STATEMENT

OF

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SUBMITTED TO THE

SUBCOMMITTEE ON AFRICA, GLOBAL HEALTH

HUMAN RIGHTS

COMMITTEE ON FOREIGN AFFAIRS

UNITED STATES HOUSE OF REPRESENTATIVES

HEARING

IMPROVING THE RATE OF RETURN OF CHILDREN

ABDUCTED INTERNATIONALLY BY A PARENT

MAY 23RD 2011

Chairman Ileana Ros-Lehtinen, Ranking Member: Howard L. Berman

Sub-Committee Chairman: Christopher H. Smith

Ranking Member: Donald M. Payne

Members of the Subcommittee:

My name is Patricia Apy. I am privileged to submit for this hearing record a statement which reflects my own experience and the experiences of many of my colleagues who practice in the complicated arena of international family law, both here and abroad.

Preliminarily, I would like to tell you something about myself. This is the third time in the last year and a half I have been privileged to offer testimony in the House of Representatives. For much of the last two and a half decades I have concentrated my practice and particular expertise in the operation of state, federal and international child custody litigation. I also hold a masters degree in Social Work with a clinical concentration in family and children's issues. My private practice is devoted to complex international and interstate child custody cases. In December of 2009 I offered my remarks regarding International Child Abduction to the Tom Lantos Commission on Human Rights, and in February of 2010 I offered formal remarks on behalf the American Bar Association to the Subcommittee on Economic Opportunity Committee on Veterans Affairs concerning Military Servicemember Child Custody Arrangements.

I have served as an instructor on issues of advanced family law, including international child custody, at the Judge Advocate General Schools of the Army and Air Force, and the Naval Justice School for over a decade. I served between 1991 and 2001 as Chair of the International Law and Procedure Committee of the Family Law Section of the ABA, and have just completed my three year tenure as Chair of that Section's Military Law Committee. I had been appointed by the ABA President to serve on the Standing Committee on Legal Assistance for Military Personnel, where I served from 2002 to 2008 as both a member and liaison.

I have attended the Hague Conference on Private International Law as an attorney advisor to the Department of State, on the preliminary negotiations of the Maintenance Convention, and returned as a delegate for the negotiations on the Protection of Minors Treaty in 1996. In June of last year, I attended a meeting of the Hague Conference as one of three international practitioner observers on behalf of the International Academy of Matrimonial Lawyers. The focus of that meeting was the workings of the Hague Convention on International Adoption, with particular attention to issues of Child Trafficking and Adoption practice.

I have addressed the return of abducted children in meetings with judges and practitioners in Pakistan, the United Arab Emirates and India and have twice travelled to Japan to meet with Japanese governmental officials and our own diplomatic officers regarding Japan's failure to consider parental kidnapping "wrongful" or enforce orders for the return of children entered by American judges.

Ironically both meetings in Japan commenced immediately prior to the G-8 summit. The first, conducted during the Clinton Administration, occurred just before the 26th G-8 Summit in Nago Okinawa in 2000. I met with Japanese officials, attorneys, judges, American diplomats and American military commanders and addressed issues of parental kidnapping, the Hague Abduction Convention, allegations of domestic violence and cases involving American servicemembers.

I left those meetings having been told by the Japanese that they were considering the protections found in the Hague Treaty. I was told by American diplomats that they were discouraged at what appeared to be little more than lip service.

In the second meeting I participated at the invitation of Congressman Christopher Smith of New Jersey occurring less than two weeks before the recent earthquake. The topics discussed were precisely the same as the discussions that had been held eleven years earlier. I am expecting to return to Japan in July to provide onsite training to American Judge Advocates and civilian attorneys serving our military families abroad regarding international child custody considerations and the threat of child abductions.

I would be honored to respond to any questions regarding my training and experiences or expertise and submission here. Of course, my responses should be construed as my own views unless confirmed as the official position of the American Bar Association, or the International Academy of Matrimonial Lawyers.

Improving the return of children abducted to "Non-Hague Countries". A significant portion of my practice has always involved international abduction of children to countries who have *not* signed the Hague Convention on the Civil Aspects of International Child Abduction (Non-Hague). I wish to propose a number of concrete steps which may be taken which will immediately impact and enhance the process for the return of children abducted to countries now not signators to the Hague Abduction Convention.

A. Encouraging accession to the Hague Abduction Convention: Review of current policy of unconditional acceptance: Japan

There is no question that encouraging accession to the Hague Abduction Convention is a positive step to the development of international law. It defines and denominates kidnapping of a child by a parent as a wrongful act, and insures that the eventual resolution of the child custody dispute is completed in the country which has the most contact with and evidence regarding a child, that is, in that child's "habitual residence". It has been the long-standing position of the United States Department of State to disfavor bi-lateral agreements or other diplomatic devices such as Memoranda of Understanding (MOU) in addressing global parental kidnapping.

