power to make laws that are necessary and proper for the carrying into execution of treaties entered pursuant to the treaty power. *Id.* at 1882–84. Yet Congress has long relied upon the Necessary and Proper Clause to make laws that are necessary to carry out the United States' treaty obligations, and continued reliance on it seems appropriate until the Supreme Court reverses *Missouri v. Holland*. For a defense of *Missouri v. Holland*, see generally David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000) (suggesting that *Missouri v. Holland* should not be overturned when analyzed using the traditional tools of constitutional interpretation).

⁷⁷ Federal district courts sometimes have exclusive jurisdiction over other areas that are traditionally state law matters, such as personal injury and contract disputes. For example, federal district courts have exclusive jurisdiction over personal injury claims arising out of a "nuclear incident" regardless of diversity or the amount in question. See 42 U.S.C. § 2210(n)(2) (2006); Acuna v. Brown & Root Inc., 200 F.3d 335, 339–40 (5th Cir. 2000) ("Congress intended to create an exclusive federal cause of action for torts arising out of nuclear incidents."). Federal district courts also have exclusive jurisdiction over contract claims involving public works under the Miller Act. See 40 U.S.C. § 3133(b)(3) (formerly cited as 40 U.S.C. § 270b(b)) (reserving exclusive federal jurisdiction for contractual disputes involving the supply of labor and materials used in the construction of federal buildings); United States ex rel. Owens-Corning Fiberglass Corp. v. Brandt Const. Co., 826 F.2d 643, 645 (7th Cir. 1987) (stating that "jurisdiction of Miller Act claims is exclusively federal").

⁷⁸ U.S. CONST. art. I, § 8, cl. 3 (giving Congress power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

⁷⁹ United States v. Cummings, 281 F.3d 1046, 1049, 1051 (9th Cir. 2002) (holding that IPCKA regulates the use of the "channels of commerce" and is constitutional when applied to a person who retains an American child in a foreign country). The other categories of activity that arise under the Commerce Clause are "regulating and protecting the instrumentalities of commerce or persons in interstate commerce, even though the threat may come only from intrastate activities; and . . . regulating activities that have a substantial effect on commerce." *Id.* at 1049.

⁸⁰ *Id.* at 1049 (citing *Caminetti v. United States*, 242 U.S. 470, 491 (1917) (upholding the criminalization of interstate trafficking of women for immoral purposes)).

IPKCA prohibits the removal of a child, the attempt to remove a child, or the retention of a child (who has been in the United States) outside the United States, with intent to obstruct lawful custodial rights.⁸¹

Congress's power to address international child abduction is particularly broad as the "foreign commerce" power is greater in scope than Congress's interstate commerce power.⁸² The Foreign Commerce Clause gives Congress the power "to regulate Commerce with foreign Nations,"⁸³ and this power has been described as "sweeping."⁸⁴ Congress has used this power, for example, to prohibit foreign travel to engage in illicit sexual conduct by any U.S. citizen.⁸⁵ This clause is interpreted more broadly than the domestic commerce clause because the concerns that govern the interpretation of the Commerce Clause generally—state sovereignty and federalism—are less prevalent when Congress regulates foreign commerce.⁸⁶ Admittedly, however, there is scant case law and scholarship addressing Congress's power to regulate foreign commerce.⁸⁷

Consolidating Hague Convention jurisdiction in a limited number of courts can be justified as an instrumental part of Congress's response to international child abduction. Just as Congress had the power to enact ICARA and confer jurisdiction on both state and federal courts, it would likewise have the constitutional authority to amend ICARA and divest state courts of jurisdiction. Jurisdiction would thereby be concentrated in the federal bench, but Congress could even go further and consolidate jurisdiction in a single federal court.

⁸¹ 18 U.S.C. § 1204 (a) (2006).

⁸² *Id.* at 1049 n.1 (citing *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979)). However, the court did not seem to rely on the interstate-foreign distinction to arrive at the conclusion that IPKCA fell within Congress's Commerce Clause power. *Id.* at 1049–51; *see also United States v. Clark*, 435 F.3d 1100, 1113, 1114 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 2029 (finding that the foreign commerce clause analysis did not require satisfaction of the test set out in *Lopez*, but would have to bear "a rational relationship to Congress's authority under the Foreign Commerce Clause" (citing *Gonzales v. Raich*, 545 U.S. 1, 26–27 (2005))).

⁸³ U.S. CONST. art I, § 8, cl. 3.

⁸⁴ *Clark*, 435 F.3d at 1109.

⁸⁵ 18 U.S.C. § 2432(c) (2006); *see also Clark*, 435 F.3d at 1109 (concluding that "Congress acted within its constitutional bounds in criminalizing commercial sex acts committed by U.S. citizens who travel abroad in foreign commerce").

⁸⁶ See *Clark*, 435 F.3d at 1110–11; *Japan Line Ltd.*, 441 U.S. at 449 n.13 ("In *National League of Cities v. Usery*, 426 U.S. 833, 855 (1976), the Court noted that Congress's power to regulate interstate commerce may be restricted by considerations of federalism and state sovereignty. It has never been suggested that Congress's power to regulate foreign commerce could be so limited.").

⁸⁷ See Recent Case, *Ninth Circuit Holds That Congress Can Regulate Sex Crimes Committed by U.S. Citizens Abroad*—*United States v. Clark*, 435 F.3d 1100 (9th Cir. 2006), 119 HARV. L. REV. 2612, 2612 (2006) ("Few constitutional grants of power have undergone less scrutiny than the plenary power of Congress over foreign commerce.").

(b) *Due Process Considerations*

The U.S. delegation did not explain why it would be “impossible” to concentrate jurisdiction, but presumably it thought that the Due Process Clause prohibited it.⁸⁸ Yet, the United States’ claim of “impossibility” was an exaggeration. A concentration of jurisdiction would not necessarily violate the due process rights of the alleged abductor because the due process inquiry is very fact dependent. Some respondents would lack a meritorious due process claim; for others, Congress could structure the courts’ jurisdiction to address any legitimate due process concerns while simultaneously achieving the benefits of jurisdictional consolidation.

To be clear, a court does need personal jurisdiction over the alleged abductor to adjudicate a Hague petition, despite the fact that Hague proceedings relate to child custody. A Hague proceeding is not a custody determination—arguably a determination of status—but rather a determination of where a custody adjudication should occur.⁸⁹ *May v. Anderson*⁹⁰ is therefore irrelevant to the discussion. *May* permits a court to adjudicate a child custody matter, even if the court lacks personal jurisdiction over the absent parent, so long as the child is present in the jurisdiction or the state in which the court sits has substantial contacts with the child and the child’s family.⁹¹

⁸⁸ See text accompanying *supra* note 54.

⁸⁹ See 42 U.S.C. § 11601(b)(4) (2006) (“The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.”).

⁹⁰ 345 U.S. 528 (1953).

⁹¹ In *May v. Anderson*, the U.S. Supreme Court held that Ohio did not have to give full faith and credit to a Wisconsin child custody judgment that was entered without personal jurisdiction over the mother. *Id.* at 529. The mother was not domiciled, resident, or present in Wisconsin. *Id.* at 533–35. The *May* decision, however, is “frequently ignored or rationalized into irrelevance.” Barbara Ann Atwood, *Child Custody Jurisdiction and Territoriality*, 52 OHIO ST. L.J. 369, 384 (1991). Professor Atwood, in a very complete and thoughtful article, explains that the majority opinion in *May* can be read to suggest that adequate judicial authority exists over an absent defendant “from child-centered contacts (residence or physical presence of the child in the forum) or the amenability of the absent parent to personal jurisdiction in the forum.” *Id.* at 385–86. In fact, Justice Frankfurter’s concurrence suggested that it would not have violated the mother’s due process rights if Ohio chose to recognize the Wisconsin award. *May*, 345 U.S. at 535–36 (Frankfurter, J., concurring). The Full Faith and Credit Clause, however, did not compel it. *Id.* Consequently, many courts and policy makers—including the drafters of NCCUSL’s uniform acts on child custody jurisdiction—have taken the position that it is constitutionally permissible for a state court adjudicating child custody to do so without personal jurisdiction over a parent so long as the state was either a place that had significant connection to the child and its family or the child was present. See, e.g., Robert E. Oliphant, *Jurisdiction in Family Law Matters: The Minnesota Perspective*, 30 WM.

Every U.S. law student is familiar with the due process analysis that determines whether Congress can require a California parent to litigate in Wisconsin, yet the law of personal jurisdiction was undoubtedly unfamiliar to the non-U.S. delegates at the Fifth Meeting. In short, Congress can authorize that an action arising under federal law be brought in any court, including a court located in a state in which the litigant does not live,⁹² so long as the respondent (1) is amenable to service of process and (2) has sufficient connections with the forum so that the federal court's assertion of personal jurisdiction over the respondent is not constitutionally problematic.⁹³

The first requirement for the court's proper assertion of personal jurisdiction over an out-of-state respondent—that the respondent be amenable to service of process—needs little discussion. In an action based upon federal law, Congress can subject a respondent to a summons that extends beyond the traditional reach of a court.⁹⁴ Congress has, on occasion, authorized nationwide service of process,⁹⁵ and even worldwide service of process.⁹⁶ Therefore, a court could assert jurisdiction over a nonresident respondent pursuant to a federal statute granting nationwide service of process even if that court would lack personal jurisdiction over the respondent in a diversity case.

The second requirement requires more discussion. While a respondent may be amenable to service of process under a nationwide service of process statute, the court's exercise of jurisdiction must also comport with the Fifth Amendment's Due

MITCHELL L. REV. 557 (2003) (examining Minnesota appellate court law on subject matter and personal jurisdiction in the field of family law).

⁹² See *Robertson v. Ry. Labor Bd.*, 268 U.S. 619, 622, 627 (N.D. Ill. 1925) (stating that “Congress clearly has the power to authorize a suit under a federal law to be brought in any inferior federal court” and holding that Congress could, but did not, require defendant to litigate in a district selected by the Labor Board even if defendant is not a citizen or inhabitant of the district and is not found therein).

⁹³ See *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 106 (1987) (finding no explicit or implicit Congressional provision for nationwide service of process in a private cause of action under the Commodity Exchange Act and no amenity to service under relevant state law).

⁹⁴ FED. R. CIV. P. 4(k)(1)(C) (explaining that a summons is effective to establish jurisdiction over the defendant when the summons is “authorized by a federal statute”).

⁹⁵ See, e.g., Securities Act, 15 U.S.C. § 78aa (2006) (action may be brought in any district wherein “the defendant is found or is an inhabitant or transacts business and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found”); 29 U.S.C. § 1132(e)(2) (ERISA enforcement action); 42 U.S.C. § 9613(e) (certain CERCLA actions).

⁹⁶ See, e.g., *United States ex rel. Vallejo v. Investronica, Inc.*, 2 F. Supp. 2d 330, 334 (W.D.N.Y. 1998) (discussing worldwide service of process authorized under False Claims Act). See 15 U.S.C. §§ 77aa, 78aa (Securities Exchange Act of 1934); 15 U.S.C. § 22 (Section 12 of the Clayton Act, providing worldwide service of process for certain antitrust defendants).

Process Clause.⁹⁷ The analysis under the Fifth Amendment differs somewhat from the familiar analysis developed by the Supreme Court under the Fourteenth Amendment because the Fourteenth Amendment's constraints are predicated, in part, on federalism principles applicable to a diversity suit, and not a federal question suit (such as the notion that states, as separate sovereigns, cannot encroach on each other's authority).⁹⁸ It is nonetheless useful to start with the well-developed Fourteenth Amendment jurisprudence because courts analyzing due process under the Fifth Amendment often start with it and then modify it as appropriate. As demonstrated below, of the two questions traditionally analyzed under the Fourteenth Amendment (whether sufficient minimum contacts exist and whether the exercise of jurisdiction comports with traditional notions of fair play and substantial justice),⁹⁹ only the second question really becomes an issue in the federal question context.

The "minimum contact" inquiry under Fourteenth Amendment jurisprudence has evolved into a series of subtests about the amount and sufficiency of contacts between the defendant and the forum. A court adjudicating a Hague Convention action involving a nonresident respondent would first assess whether it has "specific jurisdiction" over the respondent, looking at "whether the claim that undergirds the litigation directly relates to or arises out of the defendant's contacts with the forum [and] . . . whether those contacts constitute purposeful availment of the benefits and protections afforded by the forum's laws."¹⁰⁰ The adjudication of a Hague claim directly relates to the respondent's contacts with the forum because the "forum" in this context refers to the United States, and *not* the state in which the court adjudicating the action sits.¹⁰¹ In the case of international child abduction,

⁹⁷ Chew v. Dietrich, 143 F.3d 24, 28 & n.4 (2d Cir. 1998); *see* Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 102–04 (1987) (assuming Fifth Amendment applies).

⁹⁸ Hallwood Realty Partners, L.P. v. Gotham Partners, L.P., 104 F. Supp. 2d 279, 283 (S.D.N.Y. 2000) (stating that "it is far from clear whether [the Due Process Clause of the Fifth Amendment] imposes identical limitations on their exercise of personal jurisdiction in federal question cases [as the Fourteenth Amendment]").

⁹⁹ *See generally* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting *Miliken v. Meyer*, 311 U.S. 457, 463 (1940)).

¹⁰⁰ United States v. Swiss Am. Bank, Ltd., 274 F.3d 610, 620–21 (1st Cir. 2001); *see also* Ved P. Nanda & David K. Pansius, 1 LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 1:4 (2007) (explaining that specific jurisdiction typically gives rise to a "three part test: (1) the claim "arises out of or results from" defendant's forum related activities; (2) the contacts must involve some act where defendant purposefully availed itself of the forum; and (3) the exercise of jurisdiction must be reasonable").

¹⁰¹ Pinker v. Roche Holdings Ltd., 292 F.3d 361, 369 (3d Cir. 2002) (jurisdiction of a federal court "need not be confined by the defendant's contacts with the state in which the federal court sits" if Congress has authorized nationwide service of process); *see Chew*, 143 F.3d at 27; United Elec. Radio & Mach. Workers v. 163 Pleasant St. Corp., 960 F.2d 1080, 1085 (1st Cir. 1992); *see also* Action Embroidery Corp. v. Atlantic Embroidery, Inc., 368 F.3d 1174, 1180 (9th Cir. 2004) ("In a statute providing for nationwide service of process, the inquiry to determine 'minimum contacts' is thus 'whether the defendant has

there is a clear nexus between the petitioner's lawsuit for the child's return and the respondent's contacts with the United States. Therefore, even a court invoking a restrictive "proximate cause" test to assess specific jurisdiction (by examining whether the contacts "were the immediate preceding legal cause of plaintiff's injury"),¹⁰² would find that the abductor's contact with the United States qualifies.

The respondent's contact with the United States also involves "purposeful availment of the benefits and protections afforded by the forum's laws."¹⁰³ The purposeful-availment test focuses on intentionality and is satisfied "when the respondent purposefully and voluntarily directs his activities toward the forum so that he should expect, by virtue of the benefit he receives, to be subject to the court's jurisdiction based on these contacts."¹⁰⁴ The underlying question is whether the respondent's contact is such that he "should reasonably anticipate being haled into court there."¹⁰⁵ When an alleged abductor comes to the United States with a child, the alleged abductor avails himself daily of the privileges of American law. He may even become a resident. The alleged abductor cannot complain that he has to defend a suit for his child's return in the United States since an alleged abductor can reasonably anticipate being served with a Hague petition.

The final part of the Fourteenth Amendment analysis involves whether it is constitutional "fair play" for a court to assert jurisdiction over a nonresident respondent.¹⁰⁶ Some courts question whether this part of the analysis applies in the context of the Fifth Amendment. The Third Circuit noted, "there has been some debate as to whether this second prong of the *International Shoe* analysis [whether

acted within any district of the United States or sufficiently caused foreseeable consequences in this country."); U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co., 241 F.3d 135, 152 & n.12 (2d Cir. 2001) ("[A] court should consider the defendant's contacts throughout the United States and not just those contacts with the forum"); United States *ex rel.* Vallejo v. Investronica, Inc., 2 F. Supp. 2d 330, 334 (W.D.N.Y 1998) (finding personal jurisdiction for False Claims Act claim). *See, e.g.*, Gambone v. Lite-Rock Drywall Corp., 124 Fed. App'x 78, 80 (3d Cir. 2005) (non-precedential) (citing Pinker v. Roche Holdings Ltd., 292 F.3d 361, 369 (3d Cir. 2002)); U.S. Sec. & Exch. Comm'n. v. Carrillo, 115 F.3d 1540, 1542–43 (11th Cir. 1997) (citing cases from 1st, 2d, 5th, 6th, 7th, 9th, 10th Circuits). The U.S. Supreme Court has never addressed this issue. *See Omni Capital Int'l*, 484 U.S. at 103 n.5; Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 113 n* (1987) (plurality opinion).

¹⁰² Vons Cos. v. Seabest Foods, Inc., 926 P.2d 1085, 1103 (Cal. 1996) (discussing but rejecting test).

¹⁰³ *Swiss Am. Bank.*, 274 F.3d at 621.

¹⁰⁴ *Id.* at 623–24; *Vallejo*, 2 F. Supp. 2d at 334 (saying there must "be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the [United States], thus invoking the benefits and protections of its laws") (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958))) (alteration in original).

¹⁰⁵ *Vallejo*, 2 F. Supp. 2d at 334. (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)); *see also Pinker*, 292 F.3d at 370 (citing cases).

¹⁰⁶ *Hallwood Realty Partners, L.P. v. Gotham Partners, L.P.*, 104 F. Supp. 2d 279, 282 (S.D.N.Y. 2000).

the exercise of personal jurisdiction is consistent with “traditional notions of fair play and substantial justice”] ought to apply in the context of a federal statute authorizing nationwide service of process.”¹⁰⁷ Some courts have held that the respondent’s convenience is simply irrelevant when the individual is within the territory of the sovereign exercising jurisdiction.¹⁰⁸ However, the case law does not provide a clear answer to this question.¹⁰⁹

Assuming the second prong of *International Shoe* does apply, however, this part of the analysis might be short-circuited if Congress concentrates jurisdiction in a sufficient number of courts so that the venue provisions can be used to ensure fairness.¹¹⁰ “[M]ost of these cases [that have allowed contacts with the U.S. to count for the minimum contact analysis] . . . have undertaken little independent inquiry into the fairness of subjecting the defendant to the jurisdiction of the forum,” but rather rely on venue provisions to meet this concern.¹¹¹ Consequently,

¹⁰⁷ *Pinker*, 292 F.3d at 370 n.2. This question has vexed courts and commentators since at least the early 1900s. *See, e.g.*, *Robertson v. R.R. Labor Bd.*, 268 U.S. 619, 627 (1925) (holding that court did not acquire jurisdiction over nonresident defendant because statute did not authorize suit to be brought in Illinois court and court would interpret “any District Court of the United States” in statute to mean any district court of competent jurisdiction; Congress would probably not want to subject people to undue hardship without doing so explicitly); Gerald Abraham, *Constitutional Limitations upon the Territorial Reach of Federal Process*, 8 VILL. L. REV. 520, 531–36 (1963).

¹⁰⁸ *Medical Mut. of Ohio v. deSoto*, 245 F.3d 561, 567–68 & n.4 (6th Cir. 2001) (noting, in an ERISA action, that there was no due process concern and commenting that although it may be “inconvenient to the defendants [to have to defend the action in this district], it is convenient to the plan, reducing its costs, to the benefit of all plan beneficiaries. Congress has balanced the plan’s interest and permitted suit where the plan is located.”); *Flynn v. Ohio Bldg. Restoration, Inc.*, 260 F. Supp. 2d 156, 170–71 (D.D.C. 2003) (citing *Medical Mut. of Ohio*, 245 F.3d at 567).

¹⁰⁹ *See* 4 CHARLES WRIGHT & ARTHUR MILLER, FED. PRAC. & PROC. § 1068.1 (3d ed. 2002).

¹¹⁰ Unlike personal jurisdiction, which is grounded in the Constitution, venue is purely a creature of statute. Venue provisions help provide for the convenience of witnesses and parties. *See Denver & Rio Grande W. R.R. Co. v. Brotherhood of R.R. Trainmen*, 387 U.S. 556, 560 (1967).

¹¹¹ *Hallwood*, 104 F. Supp. 2d at 284; *see, e.g.*, *Sec. Investor Protection Corp. v. Vigman*, 764 F.2d 1309, 1315–16 (9th Cir. 1985). Some courts have read venue provisions as a limitation on the ability of a court to hear a matter, even if there is proper jurisdiction pursuant to a nationwide service of process provision. For example, some courts read the specific venue provisions of Section 12 of the Clayton Act (an Act authorizing worldwide service) as limiting the jurisdiction of the court. *See* 15 U.S.C. § 22 (2006) (directing that an antitrust suit against a corporation may be brought in the judicial district where it is an inhabitant, any district where it may be found, or any district where it transacts business). *Compare Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 423 (2d Cir. 2005) (holding “the plain language of Section 12 indicates that its service of process provision applies (and, therefore, establishes personal jurisdiction) only in cases in which its venue provision is satisfied”), *with GTE New Media Servs., Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1351 (D.C. Cir. 2000) (stating the Second Circuit’s interpretation is “clearly

if Congress concentrated Hague Convention jurisdiction in federal courts throughout the fifty states, then the venue provisions could continue to satisfy the “fair play” requirement in the due process analysis. Even under this approach, some courts might hold that some respondents (for example, aliens) have no claim to convenience in any event.¹¹²

If, however, a particular respondent were not an alien, and if Congress consolidated Hague Convention jurisdiction in a single court so that the venue provisions could not be relied upon to address a respondent’s concerns about convenience,¹¹³ then the court would have to decide whether the action could be brought at all. Assuming the court felt compelled to apply the second prong of *International Shoe*, the court would have to assess the importance of fairness to the respondent in light of a number of competing concerns.

The fairness analysis under the Fifth Amendment is similar to the analysis under the Fourteenth Amendment,¹¹⁴ although courts conducting a Fifth Amendment analysis give considerable weight to the national interest. For example, the Southern District of New York in *Hallwood Realty Partners, L.P. v.*

correct”), and *In re Auto. Refinishing Paint Antitrust Litig.* 358 F.3d 288, 296–97 (3d Cir. 2004) (“[We] hold that the service of process provision on foreign corporations is independent of, and does not require satisfaction of, the specific venue provision under Section 12 of the Clayton Act.”), and *Action Embroidery Corp. v. Atl. Embroidery, Inc.* 368 F.3d 1174, 1179–80 (9th Cir. 2004) (holding that, “under Section 12 of the Clayton Act, the existence of personal jurisdiction over an antitrust defendant does not depend upon there being proper venue in that court”).

¹¹² An alien’s convenience has no relevance in a venue inquiry. Aliens in the United States are not entitled to the benefits of venue provisions and generally can be sued in any district. See 28 U.S.C. § 1391(d). This reflects the fact that “suits against aliens are wholly outside the operation of all the federal venue laws, general and special.” *Brunette Mach. Works, Ltd. v. Kockum Indus.*, 406 U.S. 706, 714 (1972). Consequently, courts have repeatedly held that statutes limiting venue to a particular place do not apply to aliens. See e.g., *id.* (holding that the venue statute for patent infringement cases, 28 U.S.C. § 1400(b), does not apply to suits against aliens); *Cumberland Truck Equip. Co. v. Detroit Diesel Corp.*, 401 F. Supp. 2d 415, 423–24 (E.D. Pa. 2005) (the Clayton Act’s venue clause does not apply to suits against aliens); *RCA Records v. Hanks*, 548 F. Supp. 979, 982 (S.D.N.Y. 1982) (venue provisions for statutory interpleader actions do not apply to suits against aliens).

¹¹³ Some courts have stated that jurisdiction is independent of venue, and absent a request to transfer, the forum is proper even if jurisdiction is based solely on the respondent’s contacts with the United States and not the state in which the court sits. See *Reese Bros., Inc. v. U.S. Postal Serv.*, 477 F. Supp. 2d 31, 39 (D.D.C. 2007) (finding personal jurisdiction against nonresident defendant under Federal Debt Collection Procedures Act).

¹¹⁴ In assessing fairness under the Fourteenth Amendment, courts traditionally look to “the burden on the defendant, the forum State’s interest in adjudicating the dispute, the plaintiff’s interest in obtaining convenient and effective relief, the interstate judicial system’s interest in obtaining the most effective resolution of controversies, and the shared interests of the several States in furthering fundamental substantive social policies.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985) (internal quotation marks omitted).

*Gotham Partners, L.P.*¹¹⁵ emphasized that “the personal jurisdiction analysis must give appropriate consideration to the strong federal concerns involved” since “nationwide service provisions often are central to major federal regulatory efforts in areas at the core of Congress’s power under the Commerce Clause.”¹¹⁶ Consequently, the *Hallwood* court held, “*International Shoe* and its progeny, which rest on the Fourteenth Amendment, may not simply be transplanted to limit the exercise of personal jurisdiction in federal question cases.”¹¹⁷ The *Hallwood* court modified the *Burger King v. Rudzewicz* test that is often applied in the Fourteenth Amendment context:

[W]hat is arbitrary requires consideration of the individual’s interest in fundamental fairness, the forum’s interest in adjudicating the dispute, the plaintiff’s interest in obtaining effective and convenient relief, the judicial system’s interest in obtaining the most efficient resolution of controversies, and the interest of the forum in furthering substantive social policies.¹¹⁸

In holding that it could subject a California corporation to suit in New York under the Securities and Exchange Act of 1934, the *Hallwood* court emphasized Congress’s decision that the federal statute would be best implemented with a provision permitting nationwide service of process.¹¹⁹

Applying this *Hallwood* test to the Hague context reveals three truisms: (1) the fairness analysis is highly fact specific, (2) Congress’s decision to concentrate jurisdiction will receive much weight, and (3) some Hague respondents could be forced to litigate their Hague cases in distant forums. The United States’ interest in deterring child abduction would weigh heavily in any analysis, especially because this objective implicates foreign policy and commerce, as would Congress’s and

¹¹⁵ 104 F. Supp. 2d 279, 284–85 (S.D.N.Y. 2000).

¹¹⁶ *Id.* at 286 (holding that the Fifth Amendment’s protections cannot be as broad as the Fourteenth Amendment’s, in part, because it would “undercut severely the efficacy of nationwide service provisions,” including criminal procedures); *see also* Oxford First Corp. v. PNC Liquidating Corp., 372 F. Supp. 191, 201 (E.D. Pa. 1974) (“any constitutional due process limitations upon a federal extra territorial (nationwide) service of process statute must be broadly defined”) (explaining such was necessary because of practical considerations emanating from the realities of contemporary litigation, especially in the securities and antitrust areas).

¹¹⁷ *Hallwood*, 104 F. Supp. 2d at 285 (noting, however, that those cases were not “utterly irrelevant”); *see also* *Oxford First*, 372 F. Supp. at 203 (adopting a “judicial fairness test” and noting that “[e]ven though we are not persuaded that federal service of process statutes are constrained by constitutional due process strictures as defined by *International Shoe*, we believe that the federal extraterritorial service power is not unlimited”).

