

**Testimony before the
House Committee on Foreign Affairs,
Subcommittee on Africa, Global Health, and Human Rights
“International Child Abduction: Broken Laws and Bereavement Lives”
Tuesday, May 24, 2011**

By Kristin Wells

Chairman Smith, Ranking Member Payne, Members of the Committee, as a former counsel to the House Committee on Foreign Affairs, I am honored to be here today to share my thoughts and concerns about the parental abduction of American children to foreign countries. I am here today testifying on my own behalf. In no way should any of my comments be attributed to the partnership of Patton Boggs, where I am now a partner, or any of its clients.

My experience with this issue began when I served on the Committee from 2007 to 2009. In my position as Deputy Chief Counsel for then-Chairman Howard Berman, I conducted oversight on this issue. My work began with inquiries about the abductions of Melissa Braden to Japan and of Sean Goldman to Brazil. Soon my work involved broader policy oversight of the State Department’s efforts on this issue and the complexities of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, to which the United States is a party.

Today, my goal is to provide a practical assessment of the policy issues around the international abduction of American children. My testimony today will (1) highlight issues with the Hague Convention, (2) address obstacles associated with non-Hague convention cases, (3) discuss challenges and improvements at the Department of State, (4) highlight a issues relating to abductions in Africa and Japan, and (4) suggest practical actions Congress and other U.S. Government agencies can implement to improve the U.S. Government’s response to international abduction cases. Ultimately, I believe all of us here today share the same goals: the return of abducted American children to their habitual residence in the U.S., and the resumption of parental access and visitation when return is not forthcoming. Both of these outcomes improve the chances that the best interests of the child will be met.

My testimony focuses primarily on abducted American children. However, it is important to note that the Hague Convention also covers non-U.S. citizen children who are residing in the United States at the time of their abduction, irrespective of their immigration status here. As a party to the Convention, the United States also must uphold its obligations regarding the hundreds of children who are abducted *to* the United States each year from other countries. As the Central Authority for the Hague Convention in the United States, the State Department works actively with U.S. federal, state and local law enforcement to help resolve these cases appropriately and expeditiously.

You have already heard heart-wrenching testimony from parents who have suffered the pain of international parental abduction of their children for many years. There is nothing more fundamental to parents than the bonds with their children. It is no surprise, then, that cases of international child abduction, such as those you have heard in the testimony here today, continue to be brought to Members of Congress for their political help. There is hardly a person among us who would not support their efforts to be with their children again, or who would not do the same thing if our child was wrongfully taken from us to a foreign land.

Unfortunately, in today's age of globalism, cases of international child abductions from the U.S. are on the rise. Within the U.S., there has been an increase of marriages and partnerships that are no longer confined to by religion, language, racial group, ethnicity or national borders. Along with the increase in cross-cultural unions is the inevitable corresponding increase in dissolution of those unions. Unfortunately, incidences of conflicts in these relationships sometimes result in one parent abducting their child from the other parent and returning to their "home" country.

The House of Representatives has actively examined the issue of international child abductions in the past. In 1999, former Chairman Benjamin Gilman (R-NY) of the House Committee on International Relations requested a GAO report on this issue. In 2000, Rep. Nick Lampson (D-TX) made a series of one-minute speeches on the House floor highlighting foreign abduction cases. In 2004, the late HIRC Chairman Henry Hyde (R-IL) held a full committee hearing on international child abductions and the Tom Lantos Human Rights Commission held a hearing on the issue in late 2009. These are just a few examples of the bipartisan attention this critical issue has received in the House of Representatives.

Despite improvements in the U.S. Government's responsiveness to U.S. child abductions, the international and domestic political, legal and law enforcement challenges of these cases continue to stymie the return of many American children. While the State Department has instituted several useful reforms, the U.S. Government should continue to seek new ways to respond to international child abduction cases until the rates of returns and visitation improve.

Application of the Hague Convention

The Hague Convention is an imperfect legal instrument, yet it plays a critical role in addressing international child abduction cases and it is the U.S. government's most reliable tool for seeking the return of children abducted from the United States. Eighty-five countries are now Contracting States to the Convention and the United States has actionable agreements with many of these countries to ensure prompt return of the child to their country of habitual residence.