Because the Convention is a reciprocal Treaty, this policy reflects the historical preference that in order to encourage worldwide adoption; the "carrot" of the expedited procedure for return of children had to be exclusive. Cutting side deals, as bi-lateral and multi-lateral agreements were considered, diminished the global effectiveness of the remedy. However, thirty years after the creation of the Treaty, those countries which persist in not executing the Treaty, often reflect very different legal cultures, including religious and culturally based law regarding the resolution of family disputes which requires much more than a ratification process and enabling legislation to become effective. Keep in mind that even with a sympathetic legal system the process can be daunting. In this country, between our participation in the drafting of the Treaty and the enactment of 42 USC 11601, the International Child Abduction Remedies Act (ICARA) 8 years transpired. It is important to recall that the Hague Abduction Convention, by its own terms in Article 35 provides, "*This Convention shall apply as between Contracting States only to wrongful removals or retentions after its entry into force in those States.*" Thus, the moment that a country, such as Japan, deposits it articles of accession and that accession is accepted by the United States all of the existing kidnapping cases are excluded from reliance upon the Convention. In much of the common-law based western legal culture, that merely means that an aggrieved parent will be consigned to litigate the best interest determination in a child custody dispute in the Court to which the child has been removed, regardless of the inappropriateness or inconvenience of the forum.

However, in the case of many non-Hague countries, this will consign the left-behind parent to no remedy whatsoever. In countries like Japan, where the current legal culture and domestic law do not provide a remedy to secure even access to one's own child, let alone custodial rights. It will mean consigning these left-behind parents to legal limbo, often to never seeing their children again.

Although we , as yet, have no formal document from the Japanese indicating the timing or the process to be employed, press accounts issued in Japan included assurances that the proposed legislation , " would specify that returns will be denied in the case of child or spousal abuse ," and there would be "no negative

effects on the welfare of the child," implying a "best interest" determination prohibited by the express language of the Treaty. Finally, the Chairman of the Japanese Federation of Bar Associations cautioned, "urging the government not to rush into concluding the treaty, citing the need for thorough discussion by experts and related parties." (May 20, 2011 the Japan Times)
It would be difficult to imagine, since the dialog regarding the Treaty was alleged to have begun before July of 2000 when the world's leaders met in Okinawa and assurances were made to President Clinton , what further internal discussions could be conducted which would do anything other than delay and obstruct the return of abducted children. But more troubling is the reference to the addition of language, reportedly to be found in projected reservations taken to the Treaty, which may do little more than legitimize the persistent use of false allegations of child and spousal abuse to endorse child kidnapping.

Recommendation:
By immediately engaging in the negotiation and execution of a MOU in advance of full compliance with the Treaty, the United States Department of State could encourage the return of children through a number of diplomatic mechanisms:

- An MOU should be drafted which includes an immediate protocol for resolution of existing cases involving children alleged to have been abducted to Japan and abducted within Japan as well as Japanese children alleged to have been abducted to the United States.
- By setting a model protocol, issues of particular concern to the Japanese legislators could be addressed in advance of finalizing language in domestic legislation and provide objective criteria to evaluate positive results, and diminish the use of "reservations" which would drastically reduce the effectiveness, speed and reciprocity of application of the Treaty.
- The issue of domestic violence could be addressed with judges, lawyers, and mental health professionals developing a objective and credible mechanism for insuring that such allegations are seriously addressed, protections assured and mutual recognition encouraged, while preventing the use of false allegations to reduce the effectiveness of the Treaty.
- Unique issues of American servicemembers and their families could be addressed, assisting Judge Advocates and Command authority with tools to advise both American servicemembers and Japanese national family members of reasonable and enforceable resolutions of family disputes.
- Japan's genuine commitment to the process of fighting international parental abduction could be evaluated objectively.

- A successful MOU could serve as a template for other countries desiring to address international parental kidnapping.

Accepting any accessions without objective criteria about the likelihood and ability of a country to offer reciprocal compliance creates a misimpression to American Judges who, in assessing the obstacles to recovery of children, must enter orders addressing arrangements for the voluntary settlement of international custody and access cases. The history of a number of countries who are signators but do not comply with the international responsibilities of the Treaty, such as the historic pattern of non-compliance of Brazil, or where functioning Central authorities are absent, such as in Ecuador, must inform us in this regard.
It must be noted that in the meetings conducted in February by Congressman Smith, the diplomatic representatives of other Treaty partners, who included diplomatic the Pacific Rim countries such as Australia and New Zealand, as well as European diplomats from Spain and Germany received the concept of the use of an MOU for addressing these issues warmly.
Further, the challenges both politically and legally posed by the members of the Diet in negotiating the delicate issues of the protection of abused spouses, and need to address such allegations, I believe would welcome the assistance and assurances of the United States in attempting to address such issues as a part of a collaborative bi-lateral agreement rather than formulating politically expedient language to facilitate unimpeachable affirmative defenses to return.