¹¹⁸ *Hallwood*, 104 F. Supp. 2d at 285.

¹¹⁹ *Hallwood*, 104 F. Supp. 2d at 286; *see also* *Pinker v. Roche Holdings, Ltd.*, 292 F.3d 361, 369–71 (3d Cir. 2002) (considering “the national interest in furthering the policies of the law(s) under which plaintiff is suing”).

the Permanent Bureau's view that concentrating jurisdiction is important to prevention efforts. Other factors in the fairness analysis, such as efficiency, would also support a concentration of jurisdiction.¹²⁰

Consequently, assuming a court would apply a full Fourteenth Amendment type of analysis, one cannot conclude ahead of time that a particular respondent's inconvenience will necessarily be relevant or sufficient to invalidate a court's assertion of jurisdiction over her. Even if relevant, a court might require that the respondent's inconvenience be an "extraordinary burden" because of the strong national interest in consolidation.¹²¹ A parent who is forced to litigate in a geographically proximate forum would be hard pressed to establish the necessary burden. Imagine, for example, a respondent in Maryland having to litigate in Washington, D.C. Even the California respondent may not be sufficiently inconvenienced by having to litigate in Wisconsin. Courts have identified mechanisms that mitigate the inconvenience caused by distance: "electronic mail, facsimile transmission, videoconferencing and frequent coast to coast air service."¹²²

Given the fact-specific inquiry, the United States was wrong to say categorically that it is "impossible" for parents in one state to have to defend a Hague action in another state. Admittedly, there may be some situations where the unfairness to the respondent outweighs even a strong national interest.¹²³ Yet Congress can anticipate and address those cases. Congress might have one federal district court that adjudicates Hague cases in each state. Alternatively, Congress

¹²⁰ The adjudication of these disputes would become more efficient if jurisdiction were concentrated. A concentration of jurisdiction leads to expertise, which in turn translates into efficiency, which in turn contributes to petitioners' ability to obtain effective relief. Arguably, petitioners should not experience any inconvenience from a single forum since the Hague Convention is set up so that the left-behind parent (the petitioner) does not even have to travel to the country to obtain the return of his or her child. It should be irrelevant to these petitioners where in the United States the litigation occurs.

¹²¹ See *Hallwood*, 104 F. Supp. 2d at 286; Peay v. BellSouth Med. Assistance Plan, 205 F.3d 1206, 1212 (10th Cir. 2000) (placing burden on defendant to show the court's exercise of jurisdiction "will make litigation so gravely difficult and inconvenient that [he] unfairly is at a severe disadvantage in comparison to his opponent") (internal quotation marks omitted).

¹²² *Hallwood*, 104 F. Supp. 2d at 286.

¹²³ In *Hallwood*, the court noted that the defendant was a business enterprise. The defendant was

not an individual of limited means who could not readily cope with being forced to defend a lawsuit far from home. In the last analysis, the question is whether the burden on [the defendant] . . . is so severe that the exercise of personal jurisdiction over it is arbitrary, shocks the conscience, or offends fundamental principles of ordered liberty, notwithstanding the strong federal interest in efficient and effective enforcement of the securities laws.

might consolidate Hague jurisdiction in a single court, but might also authorize the federal district court in the state where the respondent lives to hear the respondent's motion to dismiss on personal jurisdiction grounds, and then permit that same court to exercise jurisdiction over the merits if the motion is granted. These approaches would likely survive a due process challenge and still dramatically decrease the number of courts hearing Hague cases.

Overall, reducing the number of judges in the United States who hear Hague petitions is a political, not a legal, issue. Congress could decide to divest state courts of Hague Convention jurisdiction and to concentrate these claims in the federal courts, and even in a relatively small number of federal courts. While the Executive Branch cannot unilaterally accomplish this result,¹²⁴ the U.S. Central Authority (which is part of the Executive Branch) could ask Congress to change the law.¹²⁵ Instead of admitting this fact and addressing the merits of consolidating jurisdiction, the United States chose to hide behind a separation-of-powers assertion that was disingenuous.¹²⁶

Of course, limiting Hague Convention jurisdiction to federal courts, let alone a single federal court, might not be a wise idea, and the United States might have rejected the idea for any one of a number of reasons. For example, the political costs of achieving such a reform might be too high since judges are likely opponents. The federal judiciary might dislike this idea because it has an aversion to family law matters¹²⁷ and it has concerns about its workload.¹²⁸ State judges

¹²⁴ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2773, 2776 (2006) (holding that the executive could not unilaterally grant military tribunals exclusive jurisdiction without clear congressional authority or constitutional authorization).

¹²⁵ This is done through an executive communication.

[It] is usually in the form of a message or letter from a member of the President's Cabinet, the head of an independent agency, or the President himself, transmitting a draft of a proposed bill to the Speaker of the House of Representatives and the President of the Senate. Despite the structure of separation of powers, Article II, Section 3, of the Constitution imposes an obligation on the President to report to Congress from time to time on the 'State of the Union' and to recommend for consideration such measures as the President considers necessary and expedient. . . . The communication is then referred to the standing committee or committees having jurisdiction of the subject matter of the proposal. The chairman or the ranking minority member of the relevant committee usually introduces the bill promptly either in the form in which it was received or with desired changes.

Charles W. Johnson, *How Our Laws are Made*, H.R. Doc. No. 108-93, at 4–5 (2003).

¹²⁶ See *supra* text accompanying notes 52–54.

¹²⁷ See Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073, 1110 (1994). This aversion to family law matters has influenced the federal courts' willingness to adjudicate access disputes under the Convention. See, e.g., *Cantor v. Cohen*, 442 F.3d 196, 202 (4th Cir. 2006) ("With the exception of the limited matters of international child abduction or wrongful removal claims, which is expressly addressed by

might also resent having an area of traditional state court expertise allocated exclusively to the federal courts. History suggests that this opposition is probable: the federal courts were given jurisdiction under ICARA only over the express opposition of both the federal and state judiciaries.¹²⁹ Apart from this practical concern, the United States may also have had substantive reasons for wanting jurisdiction to remain diffuse. The United States may believe that state courts are better than federal courts at adjudicating Hague cases because state courts are more familiar with family law matters, although recommendations made by the National Center on Missing and Exploited Children to attorneys representing petitioners suggest that the federal government probably believes otherwise.¹³⁰ Or the United States may be concerned about the inconvenience and burden that consolidation might entail for respondents (and potentially petitioners), even if these concerns do not rise to the level of a constitutional problem.

The United States may have opposed the consolidation of jurisdiction for any of these reasons, or perhaps for a reason not mentioned. Yet since the U.S. delegation never gave the actual reason for its opposition, this author, like the Permanent Bureau and State parties, must guess at the real motivations for the United States' resistance.

the Convention and ICARA, other child custody matters, including access claims, would be better handled by the state courts which have the experience to deal with this specific area of the law."); Wiggill v. Janicki, 262 F. Supp. 2d 687, 690 (S.D. W. Va. 2003) ("[Access] issues are best left to the state courts that traditionally deal with this special area of the law."); Janzik v. Schand, No. 99-C-6515, 2000 WL 1745203, at *2 (N.D. Ill. Nov. 27, 2000); Teijeiro Fernandez v. Yeager, 121 F. Supp. 2d 1118, 1126 (W.D. Mich. 2000); Bromley v. Bromley, 30 F. Supp. 2d 857, 862 (E.D. Pa. 1998).

¹²⁸ See 1 REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 94–108 (1990) (cautioning that the federal courts cannot accommodate a surge in the demand for its services simply by adding personnel and recommending, *inter alia*, that federal diversity jurisdiction be abolished for suits by and against citizens of foreign countries); Craig M. Bradley, *Federalism and the Federal Criminal Law*, 55 HASTINGS L.J. 573, 590–91 (2004) ("At every meeting of federal judges that I attend there is the complaint that the Congress is broadening federal jurisdiction to the point where we are unable to do our jobs. The historically unique and discrete jurisdiction of the Federal Courts is being distorted.").

¹²⁹ See 134 CONG. REC. S6482, 6483 (daily ed. Apr. 12, 1988) (statement of Sen. Hatch) ("I recently received communications from Conference of Chief Justices and the Department of Justice that they, along with the Judicial Conference of the United States, believe that 'State courts should have exclusive jurisdiction in all legal actions under the convention.'").

¹³⁰ See INTERNATIONAL CHILD ABDUCTION CENTER, TRAINING MANUAL 5, 64 (2007); see also Julia Alanen, *Remedies and Resources to Combat International Family Abduction*, 21 AM. J. FAM. L. 11, 17 (2007) ("Many attorneys [prefer federal court because] some family court judges have difficulty refraining from applying the best interests of the child standard to Hague return proceedings." (emphasis omitted)).

2. Separation of Powers and Judicial Liaisons

The concept of a “liaison judge” can be traced to a 1998 judicial seminar on the International Protection of Children in De Ruwenberg.¹³¹ Since then, an increasing number of State parties have appointed a liaison judge for purposes of implementing the Hague Abduction Convention. The number of countries with liaison judges has grown to thirty, up from twenty countries in 2001.¹³²

From the outset, liaison judges were described as having three distinct functions. The idea was that “one or more members of the judiciary [would] act as a channel of communication and liaison with their national Central Authorities, with other judges within their own jurisdictions and with judges in other Contracting States,” with respect to the Convention’s operation.¹³³ There has always been recognition that liaison judges need not fulfill all of these functions, and that the specific contours of their jobs would be dictated by what national law permitted.¹³⁴ There has also been a long-standing recognition that liaison judges could be especially important to ensuring the safe return of the child and the accompanying parent. For example, at the Fourth Meeting, the topic of liaison judges was discussed within this context.¹³⁵

¹³¹ See Hague Conference on Private International Law, *Report on Judicial Communications in Relation to International Child Protection*, at 5, Prelim. Doc. No. 8 (Oct. 2006) (prepared by Philippe Lortie) [hereinafter *Report on Judicial Communications*]. The idea has been promoted subsequently at judicial seminars. *Id.* at 6.

¹³² Notes of Proceedings, *supra* note 20, Nov. 1 (statement of Jenny Degeling); see also *Report on Judicial Communications*, *supra* note 131, at 13–15 (listing fifteen countries and their designated liaison judges).

¹³³ *Report on Judicial Communications*, *supra* note 131, at 5. See, e.g., *id.* at 8–9 (citing 2004 Latin American Judges’ Seminar) (the liaison judge is envisioned as a “significant aid to international judicial communication, collaboration, and understanding”); *id.* at 9 (citing 2005 Latin American Judges’ Seminar) (describing liaison judge as acting “in co-operation and co-ordination with Central Authorities”).

¹³⁴ The recommendations of the Special Commission with regard to direct judicial communications were actually quite modest, and were essentially a reaffirmation of Recommendations No. 5.5 and 5.6 of the 2001 meeting of the Special Commission. *2006 Conclusions and Recommendations*, *supra* note 21, § 1.6.3. It reminded states “that direct judicial communications should respect the laws and procedures of the jurisdictions involved,” encouraged states “to consider identifying a judge or judges or other persons or authorities able to facilitate at the international level communications between judges or between a judge and another authority,” and asked states to “actively encourage international judicial cooperation” through judicial conferences or by “explaining the possibilities of direct communication on specific cases.” *Id.* It listed “commonly accepted safeguards” that are used when direct judicial communication occurs, including limiting the topic to “logistical issues and the exchange of information,” notifying parties in advance of the “nature of the proposed communication,” keeping a record of the communication, confirming any agreement reached in writing, and allowing parties or representatives to be present by conference call in certain cases. *Id.*

¹³⁵ See *Report on Judicial Communications*, *supra* note 131, at 6 (referring to the Fourth Meeting in 2001).

The United States does not have a liaison judge. The U.S. delegation asserted, “We have the idea of separation of powers so we can’t appoint a judicial liaison.”¹³⁶ The United States would probably claim that the absence of a formally designated liaison judge is mitigated by two facts. First, the United States has an informally designated liaison judge.¹³⁷ Yet the informal designation appears insufficient for our treaty partners, many of whom were implicitly critical of the United States during the meeting for not formally appointing a judge.¹³⁸ In fact, the Permanent Bureau “strongly encourage[s]” formal designation so that the liaison judge receives the full support of their colleagues.¹³⁹ Second, the United States would probably claim that the U.S. Central Authority’s judicial advisory council helps fulfill the function of a liaison judge in the United States. This council is organized through the National Center for Missing and Exploited Children,¹⁴⁰ which “helps . . . with the separation of powers problem.”¹⁴¹ The council works on projects to improve implementation of the Convention, primarily through education. The United States reported that the judges on this council were familiar with abduction cases and comfortable with judicial communication,¹⁴² although the United States did not suggest that the council or its members would serve as an official liaison, appoint a liaison, or work to have one appointed. A description of the council, contained in the United States’ written answers, does not suggest otherwise.¹⁴³

The U.S. delegation’s reliance upon “separation of powers” as an excuse for not appointing an official liaison judge struck delegates from several countries as disingenuous, arguably damaging the United States’ credibility. For example, a delegate from Canada proclaimed that Canada also had the doctrine of separation of powers, but that doctrine did not preclude communications regarding procedure or of a general nature between the Central Authority and the courts.¹⁴⁴ Madame Chair Justice McGuinness proclaimed that separation of powers should not stop the exchange of information between the Central Authority and the judiciary.¹⁴⁵

¹³⁶ Notes of Proceedings, *supra* note 20, Nov. 1.

¹³⁷ See Hague Conference on Private International Law, *International Network of Liaison Judges under the Hague Convention of 25 Oct. 1980 on the Civil Aspects of International Child Abduction, Formal and Informal Designations* (13 July 2007) (mentioning Judge Garbolino) (on file with author).

¹³⁸ See *infra* text accompanying notes 144–148.

¹³⁹ Report on the Fifth Meeting, *supra* note 9, ¶ 181; Notes of Proceedings, *supra* note 20, Nov. 6 (statement of Philippe Lortie).

¹⁴⁰ Notes of Proceedings, *supra* note 20, Nov. 6 (statement of Philippe Lortie).

¹⁴¹ *Id.*

¹⁴² *Id.* Nov. 7.

¹⁴³ See *Collated Responses*, *supra* note 5, at 227–28. One of the functions of the network is “International Judicial Communication and Outreach,” although this may mean nothing more than attending judicial seminars with judges from abroad. *Id.* at 227.

¹⁴⁴ Notes of Proceedings, *supra* note 20, Nov. 1.

¹⁴⁵ *Id.* Nov. 6; see also Hague Conference on Private International Law, *Special Commission on the Civil Aspects of International Child Abduction, Report of Meeting No. 5*, at 2–3 (Nov. 6, 2006) (reporting meeting of Nov. 1, 2006).

She suggested that if a government cannot appoint a liaison judge, the judiciary itself might appoint one (as in Ireland and the UK).¹⁴⁶ The delegate from Uruguay also explained that his country followed the doctrine of separation of powers and opined that such a concept was “common,” generating laughter from other delegations at the meeting. He explained that the doctrine had not stopped the Supreme Court of Uruguay from designating him as a liaison judge. He helped bridge communication between judges in his country and other countries, provided information, and facilitated proceedings.¹⁴⁷ A delegate from Paraguay, agreeing with Uruguay’s comments, emphasized, “Obviously, we have separation of powers in Paraguay,” yet Paraguay has a liaison judge who was appointed by the Supreme Court.¹⁴⁸

The United States was never explicit about the precise nature of the separation-of-powers problem, but the other countries’ responses suggest—rightly or wrongly—that the United States believed its Executive Branch could not appoint a liaison judge. Assuming this was the United States’ concern, the delegation was wrong to imply that the Executive could not now, or ever, appoint a liaison judge. As the discussion below illustrates, Congress has the power to appoint a judicial liaison, and it can delegate this power to the Central Authority. Arguably, Congress has already done so. The appointment of a liaison judge might raise other separation-of-powers issues, such as whether an Article III judge can have administrative functions or whether a judicial liaison encroaches too much on the Executive’s powers, but these concerns also have little merit as the discussion below demonstrates. In short, the United States’ response falsely implied that the United States could not designate an official judicial liaison.

Congress currently has the power to appoint a liaison judge and to obligate the Central Authority to work with this judge. Congress can create the position of liaison judge if it is necessary and proper to carry out the United States’ treaty obligations.¹⁴⁹ Congress’s power to appoint a liaison judge can be delegated to the U.S. Central Authority or to the judiciary. The Appointments Clause of the U.S. Constitution permits this.¹⁵⁰ Congress arguably has already delegated to the Central

¹⁴⁶ Notes of Proceedings, *supra* note 20, Nov. 6.

¹⁴⁷ *Id.* Nov. 7.

¹⁴⁸ *Id.* Nov. 7.

¹⁴⁹ See *supra* text accompanying notes 73–77.

¹⁵⁰ The Appointments Clause of Article II states,

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Department.

Authority the power to select a liaison judge through passage of ICARA. Section 11606 of ICARA allows the President to designate a federal agency as the U.S. Central Authority.¹⁵¹ That agency has the functions that are “ascribed to the Central Authority by the Convention and [ICARA],”¹⁵² and may enter into agreements with any entity in the United States to help it accomplish its responsibilities.¹⁵³ Article 7 of the Convention ascribes to Central Authorities the responsibility of “promot[ing] co-operation amongst the competent authorities in their respective state to secure the prompt return of children and to achieve the other objects of this Convention.”¹⁵⁴ Article 7(h) and (i) are also relevant. They say,

In particular, either directly or through any intermediary [the Central Authorities] shall take all appropriate measures . . .

. . .

- (h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;
- (i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

This language, coupled with the Congressional grant of authority, suggests that the U.S. Central Authority already has the power to appoint a liaison judge.¹⁵⁵

Several individuals at the Fifth Meeting suggested that the judiciary itself might take the initiative to appoint a liaison judge.¹⁵⁶ It is unlikely, however, that

U.S. CONST. art. II, § 2, cl. 2. *See* Morrison v. Olson, 487 U.S. 654, 680 (1988) (holding the Appointments Clause permits congressional authorization of “interbranch appointments,” in which an officer of one branch is appointed by officers of another branch).

¹⁵¹ 42 U.S.C. § 11606(a) (2006).

¹⁵² *Id.* § 11606(b).

¹⁵³ *Id.* § 11606(e) (“The United States Central Authority is authorized to make grants to, or enter into contracts or agreements with, any individual, corporation, other Federal, State, or local agency, or private entity or organization in the United States for purposes of accomplishing its responsibilities under the Convention and this chapter.”). *See id.* § 11608 (giving Central Authority the power to communicate with others as is necessary to implement the Convention with respect to a child).

¹⁵⁴ Hague Convention, *supra* note 1, art. 7.

¹⁵⁵ It might draft regulations guiding its discretion in this matter, since the agency may “issue such regulations as may be necessary to carry out its functions.” 42 U.S.C. § 11606(c).

¹⁵⁶ For example, a representative from the European Commission suggested Article 2 of the Convention includes the judiciary and would support such an act. Notes of Proceedings, *supra* note 20, Nov. 7. Article 2 of the Convention states, in relevant part, that “[c]ontracting States shall take all appropriate measures to secure within their territories the

the judiciary in the United States could designate an official liaison judge, absent a delegation of authority to do so by Congress¹⁵⁷ or a ratification of its action by the Executive (assuming the Executive currently has the necessary authority to appoint a liaison itself). Since the Convention is not self-executing in the United States,¹⁵⁸ and since the implementing legislation makes the Central Authority the official designate of the U.S. government in terms of the Convention,¹⁵⁹ the State Department would presumably need to forward the liaison judge's name in order for that person to have official status.¹⁶⁰

Conceivably, the United States' cryptic separation-of-powers objection might not have been referring to the appointment process. The separation-of-powers concern might have related to whether the appointment of a liaison judge would impermissibly infringe on the Article III powers of the judiciary or impermissibly diminish the Article I powers of the Executive (either because a judge is occupying a role reserved to the Executive or because the Executive only, and not Congress, can designate a judicial liaison). These potential concerns also lack merit.

An Article III judge could fill the role of liaison judge without violating separation-of-powers principles, even though the liaison judge has a non-adjudicatory function.¹⁶¹ *Mistretta v. United States*¹⁶² is instructive. There the U.S. Supreme Court held that Article III judges could have administrative or rulemaking duties that are "necessary and proper . . . for carrying into execution all the judgments which the judicial department has the power to pronounce."¹⁶³ Consequently, the Court held that Congress's creation of the U.S. Sentencing Commission did not violate separation-of-powers principles, even though that Commission has at least three federal judges among its seven members and promulgates sentencing guidelines.¹⁶⁴ In upholding the creation of the Sentencing

implementation of the objects of the Convention." Hague Convention, *supra* note 1, art. 2. See *supra* text accompanying notes 146–148.

¹⁵⁷ See U.S. CONST. art. III, § 2, cl. 2.

¹⁵⁸ See D. MARIANNE BLAIR & MERLE H. WEINER, FAMILY LAW IN THE WORLD COMMUNITY 41–45 (2003) (citing Frederic L. Kirgis, *International Agreements and U.S. Law*, ASIL INSIGHT, May 1997, <http://www.asil.org/insights/insigh10.htm>).

¹⁵⁹ 42 U.S.C. § 11606(a), (b).

¹⁶⁰ The Department of State was designated the Central Authority by virtue of an Executive Order. See Exec. Order No. 12,648, 53 Fed. Reg. 30,367 (Aug. 11, 1988).

¹⁶¹ I focus initially on whether an Article III judge could constitutionally fill the position and later turn to the issue whether a state judge could constitutionally fill the position. See *infra* note 201. As discussed below, these possibilities raise different constitutional concerns.

¹⁶² 488 U.S. 361 (1989).

¹⁶³ *Id.* at 389; see also *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 22 (1825) (holding that rulemaking power pertaining to the Judicial Branch may be "conferred on the judicial department"). The Court also noted that the Constitution itself does not prohibit such activities by federal judges. *Mistretta*, 488 U.S. at 398, 404.

¹⁶⁴ *Mistretta*, 488 U.S. at 408–09. The President appoints the members with the advice and consent of the Senate, and he selects the judges from among a list of six judges forwarded by the Judicial Conference. 28 U.S.C. § 991(a).

Commission, the Court recognized Madison's flexible approach to the separation-of-powers doctrine, reaffirming his statement that it "d[oes] not mean that these [three] departments ought to have no *partial agency* in, or no *control* over the acts of each other."¹⁶⁵ Rather, the Constitution was concerned with "encroachment and aggrandizement" of power by the branches;¹⁶⁶ separation of powers does not prevent "Congress from obtaining the assistance of its coordinate Branches."¹⁶⁷ As the U.S. Supreme Court stated in *J.W. Hampton, Jr., & Co. v. United States*, "the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government co-ordination."¹⁶⁸

The Court noted two particular dangers when Congress assigns judges nonjudicial functions: first, the Judicial Branch might be given "tasks that are more properly accomplished by [other] branches," and, second, the appointment might "impermissibly threaten[] the institutional integrity of the Judicial Branch."¹⁶⁹ These concerns mean that, as a general matter, "executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution."¹⁷⁰ However, the Court noted "significant exceptions" to this general rule.¹⁷¹ In this "twilight area,"¹⁷² Congress may give rulemaking authority, or other non-adjudicatory activities, to the Judicial Branch.¹⁷³ Congress has done so with respect to the Judicial Conference of the United States, the Rules Advisory Commission, and the Administrative Office of the U.S. Courts, the latter of which has responsibility for administrating the probation service.¹⁷⁴ In all of these instances, the judges "do not exercise judicial power in the constitutional sense of deciding cases and controversies, but they share the common purpose of providing

¹⁶⁵ *Mistretta*, 488 U.S. at 380–81 (citing THE FEDERALIST No. 47, at 325–26 (James Madison) (J. Cooke ed. 1961)).

¹⁶⁶ *Id.* at 382 (internal quotation marks omitted).

¹⁶⁷ *Id.* at 372.

¹⁶⁸ 276 U.S. 394, 406, 409 (1928) (holding that so long as Congress "shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power" and upholding Congressional act empowering the President to adjust duties on foreign goods pursuant to recommendation of Tariff Commission).

¹⁶⁹ *Mistretta*, 488 U.S. at 383 (citations omitted).

¹⁷⁰ *Id.* at 385 (citing *Morrison v. Olson*, 487 U.S. 654, 677 (1988) (holding that the Special Division's powers (a special court created by the Ethics in Government Act of 1978) were not in violation of Article III limits on the imposition of nonjudicial administrative duties on federal judges)).

¹⁷¹ *Id.* at 386.

¹⁷² *Id.*

¹⁷³ The Court made clear that its approach to nonadjudicatory activities was the same as its approach to judicial rulemaking: "[C]onsistent with the separation of powers, Congress may delegate to the Judicial Branch nonadjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary." *Id.* at 388.

¹⁷⁴ *Id.* at 388–89.

for the fair and efficient fulfillment of responsibilities that are properly the province of the Judiciary.”¹⁷⁵ “Because of their close relation to the central mission of the Judicial Branch, such extrajudicial activities are consonant with the integrity of the Branch and are not more appropriate for another Branch.”¹⁷⁶ The Court in *Mistretta* found the judges’ participation on the Sentencing Commission unobjectionable, since the judiciary’s participation on the Sentencing Commission was similar to the other situations in which the Judicial Branch had been assigned non-adjudicative functions.¹⁷⁷

Taking the Court’s second concern first, a judicial liaison would not threaten the institutional integrity of the Judicial Branch.¹⁷⁸ The administrative functions of a judicial liaison are consistent with judges’ responsibilities generally. Judges adjudicating Hague Convention petitions must sometimes have information about foreign legal systems in order to ensure the safe return of a child (or the accompanying parent). For example, judges may need information about how the requesting country protects children.¹⁷⁹ The office of judicial liaison might be a particularly appropriate mechanism for obtaining such relevant information since the parties may not have lawyers, the Central Authority may appear to be a biased source of information given its predisposition to ensure the return of children, and judges often feel most comfortable sharing information with other judges.¹⁸⁰

The liaison judge’s role could be structured so that none of the liaison judge’s functions (communication with the Central Authority, domestic judges, and foreign judges) are incompatible with the judiciary’s ethical obligations.¹⁸¹ The Special Commission recognized that “the principle of the separation of powers” might cause “the relationship between judges and Central Authorities [to] take different forms.”¹⁸² In this country, the liaison judge should be able to meet with the Central Authority to learn the Central Authority’s processes and then share this information with other judges. This type of communication does not threaten judicial independence because it is for purposes of “exchanging information, not imposing a course of action.”¹⁸³ A liaison judge should also be able to communicate with foreign or domestic judges regarding a particular case so long

¹⁷⁵ *Id.* at 389.

¹⁷⁶ *Id.* at 389–90.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ See The Honourable Judge Peter Boshier, *Direct Communication in the Context of the Hague Convention on the Civil Aspects of International Child Abduction: Positive Examples From New Zealand*, XI JUDGES’ NEWSL. 19 (2006), available at <http://www.hcch.net/upload/news2006.pdf> (giving examples from several cases).

¹⁸⁰ *Report on the Fifth Meeting*, *supra* note 9, ¶ 50.