It is easy to think of the Hague Convention as an international child custody mechanism—however that perception is not accurate. The Convention does not solve matters of custody or visitation. Instead it clarifies which country has the *legal jurisdiction* to resolve the dispute between the parents. The Convention requires the prompt return of the child to that jurisdiction under the theory that returning the abducted child to his or her area of habitual residence is in the best interest of the child. Additionally, the Hague Convention confirms that the court in that jurisdiction of habitual residence is the best equipped judicial body to hear and review evidence relating to a custody or visitation decision. The Convention seeks to rebalance the playing field so that the abducting parent does not have an advantage over the left behind parent.

Despite its imperfections, the Convention has a number of strengths, notably: (1) it is an international instrument that has successfully helped resolve many child abduction cases by returning children or providing access to the left-behind parent; (2) it provides a means for countries to communicate with one another and identifies authorities in each nation responsible for addressing such cases; (3) it clarifies the internationally-agreed upon value of focusing on the child's best interests, including the child's right to a relationship with both parents; (4) it presses governments to promptly return a child to their home of habitual residence; and (5) it embodies promises made by the Contracting States to assist other countries in locating children abducted into their territory and cooperating to resolve those cases under the terms of the Convention.

Challenges of International Operation

Nonetheless several key weaknesses demand further attention. First, the most obvious weakness is that a large number of abduction cases between Contracting States are not resolved despite the presence of the Convention. Often children are not returned to their state of habitual residence, and thus, there are too many cases where the Hague Convention fails in its primary objective. Second, even when the Convention does work, rarely are children returned to their habitual residence with anything near promptness, defined by the six week standard identified in the Convention. In fact, few children are returned to their parents in less than a year. Article 12 of the Convention indicates that if more than a year has passed since the child was wrongfully removed, the judicial or administrative authority is not bound to return the child to his/her habitual residence. The Contracting States should consider amending this language to allow the Convention to remain effective beyond one year.

The unfortunate delays in return and, sometimes, the complete failure to return abducted children, result from a number of problems with the Convention itself.

One such problem is the lack of an effective enforcement mechanism for the Convention. The Hague Conference on Private International Law has no power to enforce compliance among the Contracting States. Despite the Convention's terms, Contracting States are often less willing to comply with the Convention when a dual national child with rights to citizenship in both countries is at issue. A mutually agreed upon enforcement mechanism with real teeth is needed to exact much greater compliance by Contracting States. Issues of state sovereignty make such an agreement unlikely in the near future, however.

In addition, there is insufficient oversight of the Convention. A decade ago, the House was apprised of the need for greater resources at the Hague Conference and in other agencies and bodies to ensure proper operation of the Convention. Those unmet needs are even greater now. A robust oversight office that reports to the Contracting States and the global public could have a notable impact. Of course, the political will of Contracting States to improve compliance is essential for such oversight mechanism to succeed.

Challenges of Judicial Interpretation

Although the Convention is over 30 years old, a myriad of interpretation issues are evident in the U.S. case law and the judicial systems of other Contracting States. The fact that nations and courts interpret the language of the Convention differently has dramatic effects on the cases and often results in children not being returned. This is identifiable in the differing interpretations of "habitual residence" (see Art. 4) that reflect different cultural understandings of that term, and that vary starkly between court opinions. These conflicting interpretations are evident in U.S. cases as well. Furthermore, in many countries, abduction by a parent is not viewed as "wrongful" (per Article 3, 12), either by domestic law, customary interpretation, or political practice. Many countries have strong preferences for children to be with either the mother or the father, or the families of one parent or another, despite the Convention's terms. It can be very difficult for courts to rule against those traditional viewpoints, regardless of international agreements the government may or may not have made.

Another critical area of language interpretation regarding the Hague Convention is the provision written to ensure that children are not returned to conditions where they will be harmed. The grave risk of harm exception in Article 13 states that the authority of the requested State "is not bound to order the return of the child" if it is established by the opposing party that

“there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable position.” This language becomes critical in cases where there are allegations of domestic violence. It is just these cases where the stakes for kids are highest, and the need to get the legal analysis right is most critical.