¹⁸¹ See *supra* text accompanying note 134.

¹⁸² *2006 Conclusions and Recommendations*, *supra* note 21, §§ 1.6.4–1.6.5.

¹⁸³ *Report on the Fifth Meeting*, *supra* note 9, ¶ 53 (McGuinness, J.).

as proper procedural protections are in place.¹⁸⁴ The Permanent Bureau recommends procedures to protect the parties' due process rights,¹⁸⁵ and the UCCJEA, which permits domestic judicial communication, provides additional guidance.¹⁸⁶ Finally, the judiciary's independence is not impaired simply because the Executive may appoint the liaison judge.¹⁸⁷ After all, the routine appointment of administrative law judges by the Executive Branch does not give rise to legitimate claims of bias.¹⁸⁸

Just as the appointment of an Article III judge as a liaison judge would not impermissibly threaten the Judicial Branch's institutional integrity, neither would the appointment unconstitutionally encroach upon the Executive Branch's powers, although the liaison judge's activities would admittedly overlap with the Central Authority's activities.¹⁸⁹ The liaison judge's acts would be essentially ministerial,

¹⁸⁴ See *Report on the Fifth Meeting*, *supra* note 9, ¶ 191 (noting "judges rarely discuss the merits of a case but instead want to enquire about the law and procedures existing in another State").

¹⁸⁵ The 2006 Special Commission's recommendation listed "commonly accepted safeguards" that are used when direct judicial communication occurs. See *supra* note 134 (listing the safeguards).

¹⁸⁶ See, e.g., Unif. Child Custody Jurisdiction and Enforcement Act § 110, 9 U.L.A. 666–67 (1999).

¹⁸⁷ As the U.S. Supreme Court indicated in *Morrison v. Olson*, Congress can create the position in such a way as to eliminate that concern by ensuring that the liaison judge had no role in any cases being litigated. 487 U.S. 654, 655 (1988). In *Morrison*, the court evaluated the constitutionality of a Special Court, created by Congress, that appointed Special Prosecutors and defined their jurisdiction. 487 U.S. at 670–72. The Special Court was upheld because there was no "taint" that the independence of the Judiciary was compromised. *Id.* at 661, 674. The Act "gives the Special Division itself no power to review any of the actions of the independent counsel or any of the actions of the Attorney General with regard to the counsel. Accordingly, there is no risk of partisan or biased adjudication of claims regarding the independent counsel by that court." *Id.* at 683–84. Also, "the Act prevents members of the Special Division from participating in any judicial proceeding concerning a matter which involves such independent counsel." *Id.* (emphasis omitted).

¹⁸⁸ 5 U.S.C. § 3105 (2006) (permitting each agency to appoint as many administrative law judges as are necessary for designated proceedings). Statutory safeguards ensure the independence of administrative law judges (ALJs) from the agency that employs them. See *id.* § 7521 (directing that action may be taken against the administrative law judge for "good cause" after a determination by the Merit Systems Protection Board); *id.* § 554 (directing that the decision maker cannot be subject to supervision by an agency employee engaged in investigation or prosecution or receive advice from such a person). ALJs are expected to engage in impartial decision making. See *Barry v. Bowen*, 825 F.2d 1324, 1330 (9th Cir. 1987), and cases cited therein.

¹⁸⁹ Certain functions of a liaison judge are currently specified as functions of the National Center for Missing and Exploited Children, acting at the direction of the U.S. Central Authority, pursuant to federal regulation. See, e.g., 22 C.F.R. § 94.6 (j) (2007) ("Consult with appropriate agencies (such as state social service departments, the U.S. Department of Health and Human Services, state attorneys general) about possible

and the Supreme Court has indicated that these sorts of routine acts are not particularly worrisome from a constitutional perspective. In *Morrison v. Olson*, the Court upheld federal legislation that created a Special Court, whose judges, in turn, appointed special prosecutors and defined their jurisdiction.¹⁹⁰ Although the Court stated the general rule that “Article III ‘judicial Power’ does not extend to duties that are more properly performed by the Executive Branch,”¹⁹¹ the Court upheld the creation of the Special Division because the powers “do not impermissibly trespass upon the authority of the Executive Branch.” While the Special Division’s functions required it to exercise judgment and discretion, its powers were “essentially ministerial.”¹⁹² The functions were “not inherently ‘Executive,’” since they are “directly analogous to functions that federal judges perform in other contexts.”¹⁹³ Even the power to terminate the Special Prosecutor, while administrative and not typically “judicial,” was not a “significant judicial encroachment upon executive power.”¹⁹⁴

Morrison v. Olson also puts to rest another potential separation-of-powers issue: that Congress would usurp the Executive’s foreign affairs functions if Congress itself appointed the liaison judge. *Morrison* suggests that Congress could constitutionally make an appointment itself, especially if it gave the Executive the power to remove the liaison judge for “good cause.”¹⁹⁵ The Court in *Morrison* held that Congress did not unconstitutionally reduce the President’s authority to control prosecutorial powers wielded by the independent counsel,¹⁹⁶ even though the Act reduced “the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity.”¹⁹⁷ The Attorney General maintained several means of “supervising or controlling the [independent counsel’s] prosecutorial powers,” including the ability to remove for “good cause.”¹⁹⁸ In

arrangements for temporary foster care and/or return travel for the child from the United States”). Yet just because the Executive Branch chose to allocate some of those tasks to itself, or its designate, does not mean that the task must be performed by the Executive.

¹⁹⁰ 487 U.S. 654, 711 (1988).

¹⁹¹ *Id.* at 678 n.15. Regarding the Special Court’s ability to appoint the Special Prosecutor, the Court held that the Appointments Clause was “a source of authority for judicial action that is independent of Article III.” *Id.* at 678–79.

¹⁹² *Id.* at 681 (describing functions as including granting exceptions for the Attorney General’s preliminary investigation; referring matters to the independent counsel upon request; granting attorneys’ fees upon request to individuals who were investigated but not indicted by an independent counsel; deciding whether to release the counsel’s final report to Congress or the public; and, determining whether any protective orders should be issued).

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 682 (referring to the Special Court’s authority to terminate an independent counsel when his or her task is completed).

¹⁹⁵ *Id.* at 696.

¹⁹⁶ *Id.* at 693–94.

¹⁹⁷ *Id.* at 695.

¹⁹⁸ *Id.* at 696.

addition, the creation of a Special Court did “not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch.”¹⁹⁹ Consequently, Congress did not “impermissibly undermine” the powers of the Executive Branch or “disrupt[] the proper balance between the coordinate branches [by preventing] the Executive Branch from accomplishing its constitutionally assigned functions.”²⁰⁰ *Morrison* suggests that Congress could appoint a liaison judge directly, since Congress would not be aggrandizing itself at the expense of the Executive. Congress could insulate itself from any potential claim of aggrandizement by giving the Executive the power to remove for “good cause.”²⁰¹

The claim by the U.S. delegation that separation of powers prohibited the appointment of a liaison judge was a position at odds with U.S. case law. Perhaps the United States made this claim to divert attention away from the real reasons the United States opposed the idea, whatever those may have been. Perhaps the United States believes that a liaison judge will usurp the Central Authority’s authority and functions, harming either litigants or the Central Authority itself, even if the usurpation does not rise to the level of a constitutional problem.²⁰² The liaison judge’s own views about the Convention might influence policy in the United States, and the State Department might lack any effective control over the liaison judge’s dissemination of those views. The United States may worry about breaches of judicial protocol during direct judicial communication, or about increased due process challenges to judicial decisions because of such communication. Perhaps the United States fears that increased international communication between judges would cause delay or increase the work of the Central Authority. Delegates at the Special Session could not assess the merit of any of these potential concerns since the United States did not articulate any of them as its reasons for refusing to appoint a liaison judge.

¹⁹⁹ *Id.* at 694.

²⁰⁰ *Id.* at 695 (citations omitted).

²⁰¹ The appointment of a liaison judge might create a potential constitutional problem if Congress or the Executive selected a state law judge to fill the role of liaison, but even this concern seems rather minor. Such an appointment *might* violate principles of federalism. *Printz v. United States*, 521 U.S. 898, 914 (1997) (holding that the federal government cannot commandeer state executive officials for its own purposes). Yet *Printz* may have little applicability to the liaison judge context, since a liaison judge would be a state judicial officer and *Printz* itself differentiated between judges and executive officers. *Id.* at 907–08. The Court noted that the federal government historically imposed obligations on state judicial officers by statute, but the lack of statutes imposing obligations on state executive actors suggested an “absence” of federal power to impose obligations on executive officers. *Id.* at 916. As an aside, the current Administration might agree that a state court judge could serve as a liaison judge because a state judge was part of the U.S. delegation to the Fifth Meeting and in that capacity had administrative functions. Judge Gonzalez, a circuit court judge from La Cross, Wisconsin, was a member of the U.S. delegation. Of course, if Congress selected an Article III judge to fill the role of liaison judge, this federalism concern would disappear.

²⁰² See *Report on the Fifth Meeting*, *supra* note 9, ¶ 190 (noting comment by expert that liaison judges “could encroach on the work of the Central Authorities”).

3. Federalism and Consent Forms for Travel

The United States used federalism and separation of powers to divert attention away from the U.S. position on other policy initiatives. The Permanent Bureau proposed developing a standardized parental consent form for international travel by a child.²⁰³ Part III of the *Guide to Good Practice*, approved for publication by the General Affairs Committee, stated that such a form was “beneficial as it is better, particularly for the child involved, to seek to prevent the initial removal through domestic law, than to rely subsequently on international law to seek return of a child.”²⁰⁴ The discussion brought out various problems with such a form,²⁰⁵ but many countries indicated that they already used one and that they desired development of a model.²⁰⁶ In the final Conclusions and Recommendations, the Permanent Bureau was “requested to continue to explore the feasibility and the development of a standardised or recommended permission form.”²⁰⁷

Half-truths characterized the United States’ response to this idea. In its answer to a questionnaire asking if the Permanent Bureau should develop a form, the United States simply stated, “While such a form may serve as a model in the United States, given our multi-state family law system, it is unlikely that it will be widely adopted here.”²⁰⁸ At the Special Session, the United States cited separation of powers and federalism as reasons that the form would be problematic, and specifically claimed that the United States could not take federal measures.²⁰⁹ It

²⁰³ *Report on the Fifth Meeting*, *supra* note 9, ¶ 74.

²⁰⁴ See Hague Conference on Private International Law, *Guide to Good Practice Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Pt. III—Preventive Measure, § 1.2 (2005) [hereinafter *Guide to Good Practice*, Pt. III].

²⁰⁵ See Hague Conference on Private International Law, *Report of Meeting No. 7, Special Commission on the Civil Aspects of International Child Abduction* 30 Oct.–9 Nov. 2006, at 1–2 (Nov. 7, 2006) [hereinafter *Report of Meeting No. 7*] (mentioning that a signed form or absence of one was not absolute proof that removal was lawful or unlawful, that a form might complicate the defenses under Article 13 or the effect of court orders allowing or prohibiting removal, and that the form might have marginal utility if border controls are weak); *see also Report on the Fifth Meeting*, *supra* note 9, ¶¶ 75, 76 (noting, *infra alia*, potential duress or undue influence with the use of such a form).

²⁰⁶ *Report on the Fifth Meeting*, *supra* note 9, ¶ 78 (“Generally experts were in favour of a non-mandatory standardised parental consent form for a child to travel out of the jurisdiction.”). This sentiment was consistent with responses received by the Permanent Bureau before the meeting regarding whether it should develop such a form. *See Collated Responses*, *supra* note 5, at 431 (indicating support from Austria, Canada, China, Finland, Ireland, Israel, Malta, Portugal, Slovakia, Sweden). Jurisdictions that already require parental consent prior to a child’s removal differ over who must consent. Some countries require the consent of both parents irrespective of whether one parent has sole custody and is unmarried or divorced. *Report of Meeting No. 7*, *supra* note 205, § 1.2.2.

²⁰⁷ *2006 Conclusions and Recommendations*, *supra* note 21, § 1.2.3.

²⁰⁸ *Collated Responses*, *supra* note 5, at 440.

²⁰⁹ *Notes of Proceedings*, *supra* note 20, Nov. 1.

also mentioned that a form might not be useful in the United States since the United States has no system to control exit at its borders.²¹⁰

The United States' answer suggested that each of the fifty states must decide whether a consent form should be adopted. The United States failed to mention that the federal government could require such a form for international travel regardless of individual states' actions. As the U.S. delegation itself noted, the federal government has already imposed on the states several measures aimed at the prevention of child abduction,²¹¹ including the criminalization of child abduction,²¹² and the adoption of a system of passport control.²¹³ The constitutional provisions that permitted Congress to enact the criminal prohibitions and the passport controls would also permit it to adopt a consent form.

(a) *Foreign Commerce Clause*

The United States' reference to federalism in its answer is perplexing, given Congress's power under the foreign commerce clause.²¹⁴ Perhaps the United States was suggesting that Congress's foreign commerce power was insufficient because parental consent forms address a family law issue, and family law issues tend to fall to the states under the Tenth Amendment to the U.S. Constitution. This belief may stem from the Supreme Court's decision in *United States v. Morrison*, where the Supreme Court struck down Congress's attempt to create a civil cause of action to address gender-based violence. The Court held that Congress could not "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."²¹⁵ It continued, "The Constitution requires a distinction between what is truly national and what is truly local. . . .

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² See 18 U.S.C. § 1204 (2006) (making it a crime to remove or attempt to remove a child if done with the intent to "obstruct the lawful exercise of parental rights"); *id.* § 1204(b)(2)(A) (defining "parental rights" as "the right to physical custody of the child," including visitation rights).

²¹³ See 22 C.F.R. § 51.28 (2008). Except as specifically provided for in the Code of Federal Regulations, both parents must execute an application for, or renewal of, a passport if the child is under the age of sixteen. *Id.* § 51.28(a)(2). Some exceptions exist, such as if the parent provides evidence that the person has sole custody of the child or the other parent consents in a notarized affidavit, *id.* § 51.28(a)(3)(i), (ii), or if there are "exigent or special family circumstances," *id.* § 51.28(a)(5). The Department of State can deny a passport if a court order grants sole custody to the objecting parent, establishes joint legal custody, or prohibits the child's travel without the permission of the court or both parents. *Id.* § 51.28(a)(3)(ii)(G). The Department of State also can deny a passport if the court order requires both parents' or the court's permission for important decisions. *Id.* § 51.28(c)(2). Among other things, parents can ask to be notified if the other parent seeks a passport for their child. The parent can then try to show a passport should not issue. *Id.* § 51.28(c)(1). See generally Notes of Proceedings, *supra* note 20, Nov. 1; see also *infra* note 263.

²¹⁴ See *supra* text accompanying notes 78–87.

²¹⁵ *United States v. Morrison*, 529 U.S. 598, 617 (2000).

Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.”²¹⁶

If the United States was thinking about this case when it mentioned federalism, its concern was unfounded. *Morrison* is not an obstacle to Congressional adoption of a consent form to stop international child abduction. First, *Morrison* defines the federal government’s power under the domestic Commerce Clause, not the foreign Commerce Clause.²¹⁷ Second, even if *Morrison* were applicable, the outcome would differ. When Congress passed the civil cause of action at issue in *Morrison*, Congress justified its enactment by noting the effects of violence against women on interstate commerce. The statute itself, however, did not require that the plaintiff prove the respondent traveled in interstate commerce. Consequently, *Morrison* solely addressed Congress’s power under the third *Lopez* category²¹⁸—substantial affect on commerce²¹⁹—and left untouched Congress’s power to regulate the “use of the channels of interstate commerce” and “persons or things in interstate commerce.”²²⁰ These other two categories also define Congressional power under the Commerce Clause,²²¹ and would independently enable Congress to adopt a consent form. As the Ninth Circuit recently said when upholding a conviction under the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (PROTECT Act) (an act that prohibits travel abroad for purposes of having sex with a minor), “Congress legitimately exercises its authority to regulate the channels of commerce where a crime committed on foreign soil is necessarily tied to travel in foreign commerce, even where the actual use of the channels has ceased.”²²²

A couple of examples demonstrate the breadth of Congress’s Commerce Clause power pursuant to the “use of channels” and “persons in interstate commerce” categories, even for areas of traditional state authority. For example, in *Cleveland v. United States*, a pre-*Morrison* case, the Supreme Court upheld a provision of the Mann Act that prohibited polygamous Mormons from transporting their non-legal wives across state lines for the purpose of cohabiting with them.²²³ The Court rejected petitioners’ argument that Congress could not regulate marriage because the regulation of marriage was within the police powers of the states. The Court emphasized that “the power of Congress over the instrumentalities of

²¹⁶ *Id.* at 617–18.

²¹⁷ See *United States v. Clark*, 435 F.3d 1100, 1116 (2006) (noting the domestic commerce clause analysis is a “guide, not a straight jacket”).

²¹⁸ *United States v. Lopez*, 514 U.S. 549 (1995).

²¹⁹ *Morrison*, 529 U.S. at 609–13.

²²⁰ *Id.*

²²¹ *Lopez*, 514 U.S. at 558–59.

²²² *Clark*, 435 F.3d at 1116.

²²³ 329 U.S. 14, 16 (1946). The Mann Act was originally aimed at prohibiting the white slave trade, but has been extended to cover the transportation of women across state lines for any immoral (sexual misconduct) purpose. *Id.* at 19.

interstate commerce is plenary; it may be used to defeat what are deemed to be immoral practices; and the fact that the means used may have ‘the quality of police regulations’ is not consequential.”²²⁴

The more recent case of *United States v. Bredimus* suggests that the holding of *Cleveland* is unchanged by *Morrison*.²²⁵ In *Bredimus*, the Fifth Circuit rejected a post-*Morrison* constitutional challenge to the current iteration of the Mann Act.²²⁶ Because the statute explicitly regulates transportation across state lines,²²⁷ the Fifth Circuit thought the proper Commerce Clause analysis was under “the use of channels of interstate commerce,”²²⁸ and not under “substantial effects.”²²⁹ The court emphasized that the *Lopez* categories were distinct; an analysis under “use of channels” did not require that the regulated activity “substantially affects . . . commerce.”²³⁰ Consequently, Congress validly regulated U.S. citizens’ airline travel in order to deter sexual misconduct in foreign nations regardless of the aggregate impact sexual misconduct in foreign nations has on commerce.²³¹ Judges in other cases have reached similar conclusions on topics as diverse as the enforcement of child support,²³² the regulation of child pornography,²³³ and the criminalization of domestic violence.²³⁴

²²⁴ *Id.* at 19. Congress uses the Commerce Clause to regulate other areas of traditional state authority. For example, the Hobbs Act makes interference with interstate commerce by robbery or extortion a federal crime. 18 U.S.C. § 1951 (2006). The statute expressly extends federal jurisdiction over robbery to the fullest extent permissible under the Commerce Clause. *Id.* § 1951(b)(3). This act has been upheld against a federalism challenge. *See United States v. Bailey*, 990 F.2d 119, 126 (4th Cir. 1993) (“[T]he Tenth Amendment does not prohibit the federal government from enforcing its laws, even when there are state laws addressing the same criminal act.”).

²²⁵ 352 F.3d 200, 210–11 (5th Cir. 2003).

²²⁶ *Id.* at 204.

²²⁷ *Id.* at 210–11. The Mann Act is now codified at 18 U.S.C. §§ 2421–24. It prohibits the use of interstate and foreign commerce in order to engage in prostitution, or in any sexual misconduct. *Id.* § 2421.

²²⁸ *Bredimus*, 352 F.3d at 207.

²²⁹ *Id.* at 205–06.

²³⁰ *Id.* at 207 (emphasis omitted).

²³¹ *Id.* at 202. The “substantially affects . . . commerce” analysis was reinvigorated after *Gonzales v. Raich*, 545 U.S. 1, 17 (2005), where the court reaffirmed its holding in *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942). The *Raich* Court discussed *Lopez* and *Morrison* and emphasized that Congress did not regulate any economic activity in those cases. *Raich*, 545 U.S. at 3. In contrast, the activities regulated by the Controlled Substances Act at issue in *Raich* “are quintessentially economic” since it regulates “the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market.” *Id.* at 25.

²³² In *United States v. Kukafka*, the Third Circuit held that Congress could regulate “persons” who intentionally avoid child support payments by traveling across state lines. 478 F.3d 531, 536–37 (3d Cir. 2007). Also, an interstate payment for child support was a “thing” in interstate commerce. *Id.* Because the Deadbeat Parents Act regulated “persons or things in interstate commerce,” the act was still constitutional after *Morrison*. *Id.* at 537. The *Bredimus* court also noted that various cases that upheld Congressional authority in the

Just as Congress can regulate the use of channels of commerce to prevent sexual misconduct, nonsupport of children, and domestic violence, Congress can regulate the use of channels of commerce to prevent child abduction. Requiring parental consent for a minor's international travel would fall squarely within this power.

(b) *The Power to Limit Exit*

Congress has an additional source of power, apart from the Commerce Clause, that allows it to limit aliens' and citizens' exit from the United States. While the exact source of this power is debatable,²³⁵ Louis Henkin notes that the Supreme Court relies upon the foreign affairs power to support Congressional action with respect to the travel of aliens and "American citizens which might affect foreign relations."²³⁶ Congress could invoke this power and require that parents sign a consent form before any child, alien or citizen, leaves the United

family law area were unaffected by *Morrison* because the courts analyzed statutes under the first *Lopez* category, channels of commerce. 352 F.3d at 205–06.

²³³ See also *United States v. MacEwan*, 445 F.3d 237, 244–45 (3d Cir. 2006) (stating that regulation of child pornography implicates channels of interstate commerce and "things" in interstate commerce, thus *Morrison* has no impact on Congress's power to regulate child pornography over the internet).

²³⁴ See *United States v. Page*, 167 F.3d 325, 334 (6th Cir. 1999) ("Because the triggering factor of [18 U.S.C.] § 2261(a)(2) is the movement of the victim across state lines, this statute falls in the first [*Lopez*] category and is a valid exercise of Congress's power to regulate the 'use of channels of interstate commerce.'"); *United States v. Von Foelkel*, 136 F.3d 339, 341 (2d Cir. 1998) (Violence Against Women Act of 1994 provision criminalizing violations of protection orders that involve the use of interstate commerce held constitutional).

²³⁵ The exact source of Congress's power over passports is arguably ambiguous. In one case, for example, Justice Black merely attributed the power to limit exit via passports to art. I, § 1, which provides that "All legislative Powers herein granted shall be vested in a Congress of the United States." *Zemel v. Rusk*, 381 U.S. 1, 20 (1965) (Black, J., dissenting) ("I have no doubt that [U.S. CONST. art I, § 1] grants Congress ample power to enact legislation regulating the issuance and use of passports for travel abroad.") (internal quotation marks omitted). See *Kent v. Dulles*, 357 U.S. 116, 122–23 (1958); *Briehl v. Dulles*, 248 F.2d 561, 567 (D.C. Cir. 1957), *rev'd on other grounds* 357 U.S. 116 (1958). Apart from the foreign affairs power, see *infra* note 236, Congress's power may stem from its authority to "establish a uniform Rule of Naturalization" and citizenship. U.S. CONST. art. I, § 8, cl. 4. *Kent v. Dulles* is cited in the U.S.C.A.'s annotation for this clause. Passports help distinguish U.S. citizens from aliens at U.S. borders. See *Haig v. Agee*, 453 U.S. 280, 292–93 (1981).

²³⁶ LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 26 (1972); see also *id.* at 16–18 (explaining that the Constitution doesn't give the power to conduct foreign affairs to any particular federal branch, but the Supreme Court has held that the federal government has such power implicitly).

States. Failure to have the consent form signed could invalidate both the child's passport and the passport of the parent transporting the child.²³⁷

The Executive also has the ability to require a signed consent form as a prerequisite to a minor's international travel, either pursuant to its own foreign affairs power or powers delegated by Congress. Congress has given the President the power to enact reasonable rules related to aliens' departure from the United States.²³⁸ Passports can be used to limit citizens' exit from the United States.²³⁹ Congress has delegated responsibility for passports to the President,²⁴⁰ who in turn has delegated that power to the Secretary of State.²⁴¹ The current statutes governing passports appear broad enough to permit the Executive to adopt a

²³⁷ The logistics of how this would be accomplished is outside the scope of this Article.

²³⁸ See 8 U.S.C. § 1185(a)(1) (2006) ("Unless otherwise ordered by the President, it shall be unlawful . . . for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe.").

²³⁹ See *id.* § 1185(b) (making it "unlawful" in most situations for a U.S. citizen to depart from the United States unless he "bears a valid United States passport"); *see also Haig*, 453 U.S. at 293 (stating that the only means by which an American can lawfully leave the country or return to it is with passport). *See Kent*, 357 U.S. at 129 ("[T]he right of exit is a personal right included within the word 'liberty' as used in the Fifth Amendment. If that 'liberty' is to be regulated, it must be pursuant to the lawmaking functions of the Congress."); Comment, *Authority of Secretary of State to Deny Passports*, 106 U. PA. L. REV. 454 & n.1 (1958) (citing history of needing passports in various situations since 1815 and noting that "[s]ince 1941 it has been unlawful for a U.S. citizen to leave the Western hemisphere without a passport"). *Kent* rejected the notion that Congress delegated authority to the Secretary of State to restrict issuance of passport to Communists when "in 1952 it made a passport necessary for foreign travel and left its issuance to the discretion of the Secretary of State." *Id.* at 128.

²⁴⁰ 22 U.S.C. § 211a; *see also Regan v. Wald*, 468 U.S. 222, 232–33 (1984) (discussing President Reagan's ban on travel to Cuba pursuant to a grandfather clause contained in the International Emergency Economic Protection Act). In *Kent*, the Court acknowledged the validity of Executive policies that refuse passports to applicants "participating in illegal conduct." 357 U.S. at 127. In *Zemel*, the Court cited national security considerations as justifying the Secretary of State's restriction on travel to Cuba. 381 U.S. at 15–16.

²⁴¹ *See Exec. Order 11295*, 31 C.F.R. 10,603 (1966). The Secretary of State, if authorized by law, can designate a passport as restricted for travel. 22 U.S.C. § 211a; *see also Zemel*, 381 U.S. at 13 (holding that Secretary of State had power to unilaterally restrict travel to Cuba based on foreign policy concerns by refusing to validate U.S. passports for travel to certain areas); *Boudin v. Dulles*, 136 F. Supp. 218, 221–22 (D.D.C. 1955) (upholding Secretary of State's authority to make reasonable classifications of person to be denied passports, but Secretary's denial of passport to applicant because he was a communist violated due process where applicant was not allowed to know of evidence because it was confidential).

consent form.²⁴² A recent regulation (that permits denying a passport to an applicant who is an abducted child) suggests that the Executive believes it has the power to enact substantive rules related to abduction.²⁴³ Yet, if existing statutes prove insufficient for some reason,²⁴⁴ Congress could always enact the necessary authorizing legislation. Congress itself has required that passports be denied in a wide range of situations, including when the applicant is a convicted drug offender.²⁴⁵ Congress could make it explicit that the passports of both a child and the parent accompanying the child are invalid unless two parents have signed the consent-to-travel form.

²⁴² See 22 U.S.C. § 211a (giving the President broad discretion to issue rules); 22 U.S.C. § 213 (requiring that an applicant give “a true recital of each and every fact” required by law, or rules, to be stated).

²⁴³ See 22 C.F.R. § 51.60(e) (2008). The regulation states,

The Department may refuse to issue a passport, except a passport for direct return to the United States, in any case in which the Department determines or is informed by a competent authority that the applicant is a minor who has been abducted, wrongfully removed or retained in violation of a court order or decree and return to his or her home state or habitual residence is necessary to permit a court of competent jurisdiction to determine custody matters.

Id. The new regulations also prohibit the Department from issuing a passport if the applicant is “in arrears of child support.” See 22 C.F.R. § 51.60(a)(2).

²⁴⁴ It is unclear from the legislative history whether Congress intended to give the Executive Branch the authority to promulgate substantive restrictions. See Comment, *supra* note 239, at 460 (suggesting that the “[l]egislative history of the 1926 statute gives no indication as to whether Congress intended to confer power on the Secretary to prescribe substantive eligibility requirements for a passport or whether it merely intended to confer power to establish appropriate procedures for the issuance of passports”). For many years, the Secretary of State claimed he had the authority to restrict the issuance of a passport to anyone who would use it “to further an unlawful or improper purpose.” See 3 J.B. MOORE, INTERNATIONAL LAW DIGEST § 512, at 920 (1906); see also 3 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW § 268, at 499 (1942). Department of State regulations said that a passport “shall be refused to a person when it appears to the satisfaction of the Secretary of State that the person’s activities abroad would: (a) Violate the laws of the United States; (b) be prejudicial to the orderly conduct of foreign relations; or (c) otherwise be prejudicial to the interests of the United States.” See 22 C.F.R. § 51.136 (1966). Professor Thomas Ehrlich wrote an article critical of the broad provision. Thomas Ehrlich, *Passports*, 19 STAN. L. REV. 129, 137 (1966). The provision has subsequently been eliminated. Yet the regulations today, while narrower in breadth, assume the ability to impose substantive eligibility requirements. The Department of State can deny a passport for several reasons, see 22 C.F.R. §§ 51.60, 51.61 (2008), and can revoke a passport for the same reasons, see 22 C.F.R. §§ 51.62 (2008). Such provisions seem acceptable under *Zemel*, 381 U.S. at 17–18 (indicating that the Executive could refuse to validate passports for travel to Cuba under authority given in the Passport Act of 1926).

²⁴⁵ See 22 U.S.C. § 2714 (a)(1) (2006) (requiring that a convicted drug offender be denied a passport if the person crossed an international border in committing the offense).

Although separation of powers and federalism need not preclude the adoption of consent forms in the United States, practical considerations may make the proposal unacceptable. The U.S. delegation expressed concern about the lack of exit control in the United States, and effectiveness is a legitimate consideration. However, the United States exaggerated when it said that the United States lacks any exit control.²⁴⁶ Commercial airlines and boats, for example, are required by the Enhanced Border Security and Visa Entry Reform Act of 2002 to provide U.S. border officers with manifest information, including passport information, for each passenger prior to departure,²⁴⁷ including for U.S. citizens, U.S. lawful permanent residents and foreign nationals.²⁴⁸ The United States could expand screening to include verification of a consent form.²⁴⁹ In addition, the Department of Homeland Security is working on biometric exit control that would be implemented with the cooperation of commercial airlines.²⁵⁰ Since millions of individuals depart for

²⁴⁶ I am assuming the United States was referring to practical “on the ground” exit control as opposed to exit control through passports, discussed *supra* Part II.B.3.b.

²⁴⁷ See 8 U.S.C. § 1221 (b), (c); APIS Final Rule, 70 Fed. Reg. 17,820 (Apr. 7, 2005); see also 49 U.S.C. § 44901 (authorizing screening passengers and property); 49 U.S.C. § 44902 (authorizing refusal to transport passengers and property).

²⁴⁸ See APIS Final Rule, 70 Fed. Reg. at 17,820; see also U.S. Customs and Border Protection, Advance Passenger Information System (APIS) Documentation Submission Requirements for Arrival into and Departure from the United States of America, available at http://www.cbp.gov/linkhandler/cgov/travel/inspections_carriers_facilities/apis/apis_requirements.ctt/apis_requirements.pdf (last visited March 26, 2008) (setting forth the documentation requirements for arrival and departure from the United States for U.S. citizens, permanent residents, and nonimmigrant aliens); U.S. Customs and Border Protection, Advance Passenger Information System (APIS) Requirements for Non-Immigrant Aliens Departing the U.S. Following Implementation of the Western Hemisphere Travel Initiative (WHTI) for Air Travelers (Apr. 16, 2007), available at http://www.cbp.gov/xp/cgov/travel/inspections_carriers_facilities/apis/apis_departure_req.xml (last visited Mar. 26, 2008) (citing regulations of the Departments of Homeland Security and State implementing WHTI for air transportation). The requirement for U.S. citizens traveling to Canada was temporarily loosened in June 2007 due to the processing times for passports. See U.S. Customs and Border Protection, U.S. Citizens with Pending Passport Applications Allowed Temporary Travel Flexibility Within Western Hemisphere (June 8, 2007), available at http://www.cbp.gov/xp/cgov/newsroom/news_releases/archives/2007_news_releases/062007/06082007.xml (last visited Mar. 26, 2008). Legislation was introduced in February to make travel in the Western hemisphere easier for U.S. citizens. For example, the legislation contains a pilot project to see if a driver’s license might not work for land and sea travel. See generally Protecting American Commerce & Travel Act of 2007, H.R. 10614, 110th Cong. (2007).

²⁴⁹ See, e.g., Gilmore v. Gonzales, 435 F.3d 1125, 1140 (9th Cir. 2006) (upholding identification requirement to board aircraft against constitutional right to travel, due process, and Fourth Amendment challenges).

²⁵⁰ See Press Release, Office of the Press Sec’y, US-VISIT Moves Out of Biometric Exit Pilot Phase (May 4, 2007), available at http://www.dhs.gov/xnews/releases/pr_1178549052332.shtml.

international travel through U.S. airports,²⁵¹ many abductors might very well be caught by a system implemented at the airports.

However, effectiveness should not be measured solely by whether government agents check for the consent form or require others to do so. First, the airlines or other carriers might want to see such a form before transporting a child.²⁵² The form might help ward off potential liability claims against those carriers for aiding and abetting custodial interference.²⁵³ The form might also further the transportation industry's own desire, as a moral matter, to thwart abduction. The Permanent Bureau has consulted the International Civil Aviation Organization and "transport carriers may, in the future, require consent forms from parents before transporting a child."²⁵⁴ Second, a consent form might deter abduction by informing a would-be abductor that the other parent's consent is required for travel. Third, the United States could threaten the revocation of the parent's passport if a parent and child traveled internationally without first submitting to the Central Authority the consent form and later a Hague petition for child abduction were instituted. The United States has previously revoked passports when travel occurred contrary to a passport restriction.²⁵⁵ Finally, and most importantly, countries may require a signed consent form for parents who try to enter a country with a child. Overall, therefore, the United States' concern about effectiveness is not very convincing.

What else might explain the United States' hostility to a standardized form? Again, various possibilities exist. For example, perhaps the United States recognizes that there would be great political opposition to a consent form. A consent form would constitute a dramatic change in the freedom parents in the United States now have to travel internationally with their children. Currently few (if any) states require that a parent obtain permission from the other parent merely to travel with a child, whether to another state or country, unless required by a court order or an agreement between the parties. Preapproval may not even be required for a permanent relocation by a custodial parent, although notice may be

²⁵¹ See Office of Travel and Tourism Industries, U.S. Citizens Air Traffic to Overseas Regions, Canada & Mexico 2007, available at <http://tinet.ita.doc.gov/view/m-2007-0-007/index.html> (showing 30,973,513 airline trips in 2006).

²⁵² Sarah Armstrong, *Preventing International Child Abduction—The Guide to Good Practice and A Standardised Consent Form for International Travel*, XI JUDGES' NEWSL. 73, 76 (2006), available at <http://www.hcch.net/upload/news2006.pdf>.

²⁵³ See Streeter v. Executive Jet Mgmt., No. X010201794815, 2005 WL 4357633, at *6 (Conn. Super. Ct. Nov. 10, 2005) (awarding \$27 million against airline for interference with mother's custodial relations by aiding & abetting father's abduction of child).

²⁵⁴ Report on the Fifth Meeting, *supra* note 9, ¶ 81, at 33.

²⁵⁵ See Carol F. Salans & Richard A. Frank, *Passports and Area Restrictions*, 20 STAN. L. REV. 839, 846–47 (1968) (reporting that between 1952 and 1968 there were 865 known instances where a person went to a prohibited area, and that between 1957 and 1967 the government withdrew or denied passports in 276 cases because of that travel).

required.²⁵⁶ Consequently, a proposal to adopt a consent form might generate opposition from various groups, including feminists and libertarians. The United States might not think the political battle is worth fighting.

The U.S. delegation might also fear that the form would be subject to a slew of constitutional challenges based on alleged violations of the right to travel, equal protection, and due process. In *Kent v. Dulles*, the Supreme Court recognized that international travel was “part of the liberty of which the citizen cannot be deprived without due process of law under the Fifth Amendment.”²⁵⁷ A constitutional challenge might not succeed since the freedom to travel internationally receives less constitutional protection than the freedom to travel interstate,²⁵⁸ and constitutional arguments in the relocation context have been generally unsuccessful.²⁵⁹ On the other hand, the existence of private remedies, such as provided for by the Uniform Child Abduction Prevention Act (UCAPA), make the need for governmental restrictions particularly suspect. As the Supreme Court said in *Zemel v. Rusk*, “the requirements of due process are a function not only of the

²⁵⁶ See, e.g., *Silbaugh v. Silbaugh*, 543 N.W. 2d 639, 641 (Minn. 1996) (explaining the presumption that removal is permitted); *Zimmer v. Zimmer*, No. 00AP-383, 2001 WL 185356, at *2 (Oh. Ct. App. Feb. 27, 2001) (holding relocation statute RC 3109.051(G)(1) did not require permission to relocation, only notice). But see, e.g., *Fredman v. Fredman*, 960 So.2d 52, 56 (Fl. Dist. Ct. App. 2007) (holding that fundamental right to travel was not violated by requiring a court order). The need to give notice is found in various model acts; once notice is given the noncustodial parent may file suit (for example, to change custody), which in turn requires the custodial parent to justify the relocation. See AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.17(2) & cmt. c (2002); Am. Acad. of Matrimonial Lawyers, *Perspectives on the Relocation of Children*, 15 J. AM. ACAD. MATRIMONIAL L. 1, § 101 cmt. (1998). Even if custodial parents do not technically need to obtain permission to depart, the fear that relocation will be seen as an interference with visitation (contempt) or an unfriendly action justifying a change of custody gives custodial parents an incentive to seek permission ahead of time.

²⁵⁷ 357 U.S. 116, 125 (1958); see also *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1438–39 (9th Cir. 1996) (suggesting regulations affecting international travel will be subject to a due process analysis).

²⁵⁸ *Haig v. Agee*, 453 U.S. 280, 306–07 (1981) (“The constitutional right of interstate travel is virtually unqualified. . . . By contrast the ‘right’ of international travel has been considered to be no more than an aspect of the ‘liberty’ protected by the Due Process Clause of the Fifth Amendment. As such this ‘right’ . . . can be regulated within the bounds of due process.” (citing *Califano v. Torres*, 435 U.S. 1, 4 n.6 (1978) (suggesting that freedom to travel internationally is tempered by the U.S. foreign policy and security concerns, which are of “great importance,” and is less protected than the right to interstate travel))). Congressional limits on international travel need only advance a rational or, at most, an important reason. See *Haig*, 453 U.S. at 306 (“Revocation of a passport undeniably curtails travel, but the freedom to travel abroad with a ‘letter of introduction’ in the form of a passport issued by the sovereign is subordinate to national security and foreign policy considerations; as such, it is subject to reasonable governmental regulation.”).

²⁵⁹ See Merle H. Weiner, *Inertia & Inequality: Reconceptualizing Disputes Over Parental Relocation*, 40 U.C. DAVIS L. REV. 1747, 1823–24 (2007).

extent of the governmental restriction imposed, but also of the extent of the necessity for the restriction.”²⁶⁰ At the Fifth Meeting, a delegate from the European Commission made a similar point, concluding that it would be difficult to adopt such a form in the European Union because it would restrict freedom. As the delegate asked, “Is this a private matter or does it resonate in public law?”²⁶¹ The mere fact that the United States might be embroiled in litigation all over the country regarding the constitutionality of the form must have given the United States pause, regardless of the eventual outcome of such litigation.

The United States might also have opposed the idea for substantive reasons. A consent form unfairly undermines a custodial parent’s autonomy by giving the noncustodial parent a say over matters for which he or she has no legal right to be heard. It can cause inconvenience and delay, and an undue burden for parents. Some parents routinely travel abroad with their children and requiring consent for each trip would impose considerable hardship. For some parents, the form would create an occasion for contention where previously none existed. In addition, such a form might undermine the balance struck in the Hague Convention itself, by giving noncustodial parents the right to have their children returned even if they only have rights of access. A parent who has a right to withhold consent on a form may be seen as having a “right of custody,” a predicate to being able to force the return of the child.²⁶²

Perhaps the U.S. delegation thought that a consent form would provide little protection for those parents most at risk of having their children abducted. The United States already limits the ability of only one parent to obtain a passport for a child, and the government has established a system whereby a parent can be notified when the other parent applies for a passport for the child.²⁶³ Additionally, courts in the United States already have the power to impose travel restrictions on parents for the benefit of children. In fact, the National Conference of Commissioners on Uniform State Law (NCCUSL) crafted a new model act, UCAPA, to make this power more apparent. UCAPA permits restrictions on travel

²⁶⁰ *Zemel v. Rusk*, 381 U.S. 1, 14 (1965) (discussing how the United States determined that travel between Cuba and other countries in the West was important to spreading Communist doctrine).

²⁶¹ Notes of Proceedings, *supra* note 20, Nov. 1. Professor Ehrlich asked a similar question decades ago in the context of denying passports to minors when one or both parents object to their travel, “[W]hy should the Government be involved in the restraint of his foreign travel any more than his domestic travel? If a guardian considers that travel should be limited, he has the necessary means to enforce his views.” Ehrlich, *supra* note 242, at 141.

²⁶² Hague Convention, *supra* note 1, art. 3.

²⁶³ See 22 C.F.R. § 51.28; see also U.S. Department of State, The Children’s Passport Issuance Alert Program, http://travel.state.gov/family/abduction/resources/resources_554.html (last visited March 28, 2008).

when there is a risk of abduction.²⁶⁴ For parents entitled to this remedy, a consent form would achieve little.

The practical and policy considerations set forth above may, or may not, have influenced the U.S. delegation's position. State parties and others can only guess at the United States' true reasons for opposing the consent form. The United States' refusal to discuss these issues impoverished debate about the forms. After all, the United States may have been able to convince other countries that a consent form is a bad idea if it had articulated these concerns instead of invoking references to separation of powers and federalism.

4. Federalism and Divergent Interpretations of the Convention

The U.S. delegation cited federalism as an impediment to still another reform. In response to a survey question asking for "any constitutional procedures or principles which make it difficult to implement the Hague Convention fully,"²⁶⁵ the United States said, "Under U.S. federalism principles, the fifty states and District of Columbia may make their own laws for their citizens, particularly laws governing families. The federal government has little authority to limit or control the law of states unless the state law is found unconstitutional by the U.S. Supreme Court."²⁶⁶ A similar observation was made by the United States when it noted the divergence between federal and state courts' interpretation of the Convention.²⁶⁷

The United States' answer is inaccurate because it ignores the doctrine of preemption.²⁶⁸ Grounded in the Supremacy Clause of the Constitution,²⁶⁹ the

²⁶⁴ UNIF CHILD ABDUCTION PREVENTION ACT, § 8 & cmt. (2006), available at http://www.law.upenn.edu/bll/archives/ulc/ucapa/2006_finalact.pdf (last visited Mar. 26, 2008).

²⁶⁵ *Collated Responses*, *supra* note 5, at 132.

²⁶⁶ *Id.* at 138.

²⁶⁷ Notes of Proceedings, *supra* note 20, Nov. 6 (discussing habitual residence).

²⁶⁸ The doctrine of preemption also makes inaccurate one of the "concerns" put forward by the United States with respect to the 1996 Protection Convention. Hague Conference on Private International Law, *Final Act of the Eighteenth Session with the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, and Decisions on Matters Pertaining to the Agenda of the Conference*, Oct. 19, 1996, 35 I.L.M. 1391 [hereinafter 1996 Protection Convention]. The United States expressed a "major concern" that the 1996 Protection Convention might be hard to implement in the U.S. federal system because state law would have to be amended. See Notes of Proceedings, *supra* note 20, Nov. 3. Most states treat foreign and domestic orders in a fairly similar fashion under the UCCJEA, and the 1996 Protection Convention would require that foreign orders be treated differently than at present. The UCCJEA gives a court issuing an initial order continuing exclusive jurisdiction over that order, regardless of whether it is a foreign or domestic order, even if a parent moves with the child from the state. See UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT §§ 105, 202, 9 U.L.A. 666–67 (1999). The 1996 Protection Convention, in contrast, allows jurisdiction to shift once the child acquires a new habitual residence. See 1996 Protection Convention, *supra*, art. 5, at 1397.

doctrine of preemption means that if Congress decides to legislate on a topic, state and federal courts are bound by the federal statute. Therefore, federal legislation could resolve the conflicts in the interpretation of the Hague Convention that exist in the United States (for example, how *ne exeat* clauses are to be viewed under ICARA).²⁷⁰ Congress could preempt state law expressly or implicitly. As one scholar explained, “Even if a federal statute does not contain an express preemption clause, it impliedly repeals whatever state law it contradicts: When a court must choose between applying a valid rule of federal law and applying some aspect of state law, the Supremacy Clause requires it to apply the federal law.”²⁷¹ Courts have applied this doctrine in Hague cases before. For example, state trial

Yet if federal law were enacted to implement the 1996 Protection Convention, it would preempt state law and states would not have to amend their laws for the federal law to be effective, although states might want to amend their laws to eliminate inconsistencies in statutory language.

²⁶⁹ U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

²⁷⁰ See Weiner, *supra* note 62, at 303–09; Linda Silberman, *Patching Up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments to ICARA*, 38 TEX. INT’L L.J. 41, 45 (2003); Melissa S. Wills, *Interpreting the Hague Convention on International Child Abduction: Why American Courts Need to Reconcile the Rights of Non-Custodial Parents, the Best Interests of Abducted Children, and the Underlying Objectives of the Hague Convention*, 25 REV. LITIG. 423, 453–58 (2006). William Duncan, Deputy Secretary General, drew up a General Principles and Good Practice Guide for Transfrontier Access/Contact. Hague Conference on Private International Law, Transfrontier Access/Contact: General Principles and Good Practice, Prelim. Doc. No. 4. (Oct. 2006). Among other things, the document discussed the dividing line between access and custody rights, and whether rights of access combined with a veto over the child’s removal from the jurisdiction constitutes a custody right for purposes of the Convention. *Id.* at 35. The Report, while recognizing the attraction of getting a uniform answer to the question, also recognized that achieving consensus might be difficult because the question implicates broader issues about the “proper function of the return order, and the circumstances in which it should be available where the principal objective of the applicant is to secure rights of contact.” *Id.* at 40. The United States’ position on this topic was very clear at the Fifth Meeting. The United States referred to the *Croll* decision (*Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000)) as “a tragedy,” and emphasized that the decision only bound those federal courts in the Second Circuit. See Notes of Proceedings, *supra* note 20, Nov. 7.

²⁷¹ Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 228 (2000) (“Everyone agrees that even if a federal statute contains no express preemption clause, and even if it does not impliedly occupy a particular field, it preempts state law with which it ‘actually conflicts.’ According to the Court, such a conflict exists if either (1) compliance with both the state and federal law is ‘a physical impossibility’ or (2) state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” (citations omitted)).

courts have refused to determine custody when a Hague petition is also pending because of Article 16 of the Convention (as incorporated into federal law),²⁷² and those that have done so have been chided for deciding the merits of a custody dispute before deciding whether to return the child.²⁷³

The United States probably did not answer accurately because it has no intention of trying to amend ICARA. At the Fifth Meeting, the U.S. delegation acknowledged that proposing amendments to ICARA might cause others to try to modify ICARA too, and this possibility clearly worried the U.S. delegation.²⁷⁴ While the United States spoke the truth on this occasion, the United States should not have hidden behind a false description of the U.S. legal structure in its answer to the pre-meeting questionnaire.

C. Reasons for the Half-Truths

What explains the invocation of contested or inaccurate references to federalism and separation of powers?

1. Ignorance

Perhaps the United States simply made honest mistakes about the U.S. legal system. Ignorance, rather than an attempt to engage in deliberate policy obfuscation, may explain the United States' performance.²⁷⁵ After all, the legal concepts invoked by the United States are very complicated. Even this Article's analysis of the concepts may include errors; a vast amount of legal doctrine exists on each of these topics and some of the topics are outside of my own area of expertise.

Support for the "ignorance theory" is found in still other statements by the U.S. delegation. These statements reflect a lack of understanding of even the most basic legal concepts, such as precedent (which itself has implications for federalism).²⁷⁶ For example, the United States, when discussing important

²⁷² See, e.g., *Duquette v. Tahan*, 600 A.2d 472, 474–75 (N.J. Super. Ct. App. Div. 1991). A determination on the merits would directly contravene Article 16 of the Convention and § 11601(b)(4) of ICARA.

²⁷³ *Hanley v. Roy*, 485 F.3d 641, 650 (11th Cir. 2007).

²⁷⁴ Notes of Proceedings, *supra* note 20, Nov. 7.

²⁷⁵ Mistakes do not necessarily tell one much about the author, as they can occur by individuals who work in good faith and carefully. After all, "To err is human, to forgive, divine." ALEXANDER POPE, AN ESSAY ON CRITICISM (1711), reprinted in THE POETICAL WORKS OF ALEXANDER POPE (Robert Carruthers ed., 1853).

²⁷⁶ Precedent implicates federalism—both judicial and vertical. "Judicial federalism" describes the relationship between federal and state courts. As Professor Thomas Baker explained, the relationship is one purposefully characterized by friction: "Judicial federalism is required by the duality of our national court system where the federal judiciary exists alongside the state judiciaries." Thomas E. Baker, *A Catalogue of Judicial Federalism in the United States*, 46 S.C. L. REV. 835, 857 (1995); see also Suzanna Sherry,

developments regarding the interpretation of key Convention concepts,²⁷⁷ issued a caveat that no one case could be said to reflect the settled law of the land until the U.S. Supreme Court resolved the lower courts' divergent interpretations. Noting that concurrent jurisdiction under ICARA²⁷⁸ can make the Hague jurisprudence in the United States varied, and at times even conflicting, the United States also stated: “[I]t is important to note that U.S. state and federal district courts are only required to follow the holdings of federal circuit cases in their own circuit.”²⁷⁹ This last statement is incorrect because it suggests that state courts are bound on points of law by decisions of federal circuit courts, and this is not true.

This misstatement suggests a basic misunderstanding of stare decisis. The United States Supreme Court is the only federal court that binds state courts deciding questions of federal law.²⁸⁰ Cases,²⁸¹ treatises²⁸² and scholarly articles²⁸³

Judicial Federalism in the Trenches: The Rooker-Feldman Doctrine in Action, 74 NOTRE DAME L. REV. 1085, 1086 (1999) (describing judicial federalism). “Vertical federalism” is a phrase loosely borrowed from Professor Anthony J. Bellia, and describes the relationship between state courts and the federal legislature. Anthony J. Bellia Jr., *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 1501, 1503 (2006) (stating that the question of how courts “ought to interpret federal statutes is . . . a ‘vertical’ question of the proper relationship between Congress and state courts—in other words, a federalism question”). Professor Bellia is concerned with whether “state courts [should] strive to act as faithful agents of Congress, or as partners with Congress in the forward-looking making of federal law?” *Id.* at 1506. He concludes that from 1789 to 1820, “state courts generally understood their proper role in interpreting federal statutes to be that of discerning and enforcing the directives of Congress.” *Id.* at 1548. He describes the role of the Supremacy Clause, which potentially constrained state courts in their interpretations. *Id.* at 1548–49.

²⁷⁷ See *Collated Responses*, *supra* note 5, at 149.

²⁷⁸ 42 U.S.C. § 11603(a) (2006).

²⁷⁹ *Collated Responses*, *supra* note 5, at 215.

²⁸⁰ *Martin v. Hunters Lessee*, 14 U.S. (1 Wheat.) 304, 337–41 (1816).

²⁸¹ See, e.g., *Macias v. County of L.A.*, Cal. App. 4th 313, 323 n.5 (Cal. Ct. App. 2006) (deciding what constitutes “integral participation” for purposes of police officer liability under 42 U.S.C. § 1983 and noting that “[t]here is no United States Supreme Court precedent on this issue of federal law. We therefore make an independent determination of the issue, and we accord the decisions of the Ninth Circuit no greater weight than those of other circuits.”); *Monez v. Reinertson*, 140 P.3d 242, 245 (Colo. Ct. App. 2006) (“While we must follow the United States Supreme Court’s interpretation of federal law, we are not bound by decisions of lower federal courts. . . . Nonetheless, we may look to these decisions for guidance on federal law and follow the analysis that we find persuasive.”); *Commonwealth v. Ragan*, 743 A.2d 390, 396 & n.16 (Pa. 1999) (“[I]n interpreting federal case law, this Court is not bound by decisions of federal courts inferior to the United States Supreme Court, even though we may look to them for guidance.”).

²⁸² See, e.g., 5 AM. JUR. 2D *Appellate Review* § 604 (2006) (“The general rule is that, where a federal question is involved, the state courts are not bound by the decisions of a federal court other than the United States Supreme Court, although there is authority to the contrary.”).

²⁸³ See, e.g., Bellia, *supra* note 276, at 1506 (“[U]nless and until the Supreme Court interprets a federal statute differently, state court judgments can constitute the final word

have repeatedly indicated that most state courts do *not* consider themselves bound by the decisions of federal courts inferior to the Supreme Court. As the Iowa Supreme Court so clearly stated:

The federal Circuit Courts of Appeals and, in respect to federal law, the state courts of last resort are subject to the supervisory jurisdiction of the Supreme Court of the United States. They are, however, as to the laws of the United States, co-ordinate courts. Finality of determination in respect to the laws of the United States rests in the Supreme Court of the United States. Until the Supreme Court of the United States has spoken, state courts are not precluded from exercising their own judgment upon questions of federal law. They are not concluded by, though they should give respectful consideration to, the decisions of the federal Circuit Courts of Appeals and District Courts.²⁸⁴

The United States' mistake about precedent did not affect the substantive meaning of the paragraph in which it appears,²⁸⁵ and if anything, the truth would have only buttressed the United States' answer to the question. However, this mistake is significant because it reveals a basic misunderstanding of the U.S. legal system by those involved in drafting the U.S. response.²⁸⁶ The mistake suggests

on the meaning of federal law within a state court system."); Donald H. Zeigler, *Gazing into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143, 1153–57 (1999) (explaining that state courts argue that they are bound by Supreme Court decisions, but take differing positions as to whether they are bound by lower court decisions).