Varying interpretations of this language have split the U.S. federal circuit courts. In many parts of the world, and still sometimes amongst U.S. courts, it is very difficult for victims of domestic violence to effectively use this provision to prevent the return of their child to the alleged abuser or to the immediate area where the child would be in the proximity of that abuser, and possibly at greater risk of harm as a result. There are numerous cases where a history of violence against the mother, even violence in front of the children, has been found insufficient to enact Article 13 to prevent a return of the child to the habitual residence. In more recent years, some U.S. courts have begun to find that harm to the mother puts the child at greater risk of physical or psychological harm. Yet a number of courts have declined a return to the child’s habitual residence under the Hague Convention using this interpretation. This is tricky -- for requesting countries will often argue that as the habitual residence, those nations are best situated to address issues of violence through their court system. Yet some American courts have been hesitant to accept that argument if an erroneous judgment would appear to place the child closer to the source of harm and may result in the child being returned to an abusive parent.

The U.S. Justice Department could play a more robust role to assist with U.S. federal court interpretation, by doing a thorough review of the “grave risk of harm” provision and by issuing guidelines to the federal courts on what standards and tests should be used interpret this part of the Convention. The Office of Violence Against Women could participate in developing that guidance and overseeing the training of judges on this issue, just as they have successfully trained judges on the Violence Against Women Act and thereby improved American jurisprudence to protect victims of domestic violence.

While Members of Congress have reviewed and debated the problem of international child abduction numerous times, the issues of legal interpretation are rarely addressed to the attention of Members or their staff. Few of these issues were raised to me when I was on the Committee staff. However, a notable number of law review articles discuss the challenge of handling domestic violence allegations in Hague Convention cases and the use of the “grave risk of harm” exception, along with other legal interpretation issues. When and if Congress drafts, considers or passes new legislation on international child abduction, I hope that the broad range of concerns reflected in the case law, legal analysis and statements of practitioners, and the fixes they suggest will be thoroughly considered. I am sure that further outreach to experts at the State Department’s Legal Advisor’s office, the Department of Justice and in the realm of private practice would yield many robust suggestions that would positively impact future child abduction cases.

Challenges in Addressing Non-Hague Convention Cases

While the Hague Convention is a critical tool in resolving cases between two Contracting States, the other critical tools for resolving international child abduction cases are international law enforcement cooperation, diplomacy and the political will of the home State to wield them. While all of these tools can be exercised by a state, none can be exercised by a left behind parent. A parent’s other critical tool, a good lawyer, is all that is within his or her control and many have financial, geographic or other limitations that restrict the ability to have a knowledgeable,

experienced, resourceful and tenacious lawyer advocating on his or her behalf. When facing the greatest challenge of their lives -- the abduction of their child -- left-behind parents confront their greatest need for a government that is pursuing a legally appropriate resolution for them and their child.

Without the Hague Convention, left-behind parents may not be able to identify where their child is located. They may seek to get a U.S. custody or visitation order recognized in a foreign jurisdiction, which is rarely successful. In some non-Hague countries, parents are not even able to effectively file a case in the foreign judicial system, or they cannot get it heard even if they are able to file it. It may be difficult to identify who, if anyone, in the foreign government has the ability, power or desire to help locate or return the child. Even if some of these problems are resolved, without the Hague Convention as a tool to encourage the foreign government to return the child to the habitual residence, custody is likely to be decided by the foreign court using the child's presence there and the court's jurisdiction as a key factor against the left-behind parent.

Using the U.S. courts to get a domestic judgment is a critical step. Cooperation from the FBI or other U.S. law enforcement in searching for the child, collaborating with law enforcement in the foreign country can help to find a child and result in a return. Similarly, intense diplomatic efforts sometimes result in the return of children. The foreign country may help negotiate an agreement with the abducting parent, may revoke a visa causing that parent to leave the country, or may use other domestic legal or political procedures to return a child. The State Department, FBI and Department of Homeland Security can collaborate to flag the abducting parent's passport should they reenter the U.S. and this may help locate the child. While all of these steps can help, often they do not result in the return of the child.

For those reasons, I support the State Department's efforts to continue to urge non-Hague countries to join the Convention.