²⁸⁴ Nat'l Bank v. Stewart, 232 N.W. 445, 454 (Iowa 1930) (refusing to follow federal courts of appeals on issue of federal law when plaintiffs alleged the method of taxation by county was a violation of federal law as well as unconstitutional under the federal and state constitutions), *rev'd on other grounds* Des Moines Nat'l Bank v. Bennett, 284 U.S. 239, 246 (1931) (finding tax scheme violated federal law).

²⁸⁵ This mistake was not repeated at the Fifth Meeting itself. A U.S. delegate correctly stated the way that precedent works when discussing the case of *Croll v. Croll*—a case with which the U.S. Central Authority disagrees. 229 F.3d 133 (2d Cir. 2000). The U.S. delegate, in trying to minimize the significance of that case, explained that the Second Circuit decision was not binding on the entire United States and was not binding on state courts either. *See Notes of Proceedings, supra* note 20, Nov. 7.

²⁸⁶ It is beyond the scope of this Article to see if the United States' mistake had a substantive effect on other parts of the United States' answer. In its discussion of substantive legal developments, for example, the United States chose to include in its report to the Special Commission a discussion of almost exclusively federal cases. The United States cited approximately thirty-eight cases, only two of which were state cases. *Collated Responses, supra* note 5, at 215–220. In at least one instance, the omission of state cases suggested that U.S. law was different than it arguably was. As discussed below, the United States' position on evidentiary hearings and its citation to case law to support its position was directly contrary to the holding of *In re Marriage of Jeffers*, where the Colorado Court of Appeals held, as a matter of first impression, that there must be an

that ignorance may also undergird the improper use of the terms separation of powers and federalism.

Another mistake by the United States further supports the ignorance theory. At the Fifth Meeting itself, the United States was describing the appellate process in the United States and the Article 11 obligation to process cases expeditiously.²⁸⁷ The United States explained that although the United States does not return children “like rockets,” the United States had the advantage of having only one level of appellate review because the U.S. Supreme Court is not interested in these cases.²⁸⁸ This answer was correct for cases originating in the federal system, but was incorrect for the many cases that originate in state courts. States often have both an intermediate court of appeals and a supreme court to which a case might be subject *before* being eligible for a hearing by the U.S. Supreme Court.

While this sort of obvious mistake suggests that the inaccurate statements about federalism and separation of powers might have been just mistakes too, this explanation is rather unsatisfying. After all, individuals who represent the United States at international meetings are generally accomplished and smart, and the vast majority of individual serving on the U.S. delegation were lawyers.²⁸⁹ It is difficult to imagine that members of the delegation did not know the United States’ statements were half-truths.²⁹⁰ Additionally, glaring errors, like those discussed regarding precedent and the appellate process, were not ubiquitous; one would expect even more mistakes if ignorance were the explanation. Finally, and most importantly, there was no discernable purpose for the mistakes about precedent and the appellate process, and sometimes the U.S. even undermined its own conclusion

evidentiary hearing held under the Hague Convention. 992 P.2d 686, 690 (Colo. Ct. App. 1999). The court reasoned that both the Hague Convention and ICARA allow for the return of the child “once it has been established” that the child has been wrongfully removed, and such a determination requires an evidentiary hearing. *Id.* at 690 (citation omitted).

²⁸⁷ The 2001 *Conclusions and Recommendations* recommend that states set and adhere to timetables for the speedy return of children. 2001 *Conclusions and Recommendations*, *supra* note 49, § 3.4, at 10.

²⁸⁸ Notes of Proceedings, *supra* note 20, Nov. 6.

²⁸⁹ See *supra* note 9.

²⁹⁰ In addition, various members of the United States’ delegation were associated with the Central Authority and the Guide to Good Practice suggests that Central Authority personnel “have sufficient understanding of how the Convention operates in their country in order to . . . inform . . . government on ways to overcome obstacles to, or improve the implementation of the Convention in their country.” *Guide to Good Practice, Pt. I*, *supra* note 10, § 2.4.3. The United States tries to comply with the *Guide to Good Practice*, so it seems reasonable to assume that at least some members of the delegation could have caught these half-truths. It is entirely possible, however, that particular members of the delegation did not agree with the United States’ characterizations or were insufficiently aware of them to correct the mistakes. This seems especially probable for the academics on the delegation, both of whom are distinguished and well-respected.

by making these mistakes.²⁹¹ In contrast, as discussed below, there appeared to be a purpose for invoking the half-truths.

In the next two subsections, I suggest some other possible reasons for the United States' half-truths, although I recognize that pinpointing the United States' motive is fraught with peril. It is always difficult to discern motive, but the endeavor becomes even more ungrounded when one is speculating about an entity, particularly a bureaucracy like the government.²⁹² Therefore, the following explanations for the half-truths are offered as hypotheses only.

2. Exerting Influence in the Domestic Sphere

A possible explanation for the half-truths is that the United States intended them to reach various domestic audiences, such as U.S. judges who decide Hague cases or the Administration's political constituents. As the following discussion suggests, this explanation is possible, but unlikely.

The U.S. Central Authority does try to influence the way courts in the United States adjudicate Hague petitions, despite the U.S. delegation's emphasis at the Fifth Meeting on the importance of separation of powers. The U.S. delegation admitted that the Central Authority (part of the Executive Branch) "works with federal, state, and local jurisdictions across the fifty states."²⁹³ Communication between the Central Authority and the courts typically occurs in the form of letters informing the judge that a Hague case is on its docket, and reminding the judge of the need to act expeditiously.²⁹⁴ The Central Authority also communicates with the judiciary more broadly, such as through trainings²⁹⁵ and by making available, or recommending, written materials.²⁹⁶ The documents produced for the Fifth Meeting by the Executive Branch provide yet another avenue for communication with courts. The United States' answers to the pre-meeting questionnaire are

²⁹¹ The United States gained nothing, for example, from its omission of the state appellate process in its description of the United States' efforts to return children expeditiously. The time it takes the United States to return children was known to all from Nigel Lowe's statistics. *See Statistical Analysis*, *supra* note 3, at 45–46 (noting that it took the United States on average 285 days for a court to refuse to return a child compared to a global average of 233 days).

²⁹² When I refer to the United States, I am referring to those individuals who formulated the United States' answers to the questions. From the outside, it is difficult to figure out who were the decision makers, in part because of "complicated government structures," *see* Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 916–17 (2006), and because the United States has contracted with private entities to provide some services (for example, NCMEC). In addition, it is unclear what role, if any, particular members of the U.S. delegation had in crafting the United States' position. *See generally id.* (giving examples of decisions made in connection with the "War on Terror"). *See also supra* note 290.

²⁹³ *Collated Responses*, *supra* note 5, at 403.

²⁹⁴ The Central Authority does not discuss the substance of the case in these letters.

²⁹⁵ *Collated Responses*, *supra* note 5, at 298, 309, 471.

²⁹⁶ *Id.* at 403 (mentioning the *Guide to Good Practice*).

publicly available. Judges in the United States may read the answers, and advocates may use them to support a particular position.

Support for this “domestic communication” theory comes from some U.S. responses that seem particularly designed to influence U.S. courts. As discussed below,²⁹⁷ the United States’ answers regarding the article 13(b) defense provide a good example. Another example, which is discussed here, is the U.S. response to the Permanent Bureau’s inquiry about whether “special measures/rules exist to control or limit the evidence (particularly oral evidence) which may be admitted in Hague proceedings?”²⁹⁸ The United States suggested that evidentiary hearings are rare and noted that the court in *Menechem v. Frydman-Menachem*²⁹⁹ held that

[T]here is no requirement, under the Convention or under ICARA, that discovery be allowed or that an evidentiary hearing be conducted. Thus, the court could properly resolve ICARA cases on the basis of affidavits and other evidence, without resorting to a full trial on the merits or a plenary evidentiary hearing. 240 F. Supp. 2d 437, 444 (S.D. Md. 2003). The court in *March v. Levine* came to the same conclusion. See 136 F. Supp. 2d 831, 834 (M.D. Tenn. 2000).³⁰⁰

By quoting *Menechem* without any qualification, the United States’ answer misrepresented the practice of most courts in the United States. Hague cases in the United States typically involve an evidentiary hearing with oral evidence,³⁰¹ although the cases are sometimes adjudicated so quickly that respondents may have little opportunity to develop their defenses adequately.³⁰² *Menechem* itself contains numerous qualifications, both explicit and implicit, of the quoted language. Most importantly, the *Menechem* court decided the case without an evidentiary hearing because the case was resolved on summary judgment. It found that the petitioner could not prevail because the children did not habitually reside in Israel. The court thought “an evidentiary hearing would not serve to aid the

²⁹⁷ See *infra* Part III.B.1.

²⁹⁸ *Collated Responses*, *supra* note 5, at 71.

²⁹⁹ 240 F. Supp. 2d 437, 443 (D. Md. 2003).

³⁰⁰ *Collated Responses*, *supra* note 5, at 92.

³⁰¹ See, e.g., *Didur v. Viger*, 197 Fed. App’x 749, 750 (10th Cir. 2006); *Kijowska v. Haines*, 463 F.3d 583 (7th Cir. 2006); *Lockhart v. Smith*, No. 06-CV-160-P-S, 2006 WL 3091295, at *1 (D. Me. Oct. 20, 2006); *Arrera Casimiro v. Pineda Chavez*, No. CIV. A. 1:06-CV-1889-ODE, 2006 WL 2938713, at *3 (N.D. Ga. Oct. 13, 2006); *Small v. Clark*, No. 5:06-CV-125-OC-10GRJ, 2006 WL 2024955, at *1 (M.D. Fla. July 17, 2006); *Garcia v. Angarita*, 440 F. Supp. 2d 1364, 1366 (S.D. Florida. 2006); *In re D.D.*, 440 F. Supp. 2d 1283, 1287 (M.D. Fla. 2006); *Tsai-Yi Yang v. Fu-Chiang Tsui*, No. 2:03-CV-1613, 2006 WL 2466095, at *1 (W.D. Pa. Aug. 25, 2006).

³⁰² See Merle H. Weiner, *The Potential and Challenges of Transnational Litigation for Feminists Concerned About Domestic Violence Here and Abroad*, 11 AMER. U. J. GENDER SOC. POL’Y & L. 747, 788–91 (2002).

Court in its decision,³⁰³ because “there [were] no genuine issues of material fact in dispute and . . . the case [was] ripe for decision as a matter of law.”³⁰⁴ The *Menechem* court, in fact, specifically refused to comment “on whether summary judgment will always be appropriate as there may be cases where disputed issues of fact make such a determination more difficult.”³⁰⁵ The court acknowledged that “many courts do, in fact, hold evidentiary hearings before deciding on the merits of the petition.”³⁰⁶ *Menechem* itself has had limited influence in the United States. Only one other court has cited it and not even for the proposition that full hearings can be foregone.³⁰⁷ And at least one other court has held that an evidentiary hearing is mandatory.³⁰⁸

The U.S. response to the question about evidentiary hearings is best explained as an attempt to influence U.S. court practice. “Domestic communication” makes sense for this example since the U.S. Central Authority takes very seriously its obligation to support the expeditious processing of these cases, and getting U.S. courts to forego evidentiary hearings would certainly expedite cases in the United States. Yet the domestic communication theory explains less well the half-truths discussed previously. The policy issues discussed above (the consolidation of jurisdiction, the appointment of a judicial liaison, the adoption of consent forms, and the unification of the law through a federal statute) are not issues subject to courts’ control in the United States. This fact suggests that the audience for the United States’ responses was not U.S. judges.

Perhaps the United States was trying to communicate with the Administration’s constituents. This is plausible if a particular constituency cared about a topic under discussion. While father’s rights groups care about certain issues, as discussed below, this rationale seems inapplicable here. Some proposals—such as consolidating jurisdiction and liaison judges—were probably

³⁰³ *Menechem*, 240 F. Supp. 2d at 443.

³⁰⁴ *Id.* at 443.

³⁰⁵ *Id.* at 444.

³⁰⁶ *Id.* at 443. In *Menechem*, summary judgment was appropriate because the litigation turned on the children’s habitual residence. The court found that the petitioner failed to establish that the children’s habitual residence was Israel, so the petitioner could not establish a wrongful retention within the meaning of the Convention. *Id.* at 442. The court concluded that “after two and a half years of continuous residence here in the United States, it is beyond dispute that the children are no longer habitually resident in Israel.” *Id.* at 446–47. The record was “replete with affidavits and other supporting documents which give the Court all the facts it needs to rule on the present motion,” calling the material “voluminous” and noting that “both parties have had ample opportunity to supplement the record with supporting documentation.” *Id.* at 444. The respondent had asked the court to decide the issue as a motion for summary judgment and the petitioner was given “a full and adequate opportunity to both argue to the Court why an evidentiary hearing is warranted and also the merits of his case.” *Id.* at 444 n.3.

³⁰⁷ See *Holder v. Holder*, No. C001927C, 2003 WL 24091906, at *1 (W.D. Wash. Jun. 13, 2003) (holding that petitioner had no entitlement to an evidentiary hearing before an Article III judge).

³⁰⁸ See, e.g., *In re Marriage of Jeffers*, 992 P.2d 686, 690 (Colo. Ct. App. 1999).

of little interest to fathers' rights groups. Other proposals—such as consent forms and defining “rights of custody” in federal law to include rights created by a *ne exeat* clause—might have interested them, but the U.S. position was not conducive to furthering their agenda. Therefore, it is unlikely that the United States was trying to communicate with these groups about these issues. Since it is not readily apparent which other constituent groups might care about these issues, it is best to consider other possible explanations for the United States’ approach.

3. Cover for Policy Decisions

The United States may have used legal terminology in order to provide cover for policy choices. Saying the United States cannot accept a proposal obviates the need to explain why it will not accept a proposal, while simultaneously signaling an unwillingness to consider the policy initiative further.

This theory finds support in the fact that some of the proposals described above are the pet projects of our allies and to reject them on their merits might be considered poor diplomacy. For example, some vocal and highly respected people advocate for judicial liaisons. Lord Justice Thorpe, in particular, has been working hard to increase the number of judicial liaisons around the world. The State Department respects this distinguished jurist from England, and includes on its website his speech advocating for liaison judges.³⁰⁹ The United States might not have wanted to offend him. Similarly, the United States might not have wanted to disagree with those countries that support the concept. After all, many children are abducted from the United States to countries with liaison judges.³¹⁰ Avoiding a debate on the merits of liaison judges, by pointing to the impossibility of having this institution in the United States, might have seemed politically sensible. Yet, the strategy was not without its downsides if the proponents of the idea recognized the insincerity of the United States’ objection.

The United States may have rejected some of the other proposals because the initiatives would have faced political opposition or entailed political risk, such as the proposal to concentrate Hague jurisdiction in the federal courts or define “rights of custody” in ICARA to include a *ne exeat* clause.³¹¹ Any proposal that

³⁰⁹ See Matthew Thorpe, How Judges Can Support the Operation of the Child Abduction Convention (Sept. 2000), http://travel.state.gov/family/abduction/resources/resources_544.html.

³¹⁰ See DEPT. OF STATE, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 24 (2007), available at http://travel.state.gov/pdf/child_abduction_compliance_Report.pdf (noting that the Convention partners who returned the greatest number of children to the United States in FY 2006 were Mexico, the U.K., Canada, Australia, and Ireland.); see also Alanen, *supra* note 130, at 12 (“High-volume destination countries for *outgoing* cases include the U.K., Canada, Spain, Brazil, Germany, Japan & India.”). Of these countries, the U.K., Canada, Australia, Ireland, and Brazil have judicial liaisons. See *Report on Judicial Communications*, *supra* note 131, at 13; *Collated Responses*, *supra* note 5, at 220–28.

³¹¹ See *supra* text accompanying notes 127–130, 270.

required the amendment of ICARA would entail risk, as the legislative process might generate undesirable law. Asserting that a reform is impossible obviates the need to say that an issue is just not important enough to warrant the Administration's time or political capital, including the time or capital needed to minimize the risks of amending ICARA. An international audience may not appreciate the message that an idea is unworthy considering the costs involved. Such a position may appear undiplomatic.

Finally, the United States may have hidden behind legal language because its real reason for opposition may have been just too crass to state in public. The United States might have been subject to criticism if institutional self-interest were the actual reason for the United States' opposition, and if the United States were frank about that fact. In the case of judicial liaisons, for example, the Central Authority might fear that the judicial liaison would usurp its role and reduce its importance.³¹² It might also fear that a judicial liaison would become a demanding consumer of its services, with consequent resource implications (for example, asking the Central Authority to take action that it does not now take).³¹³ Articulating these concerns might have appeared self-serving since some of the U.S. delegates work for the U.S. Central Authority. By hiding behind the "we can't," the United States never had to explain why it thought "we shouldn't," and the institutional self-interest remained submerged.

Overall, of the three possible explanations for the half-truths, it appears most likely that the United States was attempting to obfuscate its real motive for its positions. Circumstantial evidence makes ignorance and domestic communication unlikely explanations for the half-truths. The U.S. tactic of purposefully obfuscating the policy discussion raises important questions about the legitimacy of its methods and the morality of the United States' participation. The approach risked undermining the trust that lies at the heart of the Convention's implementation. It also hindered policy debate. State parties could not discuss the real motives for the United States' positions since the motives were not explicit. The approach thwarted substantive discussion about certain ideas, including potential remedies for the United States' true concerns. Even concerns about political feasibility might have been usefully discussed, perhaps culminating in offers by foreign judges to educate U.S. judges about the benefits of a specialized bench. Of course, whether these exact responses would have materialized is conjecture, but one thing is certain: the conversation would have continued. Instead, the United States thwarted the conversation by invoking the terms federalism and separation of powers.

³¹² See *supra* text accompanying note 202.

³¹³ The U.S. Central Authority dislikes additional demands being made on it. *See, e.g.*, Kathleen Ruckman, *Undertakings as Convention Practice: The United States' Perspective*, XI JUDGES' NEWSL. 45, 48 (2006), available at http://www.hcch.net/index_en.php?act=publications.details&pid=3869 (arguing against elaborate undertakings because they, inter alia, create hardship for the Central Authority "who must act as intermediaries with left-behind parents and negotiate the terms of return").

III. TRANSPARENCY AT THE FIFTH MEETING

The Article has so far argued that the United States sometimes used legal terminology as a way to signal its unwillingness to pursue a policy proposal, thereby avoiding the need to address the merits of the proposal. The United States was not always so circumspect, however. On various issues, the United States did take a stand. Sometimes the U.S. position seemed well conceived, as was the case with its position on mediation.³¹⁴ At other times, however, the U.S. position was regrettable. In particular, the United States exhibited persistent hostility to the plight of domestic violence victims who flee transnationally with their children for safety. The United States opposed several legal reforms that were important to these victims. Despite the United States' condemnable position on the issues relevant to the safety of domestic violence victims, the United States' decision to present its position forthrightly is commendable. The United States' clear articulation of its views at least facilitates discussion about the merit of those views.

³¹⁴ The Permanent Bureau, as well as “[a] significant number of participants,” believe mediation may be useful in resolving Hague cases. *Report on the Fifth Meeting*, *supra* note 9, ¶ 62. See generally Hague Conference on Private International Laws, *Note on the Development of Mediation, Conciliation and Similar Means to Facilitate Agreed Solutions in Transfrontier Family Disputes Concerning Children Especially in the Context of the Hague Convention of 1980*, at 5–6, Prelim. Doc. No. 5 (Oct. 2006) (noting the increased use by many countries of mediation for family law disputes and describing these developments).

The United States has become involved in several pilot projects, including one with Germany. *Collated Responses*, *supra* note 5, at 277. The United States’ efforts are innovative and encouraging. For example, the United States has supported co-mediation, where each mediation session has both a male and female mediator. One of these mediators has a “psycho-social” background and the other has a legal background, and each mediator comes from a country involved in the dispute. *Id.* at 277. The United States has given attention to some of the difficulties with mediation, including its potential to delay proceedings and to be dangerous and unfair if the mediator misses the power dynamics between the parties. These concerns have led the United States to recommend that mediation be completed within strict time limits, and that mediators be trained in domestic violence. *Id.* at 283. The United States also recommended “careful screening of cases, so that cases not suitable for mediation are not referred.” *Id.* at 289. The latter point, among others, was reiterated by the United States at the Fifth Meeting. The United States indicated that mediation should never be imposed on parties, but should only occur if the parties voluntarily agree to it, and should have appropriate safeguards, including screening to avoid its use where allegations of domestic violence or power imbalances exist. *See Notes of Proceedings*, *supra* note 20, Nov. 1. The United States contributed to the dialogue in a useful way.

A. The Context for the Policy Discussion on Domestic Violence

The Conclusions from the Fifth Meeting acknowledge that two-thirds of abductors involved in Hague proceedings are primary caretakers, mostly mothers, and that this gives “rise to issues which had not been foreseen by the drafters of the Convention.”³¹⁵ One such issue is that mothers who abduct often claim to be fleeing for reasons of safety. In the pre-meeting questionnaire, state after state, including the United States, recognized that domestic violence is frequently raised as an issue by the respondents in Hague proceedings.³¹⁶ The Australian Branch of the International Social Service estimates that 70–80% of cases involve allegations of domestic violence.³¹⁷ In an article published after the Fifth Meeting, Justice McGuinness commented about her experience at the Fifth Meeting and how “reassuring” it was to learn of the commonalities experienced by judges around the world. She stated, rhetorically, “Did we not all experience the difficulty posed by real or alleged domestic violence or abuse as a factor in abduction cases?”³¹⁸

The Fifth Meeting was the first meeting at which the topic of domestic violence was explicitly on the work agenda. Australia summed up well the reason for the topic’s inclusion:

There is concern that the Convention is now being used by abusive (usually male) parents to seek the return of children and primary carers back to the country of habitual residence and that the Convention is moving away from what it was meant to deter. Recent statistics demonstrate that the majority of abducting parents are women, often those fleeing situation[s] of abuse and domestic violence. There is also growing concerns regarding the correlation between incidents of child abduction and the presence of domestic violence and that the Convention does not give due consideration and sufficient weight to such mitigating circumstances in the context of “grave risk” arguments.³¹⁹

³¹⁵ 2006 *Conclusions and Recommendations*, *supra* note 21, at 3; see also *Statistical Analysis*, *supra* note 4 (providing data showing that sixty-eight percent of abductors are the mothers of the abducted children).

³¹⁶ See *Collated Responses*, *supra* note 5, at 319.

³¹⁷ See Sandra De Silva, *The International Parental Child Abduction Service of the International Social Service Australian Branch*, XI JUDGES’ NEWSL. 61, 63 (2006), available at <http://www.hcch.net/upload/news2006.pdf> (“There is a high correlation between international parental child abduction and domestic violence. In the majority of cases allegations of domestic violence are the key or a contributing, motivating factor leading to the abduction. The level of cases involving alleged domestic violence of a physical, sexual, emotional or financial nature is approximately 70–80% of cases.”).

³¹⁸ Catherine McGuinness, *Special Commission: A View from the Chair*, XI JUDGES’ NEWSL. 4, 6 (2006), available at <http://www.hcch.net/upload/news2006.pdf>.

³¹⁹ *Collated Responses*, *supra* note 5, at 458–59.

Quebec accurately described the issue as “a topical subject, difficult and very much a concern.”³²⁰ At the meeting, China expressed hope that the delegations could map a way forward.³²¹

Nations did map a way forward at the Fifth Meeting. Their solution was subtle, not bold. While they refused to modify the “grave risk” defense in article 13(b), the delegates suggested a more flexible interpretation of the defense. Additionally, the delegates endorsed procedures that might help victims of domestic violence better establish a defense, return home in safety if the defense fails, and receive some support from government officials upon return. Unfortunately, the United States contributed to the rejection of the most promising reforms, and in many instances sought to stymie even the incremental advances that were eventually adopted.

The United States’ orientation was perhaps best captured in the following statement by one of its delegates: “Rarely is abduction an act of love.”³²² Never did the United States recognize that abduction may be an act of love if the abductor is trying to minimize the child’s exposure to domestic violence (including the devastation that the child would experience upon the death of the child’s primary carer).³²³ Nor was there any recognition that the state itself has responsibility for the harm that can attend the child’s return when the state forces the child’s return either without the caregiver or without adequate protection for the child or caregiver. Recent research suggests that the *return* of the child, rather than the abduction itself, “seems to produce a pattern of more profound effects, some of which are long-lasting” for the child.³²⁴ As Professor Andreas Bucher of the University of Geneva said at the Fifth Meeting, if the goal is solely to return the child, regardless of whether the custodial parent can or should return with the child, “Where is love?”³²⁵ The United States’ contrary orientation helps explain a series of its positions that deserve scrutiny, and ultimately condemnation.

B. Embarrassments: The U.S. Position on Domestic Violence Issues

1. The Relevance of Domestic Violence to Article 13(b)

Article 13(b) provides that a court need not return a child if return would pose a grave risk of physical or psychological harm to the child or otherwise place the child in an intolerable position.³²⁶ Increasingly courts in the United States and around the world are recognizing that article 13(b) may be a viable defense for domestic violence victims who are faced with a Hague application for their

³²⁰ *Id.* at 310.

³²¹ Notes of Proceedings, *supra* note 20, Oct. 30.

³²² *Id.* Nov. 2.

³²³ Merle H. Weiner, *International Child Abduction and the Escape From Domestic Violence*, 69 FORDHAM L. REV. 593, 619 (2000).

³²⁴ FREEMAN, *supra* note 3, at 79.

³²⁵ Notes of Proceedings, *supra* note 20, Nov. 6.

³²⁶ Hague Convention, *supra* note 1, art. 13(1)(b).

children's return.³²⁷ Dr. Rainer Hüßtege, the Presiding Judge of the Higher Appellate Court of Munich, summed up judicial practice well: "The question of

³²⁷ Numerous courts in the United States and abroad have recognized that physical abuse perpetrated against the abductor is relevant to the article 13(b) defense, even absent physical abuse to the children. *See, e.g.*, *Re W (A Child)* [2004] EWCA (Civ) 1366, [49], 1 F.L.R. 727 (Eng. and Wales) (Wall, L.J.) ("[I]t is well recognised . . . that . . . the position of the child is vitally affected by the position of the child's mother. If the effect on the mother of the father's conduct is severe it is, in my judgment, no hindrance to the success of an Article 13 (b) defence that no specific abuse has been perpetrated by the father on the child."); *id.* at [22] (Thorpe, L.J.); *VP v. A*, [2005] N.Z.F.L.R. 817 (H.C.) (refusing to return children where mother was a victim of domestic violence and effect of return on mother would impair her ability to mother), *quoted in* Response to the Questionnaire Concerning the Practical Operation of the 1980 Hague Child Abduction Convention and of Access/Contract Orders, http://www.hcch.net/upload/abd_2006_nz.pdf. There are several examples of cases in the United States and abroad where courts have granted the article 13(b) defense based upon allegations of violence toward the mother with minimal, if any, direct abuse of the children. *See, e.g.*, *Walsh v. Walsh*, 221 F.3d 204, 221 (1st Cir. 2000) (granting article 13(b) defense based solely on violence toward mother because that suggested a grave risk for the children); *Elyashiv v. Elyashiv*, 353 F. Supp. 2d 394, 409 (E.D.N.Y. 2005) (allowing article 13(b) defense although child never suffered physical abuse nor was diagnosed with post-traumatic stress disorder like the child's siblings because "she is not insulated from the likelihood of future abuse, given Mr. Elyashiv's inability to control his temper, his pattern of domestic abuse and his threats to use the 'small sword' to hurt her"); *Dimer v. Dimer*, No. 99-2-03610-7SEA (Wash. Super. Ct. July 29, 1999), *available at* <http://www.incadat.com/index.cfm?fuseaction=convtext.showFull&code=218&lng=1> (granting article 13(b) defense because of violence perpetrated against mother); *State Cent. Auth., Sec'y to the Dept of Human Servs. v. Mander*, (2003) ¶¶ 110–11 (Fam. Ct. Austl.), *available at* <http://www.hcch.net/incadat/fullcase/0574.htm> (holding that years of sporadic violence in presence of children created a grave risk of harm under article 13(b) because of ongoing and chronic situation where the children find themselves "living in fear and constantly living on the move without any form of security"); *Pollastro v. Pollastro*, [1999] 171 D.L.R. (4th) 32 (Ont. Ct. App.) (Can.) ("Since the mother is the only parent who has demonstrated any reliable capacity for responsible parenting, [the child's] interests are inextricably tied to her psychological and physical security. It is, therefore, relevant to consider whether the return to California places the child in an intolerable situation to take into account the serious possibility of physical or psychological harm coming to the parent on whom the child is totally dependent.").

In some cases, the respondent has alleged that the petitioner committed acts of violence against both the child and mother, but these cases generally do not hold that violence against the child is necessary to establish the defense. Rather, even these decisions recognize the importance of the violence directed against the mother to an article 13(b) defense, and merely view the violence in the family as cumulative. For example, in *Reyes Olguin v. Cruz Santana*, the court noted that while the children had been hit, the brunt of the physical violence was directed mostly at their mother. No. 03-CV-6299-JG, 2005 WL 67094, *3 (E.D.N.Y. Jan. 13, 2005). The court cited the psychologist who stated, "The effect on children generally of an environment of domestic violence does not depend on whether they were directly attacked or were instead only witness to violence against someone else on whom they depend, usually the mother." *Id.* In fact, "watching their

whether Article 13(1) b) of the Convention is applicable if the abducting parent is threatened by violence by the left-behind parent and thereby the child's well being also put at risk, may also be answered in the affirmative."³²⁸ Various state parties expressed the same sentiment in the pre-meeting documents.³²⁹

Unfortunately, however, this view is not yet universal. Some courts continue to interpret article 13(b) narrowly and require, for example, that the violence be directed at the child, or that the mother's safety, and her inability to return safely with the child, be disregarded in the analysis. This orientation can render irrelevant the domestic violence perpetrated against an abductor. Several states mentioned that their courts narrowly interpreted article 13(b).³³⁰ The United States described

mother being abused was a traumatic as being abused themselves." *Id.* Similarly, *In re Adan*, the Third Circuit held: "We note that the evidence of the [father's] abuse of the [mother] is relevant to the District Court's determination of whether returning [the child] to Argentina would expose the child to a grave risk of harm." 437 F.3d 381, 396 n.6 (3d Cir. 2006) (ordering trial court to make detailed, written findings of fact on allegations of abuse and harm visited upon mother and child by father). In *Elyashiv*, the district court stated, "Courts have recognized that a child's observation of spousal abuse is relevant to the grave-risk inquiry." 353 F. Supp. 2d at 408. In *Van de Sande v. Van de Sande*, the Seventh Circuit noted that violence toward the mother suggested the possibility of violence toward the children. 431 F.3d 567, 570 (7th Cir. 2005). The court noted the father's propensity for violence against the mother "and the grotesque disregard for the children's welfare that he displayed by beating his wife severely and repeatedly in their presence and hurling obscene epithets at her also in their presence." *Id.* The court concluded, "it would be irresponsible to think the risk to the children less than grave," since he might lose control and inflict actual physical injury on the children. *Id.*; see also *Elyashiv*, 353 F. Supp. 2d at 408 (noting that for two of the children who had suffered physical abuse, part of the reason the article 13(b) defense was made out was because of "their witnessing the father's abuse of their mother"); *Blondin v. DuBois*, 19 F. Supp. 2d 123, 127 (S.D.N.Y. 1998) (finding a grave risk that the children would be exposed to physical or psychological harm or otherwise be placed in an intolerable situation by their father who had "repeatedly beat[en] [his wife], often in the presence of the children").

³²⁸ Rainer Hüßtege, *Article 13(1) B) of the Hague Child Abduction Convention in the Light of Judicial Practice*, XI JUDGES' NEWSL. 37, 40–41 (2006), available at <http://www.hcch.net/upload/news2006.pdf>.

³²⁹ See *Collated Responses*, *supra* note 5, at 367–69 (Austria, "A return order seems difficult in cases where the applicant is proven guilty of domestic violence."); Israel, "The exception to article 13(b) requires proof of damage to the child therefore some argue that violence towards a parent does not constitute damage to the child. However, depending on the circumstances and the age of the child, violence to a parent can in fact cause severe psychological damage to the child."); Lithuania, "[C]ompetent authorities of different states should carefully examine complaints over such violence cases and prepare detailed information on relations between family members in order to avoid returning the child to an environment where violence takes place."; New Zealand, "That domestic violence be recognized as a risk factor sufficient to prevent the return of a child if a safe return cannot be negotiated.").

³³⁰ See *id.* at 309–18. (Australia, "Generally, however, unless there are exceptional cases, domestic violence in itself will not be a reason for an Australian Court to refuse

the situation at home: “[T]ypically 13b is narrowly construed and Courts do not consider a finding of domestic violence to constitute an absolute bar to return.”³³¹

The United States opposed all efforts at the Fifth Meeting to broaden the article 13(b) defense. Instead the United States advocated for a narrow interpretation of article 13(b), believing that the article 13(b) defense “might be becoming much broader than it was originally intended to be.”³³² The U.S. position can be summarized as follows: (1) the respondent should have to establish that the habitual residence cannot protect the child and parent; (2) a grant of asylum is insufficient to meet a respondent’s burden that the habitual residence cannot protect her; and (3) the Fifth Meeting should not suggest to courts that the parent’s safety is relevant to the article 13(b) defense.

The first point is derived from the United States’ express agreement with the decision in *Friedrich v. Friedrich*, which the United States cited in response to a question regarding whether it had any comments regarding domestic violence or abuse in the context of the Convention.³³³ *Friedrich* is known for its dicta, which articulated a narrow approach to article 13(b):

Although it is not necessary to resolve the present appeal, we believe that a grave risk of harm for the purposes of the Convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute—e.g., returning the child to a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.³³⁴

return.”; Austria, “No child will be returned to a parent, who is proven guilty of domestic violence against this child!”; Quebec, Canada, “[T]he courts usually apply that exception very narrowly and order the children returned unless the evidence shows that the children themselves have been the victims of domestic violence.”; Iceland, “The general approach to such claims is stern . . .”; Ireland, “[D]omestic violence by one parent against another has not been interpreted as necessarily presenting a ‘grave risk’ to the child upon their return.”; Israel, “[T]he defense of ‘grave risk’ is interpreted in a limited and cautious manner”; United Kingdom (Scotland), “The test required for this must be robust if the central aims of the Convention are not to be defeated.”).

³³¹ *Id.* at 319.

³³² *Id.* at 462.

³³³ *Id.* at 367, 371 (answering question thirty-one by citing *Friedrich v. Friedrich*, 78 F.3d 1060 (6th Cir. 1996)); *see also* Alanen, *supra* note 130, at 17 (quoting *Friedrich*, 78 F.3d at 1069).

³³⁴ 78 F.3d at 1069. Ms. Friedrich’s defense focused on the child’s new attachments to family and friends in the United States, that the child was doing well in the United States, and that return for him without his mother would be traumatic. As the court said, “Mrs. Friedrich alleges nothing more than *adjustment* problems that would attend the relocation of most children.” *Id.* at 1067.

The last sentence of the *Friedrich* quotation can be interpreted as requiring a respondent to establish that the child is subject to a high risk of serious harm *and* that the habitual residence lacks mechanisms to adequately protect the child upon return.³³⁵

The problem with the *Friedrich* approach was evident in a recent case that cited it.³³⁶ In *Simcox v. Simcox*, the trial court ordered the return of two younger children to Mexico even though two older children and one of the younger children “expressed fear of their father,” and the two older children would not be returning to Mexico.³³⁷ The older children had also testified about their father’s violence toward the mother and the children.³³⁸ The court found the petitioner’s “in-court behavior exhibit[ed] an arrogance, a need to be in control and a tendency to act out violently that present[ed] serious concern such traits have been amplified outside the confines of the courthouse.”³³⁹ The court expressed “serious concerns” that petitioner “present[ed] a serious threat to his children’s physical and psychological well-being.”³⁴⁰ There was testimony by an expert that the youngest child would experience post-traumatic stress syndrome “due to the abuse suffered at the hands of his father and his having witnessed the abuse his father inflicted on his mother.”³⁴¹ Nonetheless, because the court was not presented with “clear and convincing evidence” that Mexico could not “provide protection” from abuse,³⁴² despite conflicting evidence from the parties,³⁴³ the court ordered the two younger children returned in the respondent’s company.³⁴⁴ *Simcox* illustrates how hard it is for a respondent to prove a negative (that the state of habitual residence will not protect the children), especially by clear and convincing evidence. The respondent will have a difficult time making out the defense so long as the system might offer some protection.

Fortunately, the Sixth Circuit recently reversed and remanded the trial court’s decision in *Simcox*.³⁴⁵ Although it was a “close question,” a grave risk to the children had in fact been made out.³⁴⁶ The appellate court was troubled by the fact that the trial court had ordered the mother to return to Mexico and that the undertakings might not be enforceable.³⁴⁷ Importantly, the Sixth Circuit clarified

³³⁵ *Id.* at 1069. The United States did mention that the country must have “institutions in place to keep *all* members of a family safe.” *Collated Responses*, *supra* note 5, at 371 (emphasis added).

³³⁶ *Simcox v. Simcox*, 499 F. Supp. 2d 946, 957 (N.D. Ohio 2007).

³³⁷ *Id.* at 949.

³³⁸ *Id.* at 952.

³³⁹ *Id.* at 953.

³⁴⁰ *Id.*

³⁴¹ *Id.* at 954.

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.* at 957.

³⁴⁵ *Simcox v. Simcox*, 511 F.3d 594 (6th Cir. 2007).

³⁴⁶ *Id.* at 609.

³⁴⁷ *Id.* at 610.

that the petitioner had the burden of establishing the “appropriateness and efficacy” of protections, including undertakings,³⁴⁸ and undertakings would be “particularly inappropriate” when the petitioner is not apt to follow them.³⁴⁹ The appellate decision in *Simcox*—a decision from the same court that decided *Freidrich*—suggests that the Sixth Circuit itself might disagree with the position taken by the United States at the Fifth Meeting.

The United States’ insistence that the child’s habitual residence be unable to protect the child upon the child’s return was presented by the United States as a particularly demanding requirement. The United States took the position that the U.S. government’s grant of asylum to a domestic violence victim would not itself satisfy the article 13(b) defense, even though a successful applicant for asylum must have established the inability or unwillingness of the child’s habitual residence to protect her.³⁵⁰ The United States explicitly disagreed with a U.S. court that had held the opposite.³⁵¹ Although admittedly the asylum hearing involves a different procedure and standard of proof than the Hague proceeding,³⁵² a grant of asylum should at least be conclusive on whether the respondent could obtain protection in the child’s habitual residence—a requirement that does not exist, by the way, in the text of article 13(b) itself. After all, the applicant for asylum bears the burden of proof, and her credibility is assessed when the decision maker evaluates the totality of circumstances. The decision maker considers her demeanor, the plausibility of her claims, and the consistency of her allegations and compares the allegations to the Department of State reports on country conditions.³⁵³ If the applicant is not found credible, she needs to corroborate her assertion.³⁵⁴ It is not an easy process. In fact, the United States only grants

³⁴⁸ *Id.* at 605, 611. This approach is consistent with the approach of other courts that require the trial court to examine carefully whether protection will actually be forthcoming. *See, e.g.*, *Van de Sande v. Van de Sande*, 431 F.3d 567, 570–71 (7th Cir. 2005) (drawing a distinction between “law on the books” and the “law as it is applied”); *In re Application of Ariel Adan*, 437 F.3d 381, 397 (3d Cir. 2006).

³⁴⁹ *Walsh v. Walsh*, 221 F.3d 204, 219–21 (1st Cir. 2000).

³⁵⁰ *See* 8 U.S.C. § 1101(a)(42) (2006) (defining refugee as one who is “unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion”); *see also* 8 C.F.R. § 208.13(b)(2) (C)(ii) (1999) (indicating that if an applicant can relocate to another part of country and it’s reasonable to expect the applicant to do so, the applicant does not have a well-founded fear of persecution).

³⁵¹ *Collated Responses*, *supra* note 5, at 243 (“The U.S. Central Authority disagrees with the decision, because the standard for asylum is much lower than the 13(b) standard, and because asylum hearings are not contested hearings. Unfortunately, as this case was heard in a California state court and was not appealed, the decision stands.”).

³⁵² *See* Merle H. Weiner, *Strengthening Article 20*, 38 U.S.F. L. REV. 701, 729–30 (2004).

³⁵³ 8 U.S.C. § 1158(b)(1)(B).

³⁵⁴ *Id.*

approximately 20% of the requests,³⁵⁵ and domestic violence victims seeking asylum face tremendous doctrinal and other obstacles.³⁵⁶ Even if an applicant is successful, the United States always has the option of removing her if circumstances change in her home country.³⁵⁷ Consequently, if the U.S. government has allowed the asylee to remain in the United States, a court should consider her home country unsafe for her.

The United States' hostility to the plight of domestic violence victims was also evident when it opposed various proposals that would have signaled to judges the usefulness of article 13(b) in situations where the abductor is fleeing domestic violence. Several non-governmental organizations put forth Working Document No. 11, which was a modest attempt to achieve a better, and more consistent, interpretation of article 13.³⁵⁸ The proposal reiterated the mantra that judges should interpret the defense restrictively,³⁵⁹ but added that a court should not privilege return over the "primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation."³⁶⁰ It identified the "unreasonably inflexible judicial interpretation" of article 13(b), "especially in cases where return requires separation of the child from the primary carer."³⁶¹ It called for a more flexible interpretation of article 13(b), consistent with the information available to the judges in the states of habitual residence and refuge.³⁶² It noted that the Convention is premised on trust, and that requesting states must trust requested courts to competently adjudicate an article 13(b) defense, just as courts in the requesting states are trusted to "expeditiously and competently resolve the merits when return is ordered."³⁶³

³⁵⁵ Edward L. Carter & Brad Clark, "*Membership in a Particular Social Group*": *International Journalists and U.S. Asylum Law*, 12 COMM. L. & POL'Y 279, 289–90 (2007) ("However, only about one in five U.S. asylum applicants is successful in gaining asylum—about 25,000 to 30,000 successful asylum applicants per year." (citing Transactional Records Access Clearinghouse, *Immigration Judges*, <http://trac.syr.edu/immigration/reports/160/> (last visited Mar. 26, 2008))).

³⁵⁶ Lori A. Nessel, "*Willful Blindness*" to Gender-Based Violence Abroad: United States' Implementation of Article Three of the United Nations Convention Against Torture, 89 MINN. L. REV. 71, 75–79, 96 (2005).

³⁵⁷ Carter & Clark, *supra* note 355, at 286 ("Even a successful asylum applicant is not guaranteed permission to remain in the United States permanently, as Congress has authorized the Attorney General to revoke asylum status if the Attorney General determines that conditions have changed such that the refugee no longer meets the requirements.").

³⁵⁸ See generally Special Comm'n on the Civil Aspects of Int'l Child Abduction, Working Doc. No. 11 (Nov. 8, 2006) (proposed by U.S.-Mexico Bar Association, the Defence for Children International, and the European Network on Parental Child Abduction, the International Association of Women Judges).

³⁵⁹ *Id.* ¶ 1.1.

³⁶⁰ *Id.* ¶ 1.2 (citing Perez-Vera Report ¶ 29).

³⁶¹ *Id.* ¶ 1.3.

³⁶² *Id.*

³⁶³ *Id.* ¶ 1.4.

Unfortunately, Working Document No. 11 went nowhere. The then-Chair of the meeting, Justice Chamberland, asked if the document had the support of any country (a procedure that differed from what had occurred previously at the meeting). Not a single country stood up for the proposal, including the United States. Switzerland expressed sympathy for it, but felt the Special Commission should not endorse it because of the diverse views expressed regarding the defense.³⁶⁴

Switzerland's own earlier attempt to obtain a more sympathetic understanding of article 13(b), embodied in article 7 of Working Document No. 2, was also unsuccessful. Switzerland sought to amend the Convention to make the best interest of the child a defense in those situations where (1) "the placement with the applicant is manifestly not in the best interest of the child," (2) the respondent cannot care for the child in the child's habitual residence (or cannot reasonably be required to do so), and (3) "the placement in foster care is manifestly not in the best interest of the child."³⁶⁵ Professor Bucher spoke passionately in favor of the

³⁶⁴ Notes of Proceedings, *supra* note 20, Nov. 9.

³⁶⁵ Special Comm'n on the Civil Aspects of Int'l Child Abduction, Working Doc. No. 2E, art. 7 (2006) [hereinafter Working Doc. No. 2E]. This was a refinement of Switzerland's initial proposal, found in item 5 of Working Document 1. Special Comm'n on the Civil Aspects of Int'l Child Abduction, Working Doc. No. 1E, item 5 (2006) [hereinafter Working Doc. No. 1E]. Switzerland offered its proposal because abduction is often now carried out by the primary caregiver for the child. *Id.* at Remarks: Point 5. It also was motivated by the worldwide adoption of the U.N. Convention on the Rights of the Child. Article 3(1) of the Convention on the Rights of the Child states: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." Convention on the Rights of the Child, G.A. Res. 44/25, at art. 3(1), U.N. Doc A/RES/4A/25 (Dec. 12, 1989), available at <http://www.cirp.org/library/ethics/UN-convention/>. Finally, Switzerland proposed these changes because of "[s]everal distressing cases" that occurred in Switzerland. See *supra* Working Doc. No. 1E, at Remarks: Point 5. One such distressing case was the *Wood* case. Parliament of Western Australia, Legislative Assembly-Grievance, Russell Wood & Maya Wood-Hosig, Aug. 24, 2006 (Mr. Dan Barron-Sullivan & Mr. David Templeman), available at <http://parliament.wa.gov.au/hansard/hans35.nsf/edf12eb560968afa48256c460024a927/e2113631be1d2431c825728900299f8b?OpenDocument&Date=2006-08-24>.

In *Wood*, the mother had abducted two children from Australia to Switzerland. *Id.* When located, the children were forcibly removed from their mother and institutionalized in Switzerland for a year until they could be returned to Australia. *Id.* Since there were serious allegations against the father, the children could not be returned to him. *Id.* The mother could not return with the children to Australia because a criminal action was pending against her for the abduction. *Id.* Once in Australia, the children wanted to return to the mother. *Id.* The children were placed in a series of different foster homes in Australia because it took several years for the court to issue a custody decision. *Id.* The Australian court ultimately gave custody to the mother and permitted the children to return to Switzerland. *Id.* Although the father lodged an appeal, the trial judge allowed the children to return to Switzerland pending resolution of the appeal. *Id.* This was important for the mother's case because an Australian law said that the judge does not have to return the

proposal.³⁶⁶ He claimed the proposal was not meant to modify the Convention, but just to make more explicit the new possibilities suggested by the case law.³⁶⁷ He suggested that recent decisions recognized the importance of the “best interest” inquiry in adjudicating an article 13(b) defense.³⁶⁸ He noted that a narrow interpretation of article 13(b) seemed too harsh: many of the abductions were motivated by a need to escape family violence. He explained that human rights law would be violated if the mother and child would be separated because the mother could not return with the child.

Working Document 2 received considerable debate. The United States disliked the document’s various provisions, including article 7.³⁶⁹ After repeating what several other countries had also said, the United States emphasized that the best interest of the child is typically achieved by returning the child.³⁷⁰ The United States also reiterated its belief that “abduction is harmful” and then argued that article 13(b) was sufficient.³⁷¹ Ultimately, the United States characterized the proposal as embodying a double standard, one for mothers and another for fathers, and cautioned against creation of a special exception for “mother abductors.”³⁷² The remedy for the parent experiencing domestic violence, according to the United States, was to seek an order to relocate prior to the removal of the child.³⁷³ The United States acknowledged that there may be circumstances when that option would be difficult, but the United States thought the Convention should encourage lawful means.³⁷⁴

The United States’ response exhibited insensitivity to the plight of domestic violence victims who leave a country with their children in order to escape domestic violence. First, its accusation of gender bias was unfounded. Professor Bucher explained that he was not suggesting that article 7 only apply to mothers. Rather his remarks equated the abductor to the mother for “linguistic simplification” since most of the cases involve abduction by mothers.³⁷⁵ Second, the United States failed to comprehend the reality of these abductors’ situations when it suggested that victims should seek to relocate prior to the removal. Some victims cannot wait to receive formal permission to relocate because immediate geographic distance is needed to ensure their safety. Other victims recognize that

child if a child lives in Australia for two years. *Id.*; see also Notes of Proceedings, *supra* note 20, Nov. 6 (Professor Andreas Bucher). If the proceedings had taken another six months, this benchmark would have been reached.

³⁶⁶ Notes of Proceedings, *supra* note 20, Nov. 6 (Professor Andreas Bucher).

³⁶⁷ *Id.* Nov. 6 (Professor Andreas Bucher).

³⁶⁸ Professor Bucher specifically mentioned the courts of France, Italy, and Austria.

³⁶⁹ Notes of Proceedings, *supra* note 20, Nov. 6.

³⁷⁰ *Id.*

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ *Id.*

³⁷⁵ *Id.*

initiating a relocation petition will increase their danger to an unacceptable level.³⁷⁶ Some victims lack the resources to hire a lawyer in order to obtain an order. Still others do not know their legal options or how to access them, and simply leave because a violence-free life awaits them elsewhere. While some victims are perhaps to be faulted for their failure to get permission ahead of time, the reality of their situation—that they left for good reason, that they probably would have received permission to leave (since the placement of the child with the other parent is “manifestly not in the best interest of the child”³⁷⁷), and that they can’t return (for example, because they may be abused upon return)—justifies excusing their ignorance. These acts of self-preservation should be excused, especially when all of the requirements of Switzerland’s proposal are met (the placement with the applicant is manifestly not in the best interest of the child, the respondent cannot care for the child in the child’s habitual residence or cannot reasonably be required to do so, and the placement in foster care is manifestly not in the child’s best interest).

It is impossible to estimate the influence that the United States’ comments had on the final fate of Working Document 2. However, the proposal failed: “A clear majority of experts indicated that the Swiss proposal to amend the Convention, while raising important and timely issues for debate, should not be accepted.”³⁷⁸ Instead, the Fifth Meeting adopted a very grudging conclusion with respect to article 13(b). It simply “reaffirms Recommendation 4.3 of the 2001 meeting of the Special Commission: The Article 13, paragraph 1b), ‘grave risk’ defense has generally been narrowly construed by courts in the Contracting States, and this is confirmed by the relatively small number of return applications which were refused on this basis.”³⁷⁹

Despite this failure to amend the Convention or to adopt the observer organizations’ proposed resolution regarding the flexibility of article 13(b), the discussion itself was very encouraging. Mr. J. David McClean, a consultant representing the Commonwealth Secretariat, drew delegates’ attention to the words “intolerable situation.”³⁸⁰ Courts have generally given these words scant attention compared to the “grave risk” language. Mr. McClean, who had been involved with the Convention’s drafting, indicated that the words “intolerable situation” in article 13(b) were meant to be a flexible concept that could address many of the harder

³⁷⁶ Carol S. Bruch, *The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases*, 38 FAM. L.Q. 529, 541–42 (2004–05) (noting that “[t]he incidence and severity of domestic violence increase at the time of separation, and women are at an even higher risk of being murdered following separation than they are while sharing their households with violent men”); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 5–6, 64–65 (1991) (describing the dynamics of separation assault and why victims need extra protection during this critical time period).

³⁷⁷ Working Doc. No. 2E, *supra* note 364, art. 7.

³⁷⁸ *Report on the Fifth Meeting*, *supra* note 9, ¶ 163.

³⁷⁹ 2006 *Conclusions and Recommendations*, *supra* note 21, § 1.4.2.

³⁸⁰ Notes of Proceedings, *supra* note 20, Nov. 6.

cases, including the situation of an abductor fleeing for reasons of domestic violence.³⁸¹ He explained that the phrase “intolerable situation” was added to the 1980 Convention to deal with exceptional cases where a court could not find a grave risk of harm to the child, but returning the child would have been absurd as a procedural matter.³⁸² He further explained that the provision was prompted by a U.K. case where the U.K. court was going to return the child to California, but everyone recognized that the child would be subsequently returned to the U.K. because the California court would certainly allow the child’s relocation.³⁸³

Mr. McClean’s recollection is confirmed by the notes of the drafting session. A U.K. delegate at those initial deliberations indicated that article 13(b) was meant to apply when the abductor was threatened with domestic violence.

[I]t was necessary to add the words “or otherwise place the child in an intolerable situation” since there were many situations not covered by the concept of “physical and psychological harm.” For example, where one spouse was subject to threats and violence at the hands of the other and forced to flee the matrimonial home, it could be argued that the child suffered no physical or psychological harm, although it was clearly exposed to an intolerable situation.³⁸⁴

Given this history, Professor Carol Bruch is correct when she argues that the “widespread inattention to this history [of adopting defenses in the Convention] has caused much of the difficulty we now see in domestic violence cases.”³⁸⁵

The final report of the Fifth Meeting accurately noted that the experts “emphasized the concept of an ‘intolerable situation,’ which was included in Article 13 of the Convention to address those situations where the return of a child would not necessarily create a grave risk, but where it would still be inappropriate to order the return.”³⁸⁶ Even Switzerland was eventually satisfied that the difficult cases could be resolved on the basis of the current text, and that the case law could develop adequately to address these situations.