Improving the U.S. Policy Response at the State Department's Office of Children's Issues

In studying this issue over the years, I have heard some of the negative experiences faced by left behind parents and their attorneys when they sought help from the State Department. There are cases where left-behind parents and attorneys did not know of or pursue a Hague Convention application and were unaware of any help, including diplomatic help, which the U.S. State Department could have provided. I also heard of a case where a foreign government tried vigorously to get the U.S. to return a child abducted into the U.S. and the State Department was nowhere to be seen in the discussion between the parties, their attorneys or the domestic court that decided the issue. Too often State Department case workers did not tell families of the resource materials created by the Department of Justice that could help their efforts to get their kids back. Too often they were negative and foreboding, and squashed what little hope families and their attorney's brought to the State Department. Too often they left parents thinking that the State Department would do nothing, had done nothing and would provide no help -- despite clear evidence they have presented to Congress that they do work intently on these cases. As staff to the Foreign Affairs Committee, I found my conversations with State to be informative and engaging. They detailed steps taken on individual cases and groups of cases in a foreign country to work diplomatically at every level to seek the return of American children.

I am hopeful, however, that with significant expansions in the staff and resources, the Office of Children's Issues is now doing a better job in its responses to families and their attorneys.

The most significant structural change to this Office was the creation of the Special Advisor for International Children's Issues within the State Department to address international parental child abduction and intercountry adoption. Ambassador Susan Jacobs was appointed to the position by Secretary of State Clinton in July of 2010 to bring higher-level diplomatic representation and attention to these issues.

Case management has also been restructured. A few years ago, the unit was staffed with about 20 Foreign Service officers who handled a heavy caseload of about 150 cases each. The volume of work these officers handled and the limited resources often made it difficult for them to provide the kinds of responses to left-behind families and their attorneys as were often desirable. In addition, these officers worked for the unit for a standard 2-year Foreign Service tour so cases were frequently changing hands and families and attorneys had to be educating the new officer on their case every few years.

Today the unit has 85 to 100 officers, both Foreign Service and civil service employees. Each is limited to no more than 75 cases under a Congressional mandate, and most case officers handle an average of 50 to 60 cases at a time. There is more stability in the officer personnel and they have more time to work each case in their portfolio and to engage in the diplomatic outreach each case requires. Hopefully, more children are being returned to their parents in the U.S. as a result.

Abductions to Japan and African Nations

Japan is a particularly difficult country for a left-behind parent whose child has been abducted. Because of cultural and historical traditions, some of which are embedded in Japanese law, it is the only nation where foreign parents are consistently unable to receive *any* access to their children's after the abduction. No U.S. child abducted to Japan has ever been returned with the involvement or assistance of the Japanese government. In the few cases where there has been contact or a return after the abduction, those have occurred when the left-behind parent was fortunate to work out access to the child with the abducting parent or with the child itself as the child became older.

However, Japan has made significant strides on this issue in recent years and there is much hope among parents and policy makers in the U.S. and in other countries that, in time, Japan will join the Hague Convention. Their Ministry of Justice recently completed a review of the Convention and, this month, recommended its consideration to the Japanese Diet. The Embassy of Japan has more vigorously engaged this issue here in the U.S. and the State Department – though both the Secretary of State and the Special Advisor on Children's Issues – have held high level discussions on the matter in Japan. Reform on this issue is still daunting in Japan, and Hague accession will not solve the thousands of existing cases. Continued political engagement, support and pressure from the State Department and from Congress will hopefully help to further this issue so that children and parents are able to retain or resume their relationships in the future.

Given this Committee's particular attention to Africa, I would like to speak briefly about some of the issues relating to the issue of international abduction of U.S. children to the nations of Africa. The profiles of these cases have some distinctions and the diplomatic effort of engaging African nations on this issue raises distinct challenges.

Most of the nations of Africa are not signatories to the Hague Convention. At present the U.S. only has four partners to the Convention in Africa: Zimbabwe, South Africa, Mauritius and

Burkina Faso. Overseas, the State Department faces unique challenges as well in these cases. The road to accession of the Hague Convention can also be tedious for some African nations when inefficient and ineffective government structures hamper progress on consideration of the treaty. Corruption in the judiciary or among law enforcement is sometimes a barrier to returns or visitation. The Hague Commission has an Africa project aimed to address these issues by increasing levels of accession in Africa. Improving Hague accession and the resolution of non-Hague cases will depend on strong relationship-building and targeted regional approaches to develop partnerships with African countries on this issue.