³⁸¹ *Id.*

³⁸² *Id.*

³⁸³ *Id.*

³⁸⁴ Notes of Meeting of Tuesday 14 Oct. 1980 (morning), Proces-Verbal No. 8, contained in Hague Conference on Private International Law, III Actes et Documents de la Quatorzieme Session 302 (1982) (statement of Mr. Jones). Mr. Leal of Canada thought that “the meeting should not concern itself unduly with such situations [as Mr. Jones’ described]. Social workers tended to take different views at different times concerning the rights and wrongs in these matters.” *Id.*; see also Shireen Fisher, *How Far Did the Conclusions and Recommendations of the Fifth Meeting of the Special Commission Advance the Interpretation of Article 13(1)(b), Grave Risk Defence?*, XII JUDGES’ NEWSL. 54, 56 (2007) (citing same). Judge Fisher astutely points out how much progress has been made in understanding domestic violence since Mr. Leal’s remarks. *Id.* at 58.

³⁸⁵ See Bruch, *supra* note 376, at 532.

³⁸⁶ Report on the Fifth Meeting, *supra* note 9, ¶ 166.

2. The Use of Undertakings to Protect Domestic Violence Victims

Respondents' allegations of domestic violence, plus some judges' impulse to interpret article 13(b) narrowly, makes the availability of undertakings and other protective measures very important to victims. Lord Justice Thorpe recognized this fact in the *Judges Newsletter*, published around the time of the Fifth Meeting. He stated, "This debate certainly brings into sharp focus the vital role of protective measures to safeguard abducting primary carers on return."³⁸⁷ The Permanent Bureau noted an increased use of protective measures, including undertakings, mirror orders and safe harbor orders.³⁸⁸ The Fifth Meeting recognized this practice and commended it:

Courts in many jurisdictions regard the use of . . . undertakings as a useful tool to facilitate arrangements for return. Such orders, limited in scope and duration, addressing short-term issues and remaining in effect only until such time as a court in the country to which the child is returned has taken the measures required by the situation, are in keeping with the spirit of the 1980 Convention.³⁸⁹

One of the more remarkable, although little noticed, achievements of the Fifth Meeting was the endorsement of a future protocol on the safe return of child, and where necessary, the accompanying parent. The concept received "positive consideration," and its value was "recognized," although "not as an immediate priority."³⁹⁰ Prominent supporters of the idea include Lord Justice Thorpe, who believe that "perhaps the greatest contribution that the international Community could make to celebrate the past achievements and to secure the future operation of the Convention would be the negotiation of a protocol, first for safety measures to protect the returning abductor."³⁹¹ Such an initiative is critical because many countries do not know the concept of undertakings and would not, therefore, impose them at all.³⁹² In addition, undertakings are not always enforceable in another member state,³⁹³ and mirror orders and safe harbor orders can delay the return of the child considerably.³⁹⁴ Designing an instrument that would make undertakings enforceable in each country, so that mirror orders and safe harbor orders would be unnecessary, seems sensible.

³⁸⁷ Mathew Thorpe, *The Hague Child Abduction Convention—25 Years On*, XI JUDGES' NEWSL. 8, 9 (2006), available at http://www.hcch.net/index_en.php?act=publications.details&pid=3869.

³⁸⁸ *Report on the Fifth Meeting*, *supra* note 9, ¶ 227, at 55–56.

³⁸⁹ *2006 Conclusions and Recommendations*, *supra* note 21, § 1.8.1, at 11.

³⁹⁰ *See id.* § 1.8.3, at 12.

³⁹¹ Thorpe, *supra* note 387, at 9.

³⁹² *See Collated Responses*, *supra* note 5, at 330–46.

³⁹³ *Id.* at 347–65 (citing answers by, *inter alia*, Australia, Poland, Portugal, Romania, Scotland, and Sweden).

³⁹⁴ *Id.* at 366.

Despite the momentum for undertakings or other protective measures, the United States had a different position. While the United States recognized the legitimacy of limited undertakings when they justified a court's denial of an article 13(b) defense,³⁹⁵ the United States limited its support to undertakings that were "appropriate" and reasonable.³⁹⁶ It specifically stated that undertakings have "become excessive," and they "should be rare."³⁹⁷

Apart from criticizing the frequency with which courts employ undertakings, the United States also criticized their scope. The United States explicitly stated that undertakings should be used primarily to protect the child, not the parent: The orders should "focus on the child and the return of the child safely, and courts should keep out of the area of the returning parent as much as possible."³⁹⁸ The United States also indicated that undertakings should only address a narrow range of protections. The United States denounced the "trend towards undertakings [that were] onerous" for the left-behind parent.³⁹⁹ It criticized courts that imposed "undertakings that are excessively broad in scope and are in fact pre-conditions on return."⁴⁰⁰ The types of "onerous pre-conditions" included

provision of a car for the abductor, prepayment of long-term financial support for a returning abductor who had remarried in the U.S. and for whom the applicant no longer had any financial obligation; dismissal of temporary *ex parte* custody orders, and withdrawal of criminal charges against the abductor.... Extensive financial conditions, particularly of spousal support, exceed what is contemplated by the Convention and contradict the understood purpose to restore the pre-abduction legal *status quo ante*.⁴⁰¹

The problematic pre-conditions also included: "Prepayment of fees for [the] abductor's United States attorney," "Requirement to vacate the family home," and "Guaranteed entry visas for the returning abductor."⁴⁰²

The United States justified its position with practical and theoretical arguments. As a practical matter, the imposition of conditions on the child's return could cause delay and "considerable hardship for all involved."⁴⁰³ In addition, the courts of the child's habitual residence could better determine the need for such measures.⁴⁰⁴ As a theoretical matter, such measures imply "a lack of trust in a

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ *Id.* at 366, 462, 577.

³⁹⁸ Notes of Proceedings, *supra* note 20, Nov. 8.

³⁹⁹ *Collated Responses*, *supra* note 5, at 383.

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.* at 366.

⁴⁰² See Ruckman, *supra* note 313, at 47.

⁴⁰³ *Collated Responses*, *supra* note 5, at 366.

⁴⁰⁴ *Id.*

treaty partner's judicial and social welfare systems."⁴⁰⁵ Ruckman, the Deputy Director of the Office of Children's Issues, later added that undertakings reward the abductor and were potentially contrary to the provision in the Convention that permits the court to order the abductor, where appropriate, to pay the left-behind parent's costs associated with the child's recovery and return.⁴⁰⁶

The United States' position on undertakings had at least four problems. First, the United States implicitly rejected the appropriateness of undertakings for domestic violence victims who abduct their children. The United States' statements that courts should "keep out of the area of the returning parent as much as possible," and that undertakings should be "rare," suggests that it would oppose undertakings for a parent's physical safety. After all, a great number of abductors allege they are fleeing from violence. The United States' position was both immoral (by expecting a person to return to a situation of danger without protection) and harmful for children (by subjecting primary carers to injury). While there are good reasons to be skeptical of the efficacy of undertakings for victims of domestic violence,⁴⁰⁷ the United States' implicit rejection of undertakings to protect domestic violence victims was not based upon concerns for domestic violence victims' safety, but rather demonstrated an utter disregard for domestic violence victims' safety.

Second, the U.S. position on the permissible scope of undertakings was also misguided. The United States failed to recognize that a child's safety can depend upon the parent's safety, and a parent's safety may require provisions beyond those minimally necessary for physical safety. A parent's safety may necessitate, for example, that she have a place to live and sufficient economic resources so that she need not return to her abuser. In recognition of this fact, U.S. courts routinely order a broad range of remedies in family law protective order cases. For example, forty-eight states permit a court to require that an abuser vacate the family home.⁴⁰⁸ The 2006 Reunite Report sheds light on the importance of these remedies, and particularly the importance of an agreement to pay the abductor's legal fees going forward. Reunite reported that some abductors continue to suffer domestic

⁴⁰⁵ *Id.* At the meeting, the United States reiterated that undertakings usurp the authority of the judge in the habitual residence. Notes of Proceedings, *supra* note 20, Nov. 7.

⁴⁰⁶ Ruckman, *supra* note 313, at 48 (referring to article 26).

⁴⁰⁷ See *infra* text accompanying notes 416–422.

⁴⁰⁸ See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Caselaw*, 21 HOFSTRA L. REV. 801, 931–32 (1993). See generally Margaret Martin Barry, *Protective Order Enforcement: Another Pirouette*, 6 HASTINGS WOMEN'S L.J. 339, 348 (1995) (noting orders, available in all 50 states, have remedies such as support and vacate orders); Charles J. Ogletree, Jr. & Rangita de Silva-de Alwis, *The Recently Revised Marriage Law of China: The Promise and the Reality*, 13 TEX. J. WOMEN & L. 251, 287 (2004) (explaining that judges have broad discretion to order effective relief in a civil protection order and that relief can include orders to allow exclusive use of certain personal property, orders to enter counseling, and orders to pay attorneys' fees).

violence upon return “without the support from their families that they had temporarily found in the abducted-to State.”⁴⁰⁹ These victims of violence

spoke[] of feeling ‘vulnerable and alone,’ of being ‘totally isolated and impoverished.’ . . . They were usually without funds to finance the proceedings in the home State, including those to enforce the undertakings which had been given to the returning Court and upon which the return order had been made.⁴¹⁰

The lack of resources to hire a lawyer “caus[ed] some of the worst problems for many parents who might be forced to accept situations which they did not believe to be in the child[ren’s] best interests.”⁴¹¹ Obtaining assurances about the abductor’s ability to enter the country and the dismissal of criminal charges against her may also be essential for the well-being of the child: these sorts of assurances protect against the separation of the child from the primary caretaker and help ensure that the abductor will be able to participate in any custody adjudication in the child’s habitual residence.

The third reason the U.S. position was problematic is that the delegation’s reasons for its views lacked merit. For example, the United States claimed that undertakings can “reward” the abductor. Few, if any, parents facing the return of their children to a place where they themselves were abused would view any part of a return order as a reward. Rather, the Hague procedure, with its free lawyers for left-behind parents, can be seen as a reward for the abusers from whom the victims have fled. In fact, left-behind parents have been known to use the “free” Hague remedy solely for the purpose of harassing and controlling their victims.⁴¹²

The United States also justified its position by claiming that undertakings imply a lack of trust in the court of the habitual residence. Yet as the Swiss representative said, the U.S. position is an “insult to U.S. judges.”⁴¹³ The NGOs made this same point in their proposed Working Document No. 11: States should trust their own judges to adjudicate the article 13(b) defense, just as they trust foreign judges to adjudicate the merits of a case.⁴¹⁴ The United States’ experience with its own interstate system further weakens the United States’ objection. The

⁴⁰⁹ FREEMAN, *supra* note 3, at 27.

⁴¹⁰ *Id.*

⁴¹¹ *Id.* at 41–42.

⁴¹² *Id.* at 39 (“Several of those interviewed stated their belief that the left-behind parent would not have insisted on the return of the child (and the ‘abducting’ parent) if the left-behind parent would have to pay for the proceedings. They expressed the view that the left-behind parent was simply playing ‘a trump card’ which had been provided by the Hague Convention but with no desire or intention of daily, or even frequent, involvement with the child on return.”).

⁴¹³ Notes of Proceedings, *supra* note 20, Nov. 8. Citing article 32 of the Protection Convention, the delegate emphasized that the judge should be able to propose certain measures because that judge knows about the situation. *Id.*

⁴¹⁴ See *supra* text accompanying notes 358–363.

Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) allows a court with emergency jurisdiction to enter an order that will help protect the child, sibling, or parent from violence until the home state is seized of the matter. Similarly, Brussels *IIbis* and the 1996 Protection Convention recognize that the state to which an abductor has fled is sometimes the appropriate forum to enter an interim order.⁴¹⁵ A judge is not demonstrating a lack of trust in a foreign court when the judge enters an interim order; rather, the judge is recognizing the real risks to the child and parent created by the practical difficulties of seamlessly obtaining protective measures from a foreign court. The United States' contrary suggestion shows the length to which the United States went to oppose a sensible recommendation.

Fourth, the United States' limited support for undertakings was made without qualification. The United States suggested that undertakings are appropriate if they eliminate the need for a judge to grant an article 13(b) defense. Yet undertakings are not a panacea, and it is naive to think otherwise. The 2003 outcomes study by the European Network for the Protection of Children indicated that undertakings are generally not enforceable, and very often not honored.⁴¹⁶ The same study found that the nonmolestation provisions were always breached.⁴¹⁷ Judges that recognize these types of problems sometimes require that the petitioner prove that the undertakings are likely to be effective;⁴¹⁸ otherwise, as one court noted, the Convention, which was designed to protect children, might "be turned into an instrument of harm."⁴¹⁹ As another judge noted, "The danger of domestic violence is not reduced if the left-behind parent promises to desist from further acts of violence. Perpetrators behave reasonably and promise much in courtrooms."⁴²⁰

⁴¹⁵ Council Regulation 2201/2003, art. 20, 2003 O.J. (L338) 1, 9 (EC) (Brussels *IIbis*) (allowing a court in urgent cases to take provisional measures, including protective measures, even though another country has jurisdiction to make the custody order). Those provisional measures cease when the court of the Member State having jurisdiction as to the substance takes measures it considers appropriate. *Id.*; see also 1996 Protection Convention, *supra* note 268, art. 7(3), 11, at 1397.

⁴¹⁶ See generally REUNITE, THE OUTCOMES FOR CHILDREN RETURNED FOLLOWING AN ABDUCTION 27–28 (2003), available at <http://www.reunite.org/page.php?alias=research17> [hereinafter REUNITE, OUTCOMES]. One interviewee in Reunite's 2006 study characterized undertakings as "toilet paper." FREEMAN, *supra* note 3, at 39. Some interviewees who tried to explain to the returning court that the undertakings would not be obeyed nor enforced "were not heard in the returning Court's attempts to ensure comity." *Id.* at 40.

⁴¹⁷ REUNITE, OUTCOMES, *supra* note 416, at 31.

⁴¹⁸ The House of Lords recently issued the decision in *In re D*, recognizing that it will not always be the case that undertakings or the courts of the requesting State can protect the child, and that "it has to be shown that those arrangements will be effective to secure the protection of the child." [2006] UKHL 51, [52] (appeal taken from Eng.). See also Van de Sande v. Van de Sande, 431 F.3d 567, 571 (7th Cir. 2005); Simcox v. Simcox, 511 F.3d 594, 611 (6th Cir. 2007); cf. Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593, 676–81 (2000).

⁴¹⁹ *In re D*, [2006] UKHL 51, [52].

⁴²⁰ Notes of Proceedings, *supra* note 20, Nov. 8.

Even the Permanent Bureau reminded delegates that it was “common” for a parent to ignore an undertaking once the child was returned.⁴²¹ It also noted “concern” that some courts relied upon undertakings “despite a demonstrated unwillingness to comply.”⁴²² In contrast, the United States did not suggest that there were any limitations to the effectiveness of undertakings; instead, it appeared to accept without question that a petitioner’s promise to be good eliminates the danger faced by children and their carers.

3. The Central Authority’s Role in Helping Domestic Violence Victims and Their Children

Finally, it is instructive to examine the U.S. position on a variety of topics related to the Central Authority’s responsibilities. The Fifth Meeting considered a number of Swiss proposals, including that Central Authorities should (1) provide access to information during proceedings;⁴²³ (2) cooperate to ensure the safe return of the child and the accompanying parent as necessary;⁴²⁴ and (3) respond to requests for information after the child’s return.⁴²⁵ Each of these proposals would have benefited domestic violence victims who flee transnationally with their children for safety. Cumulatively, they would have made a noticeable improvement in the processing of these cases.

(a) Accessing Information

Switzerland offered Working Document No. 2, which among other things, called upon Central Authorities (and other public authorities) to cooperate to ensure direct access to pertinent documents, witnesses, and experts.⁴²⁶ The proposal called for an amendment to the Convention in order to make binding the recommendations from the Fourth Meeting.⁴²⁷

The Swiss proposal seemed reasonable. Judges need accurate information in order to decide whether to grant an article 13(b) defense or whether to rely on undertakings and return a child. Facilitating access to relevant information leads to better decisions, which in turn inures to the benefit of children. Imagine, for example, a respondent who raised an article 13(b) defense and claimed that the petitioner was convicted of abusing her. A copy of the conviction would be highly probative, especially if the petitioner denied the allegations. Yet the respondent

⁴²¹ *Report on the Fifth Meeting*, *supra* note 9, ¶ 227.

⁴²² *Id.* Experts noted that safe harbor orders were a much better instrument than undertakings as they provided instantaneous safety for the child back home. *Id.* ¶ 231. In addition, the court issuing the safe harbor order is in the best position to know what is possible and enforceable under its own domestic law.

⁴²³ See, e.g., Working Document 2, *supra* note 365, art. 5(2).

⁴²⁴ *Id.* arts. 4(2)(d), 4(4).

⁴²⁵ *Id.* art. 5(3).

⁴²⁶ *Id.* art. 5(2).

⁴²⁷ Notes of Proceedings, *supra* note 20, Oct. 31 (Swiss delegation, Professor Bucher).

might have great difficulty accessing a copy of the conviction from abroad, especially in the short amount of time before the Hague hearing.⁴²⁸ If the Central Authority in the child's habitual residence could obtain a copy of the conviction and forward it to the court adjudicating the petition, a more informed decision could be made.

The United States did not like the provision that would require Central Authorities to cooperate "to ensure direct access to pertinent documents, witnesses and experts available in one or the other of these States." It claimed that parties would seek information on a broad array of issues, and thereby lengthen proceedings.⁴²⁹ The United States' concern had some merit since the proposed language was originally ambiguous. "Direct access" was undefined, as was the identity of individuals who could determine relevance and request the material. The Swiss proposal perhaps made the most sense for an inquisitional system where the judge seeks relevant information from the Central Authorities, but it arguably made less sense for a system like the United States where the litigants, and not the judge, take the initiative to gather and put on evidence. Nonetheless, the United States might have suggested a slight modification to make the provision workable within the U.S. adversarial system. For example, if the provision required Central Authority cooperation to ensure direct access when the request came from the adjudicating body, then a court in the United States could initiate a request after a litigant identified important documents, explained why the documents were unavailable, and asked the court to request the assistance of the Central Authority. The court would then be the arbiter of relevance and whether the litigant had made sufficient efforts on her own to warrant assistance. Such a procedure might have addressed the United States' concern that litigants would abuse the system.

The Fifth Meeting eventually adopted a modified version of the provision, but unfortunately, the modification weakened it. First, the proposal's wording was changed. It now said:

The Special Commission is of the view that the provisions of the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction support measures to be taken, where appropriate in a particular case, to . . . enable or require the relevant authorities to cooperate in order to ensure access to pertinent information available in the States concerned.⁴³⁰

By eliminating the word "direct," and changing "documents, witnesses, and experts" to "information," the Special Commission changed the tenor of the original proposal. Indirect access to information is much less helpful than direct access to documents, witnesses and experts. Indirect access might only require, for

⁴²⁸ See Weiner, *supra* note 302, at 788–91.

⁴²⁹ Notes of Proceedings, *supra* note 20, Nov. 8.

⁴³⁰ 2006 *Conclusions and Recommendations*, *supra* note 21, at 15 (emphasis omitted).

example, that a party be able to return to the country to obtain access to the records.

Second, the revised proposal no longer called for amending the Convention, but merely provided a “[s]tatement on the operation of the Convention.”⁴³¹ As it turned out, this statement was not even adopted as part of the final Conclusions and Recommendations of the Fifth Meeting, but rather was adopted as an Appendix entitled “Additional considerations relevant to the safe return of the child.”⁴³² While presumably the provision was intended to permit a court to order the Central Authorities, or other relevant authorities, to cooperate to ensure access to relevant information, the nonbinding nature of the revised proposal reduces its usefulness. For example, an order from a U.S. court to a foreign Central Authority will still lack extraterritorial effect, other than by comity. Nor is it clear that the U.S. Central Authority, or any other public authority, need act upon a request from a U.S. court since the authority is not a party to the proceeding. Consequently, while State parties recognized the importance of exchanging information to adequately protect domestic violence victims,⁴³³ the final version of the Appendix may not be particularly helpful to domestic violence victims who are trying to defend against return.

The United States’ compliance with even the spirit of this watered-down obligation remains to be seen. The United States’ answer to a pre-meeting questionnaire reflected the unimportance it attributed to dissemination of information about measures available in the United States for the safety of the returning parent. As part of the 2001 meeting, countries agreed to post information on the Central Authorities’ websites “concerning the services applicable for the protection of a returning child (and accompanying parent, where relevant), and concerning applications for legal aid for, or the provision of legal services to, the accompanying parent on return.”⁴³⁴ The pre-meeting questionnaire asked whether the United States was in compliance with the 2001 Special Commission report; for example, whether the United States had a website, brochure or information pack that contained information on services available for the protection of a returning child and accompanying parent. The United States’ response was “See response to

⁴³¹ Special Comm’n on the Civil Aspects of Int’l Child Abduction, Working Doc. No. 10E, Corrigendum II, at 1 (Nov. 8, 2006).

⁴³² *2006 Conclusions and Recommendations*, *supra* note 21, at 14.

⁴³³ *Report on the Fifth Meeting*, *supra* note 9, ¶ 166 (“[The experts] indicated that greater co-operation and exchange of information between Central Authorities and between judges should be encouraged to ensure more effective implementation of the Convention. This was especially important when a return order was issued in conjunction with protective measures by a judge in a requested State, particularly in cases of domestic violence.”). In preliminary documents, the Permanent Bureau recognized that this was an appropriate role for Central Authorities. See *Enforcement of Orders*, *supra* note 46, ¶ 6.5–6.7.

⁴³⁴ *Collated Responses*, *supra* note 5, at 24–25.

f) above,” which actually made its answer non-responsive.⁴³⁵ A look at the United States’ website indicates that it gives minimal information about services available to a returning parent, legal or otherwise,⁴³⁶ although it apparently provides that information when directly requested by the parent herself.⁴³⁷

(b) Ensuring the Safe Return of the Child and the Accompanying Parent

Switzerland also proposed imposing a heightened obligation on countries to ensure that the child and the accompanying parent would be safe upon return to the habitual residence. Although the Convention itself already obligates Central Authorities to ensure the child’s safety,⁴³⁸ there is no comparable provision in the Convention related to the accompanying parent. State parties have been concerned for a long time about the safety of the parent who returns with the child, as reflected in the 2001 Conclusions and Recommendations of the Fourth Meeting. That document said, “It is recognized that the protection of the child may also sometimes require steps to be taken to protect an accompanying parent.”⁴³⁹ The Report from the 2002 Special Commission reiterated this sentiment: “The meeting emphasized the importance of recognizing that the protection of the child may also sometimes require steps to be taken to protect an accompanying parent.”⁴⁴⁰ It also appears in the Guide to Good Practice.⁴⁴¹ Switzerland articulated concerns about the lack of sufficient guarantees for the child’s safe return in certain cases,⁴⁴² and

⁴³⁵ “F” referred to the judicial procedures that applied to return applications. The U.S. mentioned that it provided information on the court procedures abroad for applicants in the U.S. It stated that the web site “will be redesigned to include this information for applicants abroad.” *Id.* at 43. That does not appear to have happened yet. Canada suggested that “in light of concerns respecting domestic violence allegations, a distinct Country Profile be developed to provide Courts and Central Authorities with useful information about legislation, resources and approaches to domestic violence cases.” *Id.* at 578.

⁴³⁶ See Department of State, International Child Abduction, http://www.travel.state.gov/family/abduction/abduction_580.html (last visited Mar. 26, 2008).

⁴³⁷ See *Collated Responses*, *supra* note 5, at 319.

⁴³⁸ See Hague Convention, *supra* note 1, art. 7(h) (directing Central Authorities to cooperate and “take all appropriate measures . . . to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child”).

⁴³⁹ 2001 Conclusions and Recommendations, *supra* note 49, § 5.1.13.

⁴⁴⁰ Hague Conference on Private International Law, *Report and Conclusions of the Special Commission Concerning the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction 27 September–10 October 2002*, ¶ 76 (March 2003) (discussing § 4.8: issues surrounding safe return of children and parents).

⁴⁴¹ *Guide to Good Practice*, Pt. I, *supra* note 10, §§ 3.18, 4.23. While acknowledging that Central Authorities may have a limited role, if any, in ensuring that undertakings are complied with, the Guide encourages Central Authorities as follows: “If conditions were imposed or undertakings given with the return order, take whatever steps are appropriate within the limits of the Central Authority’s powers, to ensure that the conditions are met or the undertakings are fulfilled.” *Id.* § 3.21.

⁴⁴² See Working Doc. 1E, *supra* note 365, at item 5.

these same concerns are even greater with regard to the accompanying parent for whom there is no overt legal obligation to aid. Consequently, the Swiss proposed Working Document 2, which would have allowed a court to enact measures “in order to ensure the protection of the parent who removed or retained the child,”⁴⁴³ and would have obligated the “competent authorities” of the habitual residence to “assist in the implementation” of any undertakings given.⁴⁴⁴

The United States objected to these provisions of Working Document No. 2. It asserted that judicial cooperation was the best way to deal with these issues, thereby minimizing the need for Central Authority participation.⁴⁴⁵ The problem with the U.S. response is evident from a statement by a left-behind parent interviewed by Reunite. That parent noted,

[T]he lack of protection for the returning mother with no follow-up from the returning Court . . . was not a good thing. . . . [P]eople want revenge and . . . when someone has abducted a child and is returned to the former place of residence, . . . such protection and surveillance is necessary in the interests of the child(ren).⁴⁴⁶

While the interviewee erroneously assumed that a returning court would be the proper entity to follow-up with a parent after return, a court in the child’s habitual residence would not necessarily be the appropriate entity either. In the United States, courts have few resources for social work, and they use these resources only if they are seized of the matter (which they might not be). In contrast, the Central Authority can call the returning parent to see if she is safe.

The United States’ comment appeared to have an effect. Later in the meeting, Switzerland proposed Working Document No. 10, which was a watered-down version of Working Document 2. Yet the United States thought Working Document No. 10 had its own “serious language problems,” and the United States took particular issue with section 7. Section 7 reiterated the idea that states must ensure that protective measures imposed by the requested court are implemented. Section 7 stated:

The Special Commission is of the view that the provisions of the [Hague Convention] allow appropriate measures to be taken, in particular, to . . . assist in the implementation of protective measures, approved by the authorities in the requested State, to ensure the protection of the child and of the parent who removed or retained the child upon their return.⁴⁴⁷

⁴⁴³ Working Doc. No. 2E, *supra* note 365, art. 4(2)(d).

⁴⁴⁴ *Id.* art. 4(4).

⁴⁴⁵ Notes of Proceedings, *supra* note 20, Oct. 30.

⁴⁴⁶ FREEMAN, *supra* note 3, at 43–44.

⁴⁴⁷ Working Doc. No. 10E, *supra* note 431, § 7.

Challenging what appeared to be a settled position, the United States boldly argued that protection of the parent should not be given equal status as protection of the child.⁴⁴⁸ While the United States did not repeat this argument after receiving political pressure from domestic violence groups in the United States, the delegation continued to speak generally against Working Document 10. The United States feared that the document would cause mischief because practitioners might try to give it more effect than the Special Commission intended it to have.⁴⁴⁹

Again, the United States' opposition appeared to have an effect. Working Document No. 10 was modified before adoption, and ultimately adopted only as an Appendix, not as an official part of the Conclusions and Recommendations.⁴⁵⁰ In addition, while the final Conclusions and Recommendations acknowledged the relevance of the parent's safety to the child's safety,⁴⁵¹ the language in the Appendix was much weaker. The words "if necessary" were added to section 7: protective measures for the parent should be adopted only "if necessary."⁴⁵² Since courts presumably would only impose protective measures when such measures were necessary, the new language was not needed as a substantive matter. Rather the phrase "if necessary" signaled a difference in importance between the parent's safety and the child's safety. In addition, section 7 was modified (perhaps inadvertently) so that any obligation only arose if the requesting state enacted a safe harbor or mirror order (that is, the protective measures had to be approved by authorities in the "requesting," not "requested," state). This change obviously diminishes the provision's usefulness.

(c) *Monitoring the Situation After Return*

Finally, Switzerland proposed that authorities from the countries involved in a particular case share information about the child during the Hague proceedings and after the child's return. The Central Authority in the requested state would keep the competent authorities in the requesting state "informed about the on-going proceedings and any decision taken."⁴⁵³ The Central Authority in the requesting state would inform the requested state's Central Authority about any custody

⁴⁴⁸ Notes of Proceedings, *supra* note 20, Nov. 8.

⁴⁴⁹ *Id.* Nov. 9.

⁴⁵⁰ The United States ultimately acquiesced and agreed to let the proposal be incorporated into the final Conclusions and Recommendations, but only as an appendix.

⁴⁵¹ 2006 *Conclusions and Recommendations*, *supra* note 21, § 1.1.12 ("It is recognised that the protection of the child may also sometimes require steps to be taken to protect an accompanying parent.").

⁴⁵² *Id.* app., ¶ 7 ("The Special Commission is of the view that the provisions of the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction support measures to be taken, where appropriate in a particular case, to . . . assist in the implementation of protective measures, approved by the authorities in the requesting State, to provide for the protection of the child and, if necessary, the parent who removed or retained the child upon its return.").

⁴⁵³ Working Doc. No. 2E, *supra* note 365, art. 5(1).

decision on the merits rendered subsequent to the child's return.⁴⁵⁴ In addition, the requesting state's Central Authority would reply to "justified requests for information about the particular situation of this child made within a period of one year after the return of the child by the Central Authority."⁴⁵⁵

The United States responded to the Swiss proposal by claiming that "privacy" law precluded its Central Authority from monitoring the family after the case was over.⁴⁵⁶ Yet, the Swiss proposal also permitted "any other competent authority of that State" to respond to requests. The Privacy Act of 1974 does not apply to state agencies or the federal Judicial Branch,⁴⁵⁷ but only precludes the federal Executive Branch from releasing to others information about a U.S. citizen or lawful permanent resident that is contained in U.S. government files.⁴⁵⁸ Even the U.S. Central Authority, an arm of the Executive Branch, is not precluded by the Act from disclosing information about aliens who are not lawful permanent residents.⁴⁵⁹ Nor does it preclude an executive agency from releasing information when there is prior written consent from the person affected.⁴⁶⁰ If that person is a minor, the written consent can come from one of the minor's parents.⁴⁶¹ It would seem that either the taking parent or the left-behind parent might want the adjudicating court to learn of the child's situation after his or her return to the United States and would therefore authorize the release of such information. If

⁴⁵⁴ *Id.* art. 5(3). The basis for this part of the proposal was presumably article 7(i) of the Convention, which states Central Authorities "shall take all appropriate measures . . . to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application." Hague Convention, *supra* note 1, art. 7(i). The importance of the proposal was noted in the Reunite study:

[A] system of initial monitoring of children returned following an abduction would be welcomed by most of those interviewed, including both abducting and left-behind parents. It need not be seen as a challenge to the mutual trust [within the Hague signatory states], but rather as a mutual service, and could be organised through bi-lateral and multi-lateral arrangements between participating States. . . . [Such a system] will improve the future lives of those concerned, especially the children.

FREEMAN, *supra* note 3, at 66–67.

⁴⁵⁵ Working Doc. No. 2E, *supra* note 365, art. 5(3).

⁴⁵⁶ *Report on the Fifth Meeting*, *supra* note 9, ¶ 40.

⁴⁵⁷ See generally Jay M. Zitter, Annotation, *What is Agency Subject to Privacy Act Provisions*, 150 A.L.R. FED. 521, § 2[a] (1998); see also Cobell v. Norton, 157 F. Supp. 2d 82, 87 (D.D.C. 2001); Callwood v. Dep't of Prob. of the V. I., 982 F. Supp. 341, 343 (D. V.I. 1997).

⁴⁵⁸ See 5 U.S.C. § 552a(b) (2006).

⁴⁵⁹ See 5 U.S.C. § 552a(a)(2).

⁴⁶⁰ See *id.* § 552a(b).

⁴⁶¹ U.S. DEP'T OF STATE FOREIGN AFFS. MANUAL, VOL. 7, CONSULAR AFFAIRS, § 7 FAM 1713.1(g) (2005), available at <http://www.state.gov/documents/organization/86818.pdf>.

neither parent gave a waiver at the time the Hague petition was adjudicated, a parent might later issue a written waiver when a Central Authority requests the information. Information could then be passed along to the requesting Central Authority. If a waiver could not be secured, the U.S. Central Authority could simply state that “the Central Authority is precluded from transmitting information about that issue.”⁴⁶²

Ultimately, a weak version of the Swiss proposal was attached as an Appendix to the Fifth Meeting’s Conclusions and Recommendations. While originally the Swiss sought to permit the receipt of information on “the well-being of the child following its return to the State of its habitual residence,”⁴⁶² the final language only required information about any custody decision issued in the wake of return.⁴⁶³ A country need not even report this minimal amount of information if prohibited “by the law of the State where the decision has been taken.”⁴⁶⁴ Moreover, knowing the outcome of the custody contest will not be as informative as knowing whether a domestic violence perpetrator continues to terrorize the custodial mother and whether the child is suffering.

Although section 8 releases a State party from the obligation to disseminate information when its law does not permit it, the Privacy Act will not excuse U.S. compliance. Other countries can ask a judge in the United States, or a state agency (such as the California District Attorney), to relay the merits of the custody decision. The Privacy Act does not apply to courts or states as discussed above.⁴⁶⁵ However, section 8 contains language that will inhibit U.S. judges from receiving information about children that they have returned. The language in the Appendix specifies that the Central Authority of the requested State is the entity to whom information should be *transmitted* when responding to a request, not the entity that sought the information. Consequently, information sought by U.S. judges from other nations will go to the U.S. Central Authority, and that agency is precluded by the Privacy Act from relaying the information to the state or federal judge who made the inquiry. It is unfortunate that the U.S. delegation did not catch this problem. It could have recommended that the words “Central Authority” be removed from section 8, just as it had been removed from every other section of the Appendix. Instead, United States judges will be kept in the dark unnecessarily about the children whom they have returned.

C. Reasons for the Embarrassments

The U.S. performance exhibited a persistent insensitivity to the plight of domestic violence victims fleeing with their children for reasons of safety. The U.S. performance may be attributable to ignorance about domestic violence, institutional self-interest, or a desire to appease domestic constituents. All three

⁴⁶² Working Doc. No. 1E, *supra* note 365, at 2.

⁴⁶³ 2006 *Conclusions and Recommendations*, *supra* note 21, app., § 8.

⁴⁶⁴ *Id.*

⁴⁶⁵ See *supra* text accompanying notes 457–458.

factors are likely contributors, but it is impossible to say for sure that any of these factors were involved or which factor carried the most weight in shaping the United States' orientation. While elaborating on the United States' possible motives is admittedly a speculative endeavor,⁴⁶⁶ it is a useful exercise because it may generate ideas for how to change the United States' positions.

1. Ignorance

Perhaps key members of the U.S. delegation are simply unfamiliar with the realities of domestic violence. Many misconceptions about domestic violence victims and their batterers exist,⁴⁶⁷ even among very smart people.⁴⁶⁸ Whether all members of the U.S. delegation have had intensive training on the topic is unknown.

Support for the ignorance hypothesis comes from other mistakes the United States made on basic family law topics. For example, the Permanent Bureau asked in its pre-meeting questionnaire, "Are you aware of cases in which your authorities have refused to make or enforce an order in respect of a young child on the basis that an abducting parent who is the child's primary carer, refuses or is otherwise not in a position to return with the child?"⁴⁶⁹ The Permanent Bureau was inquiring

⁴⁶⁶ See *supra* text accompanying note 292.

⁴⁶⁷ See Mary Becker, *Access to Justice for Battered Women*, 12 WASH. U. J.L. & POL'Y 63, 88 (2003) ("[J]udges, prosecutors, psychiatrists, and others often hold a narrow and inaccurate notion of what battered women are like, believing that they are always and only passive, compliant, and economically or emotionally dependent on their abusers."); see also Prosecuting Attorney, Clark County Indiana, Myths About Domestic Violence, <http://www.clarkprosecutor.org/html/domviol/myths.htm> (last visited Mar. 26, 2008). The Clark County Prosecuting Attorney website identifies nine myths about domestic violence: (1) "Domestic violence affects only a small percentage of the population and is rare"; (2) "Domestic violence occurs only in poor, uneducated, and minority families"; (3) "The real problem is couples who assault each other, women are just as violent as men"; (4) "Alcohol abuse causes domestic violence"; (5) "Domestic violence is usually a one time, isolated occurrence"; (6) "Men who batter are often good fathers and should have joint custody of their children if the couple separates"; (7) "When there is violence in the family, all members of the family are participating in the dynamic, and therefore, all must change for the violence to stop"; (8) "Battered women are masochistic and provoke the abuse. They must like it or they would leave"; (9) "Men have a right to discipline their partners for misbehaving. Battering is not a crime."

⁴⁶⁸ See ABA COMM'N ON DOMESTIC VIOLENCE, WHEN WILL THEY EVER LEARN? EDUCATING TO END DOMESTIC VIOLENCE: A LAW SCHOOL REPORT I-5 (Deborah Goelman & Roberta Valente eds., 1997); Becker, *supra* note 467, at 64 (speaking of how batterers "successfully use the legal system as a tool in their arsenal" and "[j]udges are shockingly naive, uninformed, or indifferent to the abuser's ability to manipulate their children as well as the legal system"); Sarah M. Buel, *The Pedagogy of Domestic Violence Law: Situating Domestic Violence Work in Law Schools, Adding the Lenses of Race and Class*, 11 AM. U. J. GENDER SOC. POL'Y & L. 309, 310 (2003).

⁴⁶⁹ *Collated Responses*, *supra* note 5, at 371.

about the situation in which abductors, who are often primarily caregivers, might be separated from the child if the child is returned. Well-known research indicates that stability in the child's relationship with the primary caregiver is very important.⁴⁷⁰ Returning the child to his or her habitual residence may interrupt this relationship if the abductor will not, or cannot, return to the child's habitual residence too. The abductor may refuse to return to the child's habitual residence for a variety of reasons, but the most common reasons probably include pending criminal charges, safety concerns, or an inability to enter the country based on immigration status. A court might find a separation, and its resulting harm, relevant to an article 13(b) defense,⁴⁷¹ although many courts refuse to allow a separation caused by the abductor's own actions to count in the article 13(b) calculation.⁴⁷²

The United States misinterpreted this question. The delegation's answer suggested that the person answering the questionnaire was not familiar with U.S. family law. The United States stated,

The United States has generally moved away from analyzing custody cases using the primary caregiver doctrine because it has been found to be equivalent to gender bias. To the extent that this question is asking about the effect of the immigration status of the abducting parent on Hague proceedings, please see the responses to questions 15–18 . . .⁴⁷³

⁴⁷⁰ See Carol S. Bruch, *Sound Research or Wishful Thinking in Child Custody Cases? Lessons from Relocation Law*, 40 FAM. L.Q. 281, 285 (2006) (observing that attachment theory—"a child's ability to form and maintain healthy intimate relationships across the life span depends on its having had a close and consistent relationship with its mother during infancy and early childhood"—"is broadly accepted in child development and developmental psychology"); Judith S. Wallerstein & Tony J. Tanke, *To Move or Not To Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L.Q. 305, 311 (1996) ("All of our work shows the centrality of the well-functioning custodial parent-child relationship as the protective factor during the post-divorce years. When courts intervene in ways that disrupt the child's relationship with the custodial parent, serious psychological harm may occur to the child as well as to the parent.").

⁴⁷¹ See Panazatou v. Pantazatos, No. FA960713571S, 1997 WL 614519, at *3 (Conn. Super. Ct. Sept. 24, 1997) (recognizing that without enforceable undertakings allowing a mother to return with the child to the child's habitual residence, the article 13(b) defense would be made out); *see also Re D*, [2006] EWCA (Civ.) 146, [312]–[13] (Eng.); *cf.* Rydder v. Rydder, 49 F.3d 369, 373 (8th Cir. 1995) (suggesting separation can support an article 13(b) defense, but noting that mother presented no specific evidence of potential harm in this case).

⁴⁷² Freier v. Freier, 969 F. Supp. 436, 442 (E.D. Mich. 1996) (stating "adjustment problem[s] common in the relocation of most children is not enough"); C v. C [1988] 2 All E.R. 465, 470–71 (Eng.).

⁴⁷³ *Collated Responses*, *supra* note 5, at 376.

The U.S. answer lacks any mention of children's need for stability in their relationships with their caregivers. The second sentence in the answer is also problematic because it reflects a limited and myopic view of why an abductor may not return.

Most revealingly, however, the first sentence in the answer is totally non-responsive. The question does not ask about custody or the standards for analyzing custody. Assuming, however, that were the question, the U.S. response is still quite odd. It contained an inaccurate statement of family law in the United States. Most courts find the fact that someone has been the primary caregiver *relevant* to the best interest analysis,⁴⁷⁴ although relatively few courts apply a presumption that the primary caregiver should obtain custody.⁴⁷⁵ Courts that have rejected the primary caregiver presumption have done so because they think that no one factor should dominate the best interest analysis,⁴⁷⁶ not because it is gender biased.⁴⁷⁷ The test, after all, is gender neutral on its face and any benefit to women comes from the way couples choose to order their lives.⁴⁷⁸ In one of the cases most cited for embodying the primary caregiver presumption, *Garska v. McCoy*,⁴⁷⁹ the court noted that changes in the sex roles meant the primary caretaker could be the

⁴⁷⁴ See Paul L. Smith, Note, *The Primary Caretaker Presumption: Have We Been Presuming Too Much?*, 75 IND. L.J. 731, 735–36 (2000) (“[C]ourts and legislatures across the country, a majority of which use a best interest standard, continue to incorporate the primary caretaker presumption as one of the factors in determining what would be in the best interest of the child. . . . Courts in at least sixteen states have identified and showed some favor for the parent who had been the primary caregiver before the couple separated. Furthermore, courts from at least seven of these states have identified primary caretaking as a significant factor in assessing the child’s best interests. Some commentators have even argued that there is a trend in the laws of many states towards saying that it is always in the child’s best interest to be with his or her primary caretaker.”) (footnotes omitted); *see also* Andrea G. Nadel, Annotation, *Primary Caretaker Role of Respective Parents As Factor in Awarding Custody of Child*, 41 A.L.R. 4th 1129, §4 (1985) (listing twenty-six states that consider the primary caretaker role a factor in determining custody).

⁴⁷⁵ See Nadel, *supra* note 474, § 3 (listing four states that use a presumption in favor of the primary caretaker, at least for young children).

⁴⁷⁶ See, e.g., *Thompson v. Thompson*, 974 S.W.2d 494, 496 (Ark. Ct. App. 1998); *Schumm v. Schumm*, 510 N.W.2d 13, 14 (Minn. Ct. App. 1993); *Applegate v. Applegate*, 461 N.W.2d 419, 420 (Neb. 1990); *Holm v. Smilowitz*, 615 N.E.2d 1047, 1059 (Ohio Ct. App. 1992); *Nickerson v. Nickerson*, 605 A.2d 1331, 1333 (Vt. 1992).

⁴⁷⁷ Cynthia A. McNeely, *Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court*, 25 FLA. ST. U. L. REV. 891, 934 (1998) (“While fathers have raised equal protection challenges to the mother-preference in custody determinations, it appears, at least at the appellate level, that none have been successful—unless the statute states a blatant presumption favoring mothers.”).

⁴⁷⁸ See Phyllis T. Bookspan, *From a Tender Years Presumption to a Primary Parent Presumption: Has Anything Really Changed? . . . Should It?*, 8 BYU J. PUB. L. 75, 84 (1993).

⁴⁷⁹ 278 S.E. 2d 357 (W. Va. 1981).

father.⁴⁸⁰ In a case from my own state, the appellate court chastised a trial court when it called the application of the primary caretaker factor gender discriminatory.⁴⁸¹ Some scholars even have argued that a court's failure to give significant attention to the primary caretaker's role reflects gender bias.⁴⁸²

The lack of expertise on family law matters was evident in other ways too. For example, the United States was asked to list non-governmental organizations involved in matters covered by the Convention.⁴⁸³ While the United States mentioned NCCUSL and its uniform act on jurisdiction—the UCCJEA—it omitted any mention UCAPA.⁴⁸⁴ UCAPA is NCCUSL's newest model act in the family law area and overlaps with the Hague Convention. UCAPA is meant to prevent abduction. UCAPA even explicitly refers to the Hague Convention: A court must examine whether the child is traveling to a country that is a party to the Hague Convention when assessing the potential risk of harm from an abduction.

These mistakes illustrate that the U.S. delegation may have lacked the sort of understanding about U.S. family law and family dynamics that one would hope it would have. One would expect the United States to know that children need stability in their relationships with their primary caregivers, even if the Hague Convention does not necessarily privilege that sort of continuity. The importance of stability for children is so fundamental that the United States' mistake makes one wonder if the U.S. delegation understands children's needs or family dynamics at all. This mistake raises questions about the United States' understanding of other family law concepts like domestic violence.

The U.S. answer also is revealing because it contained a knee-jerk response about discrimination. The fact that the U.S. Central Authority views the primary

⁴⁸⁰ *Id.* at 360; *see also* Nadel, *supra* note 474, § 2[a] (“Courts in custody disputes between parents appear to be placing more importance on which parent provided the primary care for the child, regardless of the parent’s sex.”).

⁴⁸¹ *Van Dyke v. Van Dyke*, 618 P.2d 465, 466–67 (Or. Ct. App. 1980) (noting either parent could be the primary parent and “the identity of the primary caretaker is . . . relevant”).

⁴⁸² *See generally* Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN’S RTS. L. REP. 235, 237 (1983) (noting that women lose custody of their children when courts rely on factors other than the primary caretaker factor even though the factor is gender neutral and even though it corresponds with children’s needs for nurturance and continuity); *see also* Katharine T. Bartlett, *Preference, Presumption, Predisposition, and Common Sense: From Traditional Custody Doctrines to the American Law Institute’s Family Dissolution Project*, 36 FAM. L.Q. 11, 22–23 (2002) (“[C]ourts tend to give fathers more credit than mothers for doing what is expected of mothers, to penalize mothers more than men for extramarital affairs, and to think that a mother’s investment in her career is selfish while a father’s is the act of a responsible provider.”); Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 773 (1988) (noting that “if we value nurturing behavior, then rewarding those who nurture seems only fair,” and the rule is gender-neutral on its face).

⁴⁸³ *Collated Responses*, *supra* note 5, at 471.

⁴⁸⁴ *Id.* at 480, 149.

caretaker doctrine as gender discrimination mirrors the position of the fathers' rights groups.⁴⁸⁵ As discussed below, the U.S. invocation of a nonresponsive and incorrect answer with respect to this inquiry raises questions about the potential influence that fathers' rights groups had with respect to the United States' approach to domestic violence generally.

2. *Appeasing Domestic Constituents*

The U.S. hostility to the plight of domestic violence victims may in fact reflect the influence of fathers' rights groups, although admittedly the only evidence for this conclusion is circumstantial. The U.S. delegation was clearly aware of the fathers' rights groups.⁴⁸⁶ Also, some of the U.S. positions were aligned with the views of such groups. Mention was just made of the United States' claim that the primary-caretaker consideration is gender biased. In addition, fathers' rights advocates have criticized the use of article 13(b) by domestic violence victims and have questioned these victims' veracity.⁴⁸⁷ Fathers' rights advocates have also pushed for better enforcement of access rights than the Convention currently provides,⁴⁸⁸ and the State Department's position on access is

⁴⁸⁵ See FATHERS & FAMILIES, THE FATHERS & FAMILIES STRATEGIC PLAN 5 (2001) ("A 'primary caretaker' custody standard is a pretext for gender bias."); Smith, *supra* note 474, at 732 ("Father's rights groups have claimed that it is actually a maternal preference disguised as a gender neutral rule."); Ronald K. Henry, The Primary Caretaker Theory: Backsliding to the 'Tender Years' Doctrine, <http://www.deltabravo.net/custody/caretaker.php> (last visited Mar. 26, 2008) ("The gender bias inherent in the 'primary caretaker' theory lies in its insistence that the types of tasks most often performed by women, regardless of the presence of children, are worthy while those of men are not."); Glenn Sacks & Dianna Thompson, *Fathers and Gender Bias*, MINNEAPOLIS STAR TRIB., June 21, 2002, available at <http://www.acfc.us/reports/pdfs/DTWMinnStrTrib062102Fathers&GenderBias10.pdf> (noting father's grievances include "judicial preference for mothers as custodial parents" in a state that has a primary caretaker presumption for children of tender years).

⁴⁸⁶ The Central Authority identified two issues that have received publicity in the United States. "There have been complaints by some fathers' rights groups about not being able to use the Convention to enforce access rights. . . . [A]dvocates for domestic violence victims have prompted some debate, mostly in academic circles, about the use of Article 13(b) in protecting domestic violence victims." *Collated Responses*, *supra* note 5, at 458.

⁴⁸⁷ See Men's Aid Campaign for Equality, http://www.mensaid.com/false_allegations (last visited Mar. 26, 2008); Men's Rights Agency—Feminism, <http://www.mensrights.com.au/page24e6.htm> (last visited Mar. 26, 2008). See generally Molly Dragiewicz, *Patriarchy Reasserted, Father's Rights and Anti-VAWA Activism*, 3 FEMINIST CRIMINOLOGY 121, 126 (2008), available at <http://fcx.sagepub.com/cgi/reprint/3/2/121> (demonstrating how these groups "work to undermine the necessary conditions for women's freedom from violence without making direct statements of support for violence against women that might be socially unacceptable").

⁴⁸⁸ See *supra* note 486.

consistent with this viewpoint.⁴⁸⁹ The Bush Administration has enjoyed the support of these groups in other contexts.⁴⁹⁰ Consequently, fathers' rights groups may have formally influenced U.S. policy. Alternatively, the Administration may have unconsciously absorbed the perspective of fathers' rights groups because left-behind parents, or fathers, constitute the majority of individuals with whom the Central Authority deals.⁴⁹¹

⁴⁸⁹ The United States wants countries to recognize and enforce access rights. For example, the State Department said,

The Guide [to Good Practice on Transfrontier Access/Contact] should emphasize the recognition of the obligation on the part of all contracting states that they must acknowledge the rights of both parents to have a meaningful relationship with their child, absent a court order terminating parental rights. Further, this obligation implies that the parties will work, within the laws and regulations of their respective states, to ensure the exercise of that right.

Collated Responses, *supra* note 5, at 419. The United States, however, was not totally supportive of the timing for a Protocol to improve access. Its opposition appeared to reflect a pragmatic assessment of the likelihood of successfully ratifying such a document. The delegation thought a Protocol might not be adopted in the United States if it were introduced today. *See Notes of Proceedings*, *supra* note 20, Nov. 7. The United States spoke of the changing environment in Congress, particularly the hostility to federal intervention in issues of American family law. The Special Commission has made it a priority to work on the improvement of transfrontier access/contact. *See 2006 Conclusions and Recommendations*, *supra* note 21, at 5.

The United States also expressed concern that application of the 1996 Protection Convention might undermine access rights. *Notes of Proceedings*, *supra* note 20, Nov. 4. It explained that the 1996 Protection Convention would permit a court in another nation to modify access rights that were given as a quid pro quo for permitting the custodial parent's relocation. *Id.* Since the primary basis for jurisdiction under the 1996 Protection Convention is habitual residence, *see 1996 Protection Convention*, *supra* note 268, art. 5, at 1397, and since the child's habitual residence can change when the child relocates, a court in the new state can obtain jurisdiction to modify access. A court can also acquire jurisdiction after an abduction if (1) the left-behind parent either acquiesces to the new habitual residence, or (2) the child has lived there for at least one year and the child is settled, and the other parent has not sought the return of the child. *Id.* art. 7, at 1397. Article 17 suggests that the courts in the new habitual residence will be able to alter visitation arrangements if appropriate. *Id.* art. 17, at 1399.

⁴⁹⁰ *See Kim Gardy, Viewpoint: Father's Rights . . . and Wrongs*, NATIONAL NOW TIMES (Summer 2006), available at <http://www.now.org/nnt/summer-2006/viewpoint.html> (discussing Wade Horn and the Responsible Fatherhood program); Wayne Parker, Judge Samuel Alito and Father's Rights, <http://www.fatherhood.about.com/od/fathersrights/a/alito.htm> (last visited Mar. 26, 2008).

⁴⁹¹ Incoming cases are far more numerous than outgoing cases. *See Statistical Analysis*, *supra* note 3, at 627 (reporting that in 2003, there were 286 incoming return applications versus 85 outgoing return applications).

3. Institutional Self-Interest

Finally, the U.S. Central Authority might be wary of proposals to help domestic violence victims because many of the proposed solutions would involve increasing the Central Authority's workload. For example, facilitating access to documents during proceedings or helping put in place protective measures for a returning parent would require the Central Authority to undertake additional responsibilities. These new efforts are not part of the criteria by which Congress currently evaluates the Central Authority.⁴⁹² Consequently, it makes institutional common sense for the Central Authority to oppose measures that would divert its resources away from the activities on which it is evaluated. Yet the various proposals had much merit and would have improved operation of the Convention for a vulnerable population. The U.S. delegation could have supported the initiatives on the condition that the U.S. Central Authority would receive additional resources to implement them. Certainly the imposition of new responsibility on the Central Authority would have given the Central Authority a good reason to seek additional resources.

IV. CONCLUSION

The United States was not an admirable leader at the Fifth Meeting. When invited by the pre-meeting questionnaire to "make proposals concerning recommendations to be made by the Special Commission," the United States was silent.⁴⁹³ The United States, however, was vocal in its indifference, or perhaps hostility, to the plight of domestic violence victims. While its position was condemnable, the transparency with which the United States presented it allows concerned individuals to address the merits of the U.S. position. In contrast, the U.S. position on a number of other issues was obscured with nationalistic legal language. The use of this language was not necessary, nor even precise or accurate in certain instances, raising legitimate questions about the United States' tactics. As a U.S. citizen, I was surprised and disappointed by my government's performance. This Article may cause others, both here and abroad, to have a similar reaction to the United States' participation. I hope it will prompt the United States to rethink its strategy and positions, and thereby redeem itself at the Sixth Meeting of the Special Commission.

⁴⁹² 42 U.S.C. § 11611 (2006) (describing contents of report that the Secretary of State must submit to Congress each year).

⁴⁹³ *Collated Responses*, *supra* note 5, at 577, 582.