While abduction fact patterns often look different from cases of children abducted to industrialized countries, the pain for the left-behind parent is no less. U.S. children abducted to Africa are often taken to the continent and left with extended family – grandparents, an aunt or uncle or family friend – while the abducting parent returns to the United States or a third country. Some children are also left at boarding schools. For Consular Officers, the complications of locating a child and conducting welfare and well-being visits are sometimes extreme. A small number of the Africa cases also involve fears by the left-behind parent that their daughter will be subjected to female genital cutting.

Often both parents of children abducted to African nations are immigrants or visitors to the United States from Africa. They may use customs traditional to their country or community to solve relationship disputes and child custody issues without knowledge, understanding or acceptance of U.S. laws on these matters. In the United States, left-behind parents from Africa face great difficulties in getting help from local law enforcement when they try to access their child or pursue legal remedies against the other parent. Language, cultural differences and weak relations with law enforcement make their efforts particularly challenging. In addition, some of these parents are not as familiar with the American political system, and are not in large established immigrant communities where they can find support and information. As a result, African parents may not be able to galvanize the effective legal representation and political attention these cases often need.

Congressional Response

Without a doubt, a Member's advocacy on individual cases is critically important and I must commend you all for the attention you have given to this issue. While continuing that important work, I think that the House must be careful in moving measures that seek to respond to individual cases of abduction, rather than addressing the problem more broadly in a way that represents and can help the causes of all abducted American children. While some forms of economic sanctions may be successful in getting greater attention from a foreign government to abduction cases, they could cause notable other harms to our trade, diplomatic, intelligence or security interests that may sway against their use. If those steps are considered, it will be important for the United States to maintain compliance with international trade agreements and it should be weighed with trade preference discussions currently underway.

In closing I recommend that Members of Congress consider several actions:


- Request a follow-up report from the GAO on its 2000 report "Specific Action Plan Needed to Improve Response to Parental Child Abductions" (GAO/NSIAD-00-10) to analyze whether the recommendations were implemented, what effect they had, and what more should be done to improve our ability to win the return of American children.

- Examine the need for better collaboration between the Department of State, the Department of Justice, and the Department of Homeland Security, particularly the success of such collaboration in the field between our Foreign Service officers, law enforcement agents, and border security agents to locate children and achieve their return to the U.S.
- Expand existing programs of the Department of State and the Department of Justice to provide legal training on international child abduction and resources to identify and help left behind parents and inform them of their options and enable them to pursue those options.
- Continue to diplomatically engage non-Hague countries in discussions about joining the Hague Convention and advise on laws and structures for successful implementation and compliance.
- Organize and sponsor international conferences to expand understanding, and improve dialogue with other nations on abduction issues. These could both encourage Hague compliance, address issues of compliance, and look for other areas of cooperation with countries that are not becoming signatories to the Hague Convention.
- Continue training U.S. and foreign judges on the Hague Convention and non-Hague options for judicial consideration.
- Congress should consider increased funding to the Hague Conference on Private International Law to establish a robust office of oversight and compliance to monitor the Convention.
- Congress should support the State Departments active engagement with the Hague conference and urge continued dialogue on varying international interpretations of the Convention's language.
- Members should call on the Department of Justice to issue guidelines on the U.S. interpretation and application the Hague Convention, especially on the risk of harm exemption.
- Congress should continue to raise desire for Hague accession to Japanese government officials and should support efforts to improve cooperation among African nations on abduction cases.

United States House of Representatives
Committee on Foreign Affairs

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Kristin Wells	Self, partner at Patton Boggs, LLP
3. Date of Committee hearing:	
Tuesday, May 24, 2011	
4. Have <u>you</u> received any Federal grants or contracts (including any subgrants and subcontracts) since October 1, 2008 related to the subject on which you have been invited to testify?	5. Have any of the <u>organizations you are representing</u> received any Federal grants or contracts (including any subgrants and subcontracts) since October 1, 2008 related to the subject on which you have been invited to testify?
<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
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