B. Negotiating Bi-Lateral and Multi-Lateral Agreements with Countries which will likely be unable to consider ratification of the Hague Convention: Pakistan

Countries which base their family and personal status law upon religious law provide a unique challenge, in that the underlying premise is that they will not consider the Hague Abduction Convention as a viable option. A number of countries with which we have and desire to maintain strong commercial and strategic ties do not lend themselves to inclusion in the Treaty processes.
Even when a country is struggling with extraordinary challenges, such as Iraq in the wake of the overthrow of the prior regime and subsequent instability , family courts were among the first, if not the first courts which were re-opened and stabilized. The reasons are very straightforward, the presence of family disputes, the dissolution of marriages, and family conflict are, unfortunately universal. International marriages and cross border commercial and educational endeavors require attention to the ability to provide a mechanism for the resolution of such disputes on a global basis. By way of example, the United Kingdom and Pakistan

entered a bi-lateral which has been judicially enforced addressing international parental kidnapping allegations between the countries.

Pakistan provides a unique opportunity, in that it is one of very few, if not the only country with a family law system conducted with common law legal structure, which incorporates the significant principles of sharia law.

In April of 2009 I addressed the South Asian Bar Association regarding the potential for engaging in talks directed to such a bi-lateral agreement with the United States to address the growing number of custodial disputes and unresolved abductions involving the parents with ties to the United States and Pakistan.

Recommendation:

- Engage in immediate discussions with Judicial and Governmental Officials in non-Hague countries with religious based systems to identify categories of cases lending themselves to treatment by bi-lateral or multi-lateral agreements. Examples : United Arab Emirates, India, Pakistan

C. The Case for Reciprocity:

The issue of compliance with the Hague Convention on Child Abduction must be a crucial aspect of legislative efforts. The Abduction Convention is a reciprocal treaty. The primary goal of the Treaty is to deter international parental abduction by insuring a disincentive for doing so. By providing a unique abbreviated process with a limited and specific remedy, that of the immediate return of a child to the state of habitual residence, parents may rely upon this process when they enter into agreements for parental access and time sharing with their children. Judges in fashioning orders permitting summer access, or visits to grandparents abroad, refer to the Treaty status and rely upon the reciprocal obligations in making their determinations. When there is no compliance, and when there is no objective way of evaluating compliance, families and those engaged in resolving family disputes reasonably rely upon the Treaty to their detriment.

In order to prevent parental abductions, families, mediators, lawyers and judges must be in a position to evaluate the potential risk of abduction, by accurately evaluating the obstacles to recovery found in a given country, were a wrongful removal or retention occurred.

When a country is not compliant, when the Department of State has identified patterns of non-compliance, that information must be communicated in real time, in an objective way, and the status of Treaty reciprocity evaluated and disclosed.

Finally, in circumstances where there is no reciprocity, to protect families and children diplomatic and legislative efforts must be made with urgency and vigor to identify the problems and to seek immediate solutions. No individual parent is in a position to litigate and fight a battle which appropriately belongs at a nations-state level, which is what each left behind parent is required to do when they attempt to

retrieve their child from a country that identifies itself as a Treaty signatory, but refuses to abide by its obligations.

Recommendation:

- Legislative efforts must provide mechanisms for diplomatic action on systemic lack of treaty reciprocity. Protections outlined HR 3240 provide an objective, transparent process to evaluate reciprocity and compliance with the assistance of practitioners and judges who are litigating and entering protective orders.
- Members of this body must be immediately made aware if a child has been abducted from their district, along with a "real time" report of the compliance status of the country in question.
- A reasonable system of diplomatic consequences must be available to the Secretary of State and the President so that no country may engage in repeated and flagrant violations of its Treaty obligations with any meaningful review.

D. Military Parents

It is important to remember parents who serve our country and consider their unique circumstances. There must be a dedicated effort to provide legal services to military members, particularly those abroad and deployed whose children are subjected to wrongful removal and retention, thus resulting in what is technically"in country" abduction from a United States military facility. Diplomatic efforts have to be made to consider international parental kidnapping issues when negotiating Status of Forces agreements and other necessary obligations associated with our service members' service abroad.

Conclusion

As you are already aware, two of my clients, David Goldman and Michael Elias have offered testimony to you today. I am most certainly not the only family lawyer working to see that families and children are protected from the scourge of international parental abduction. The American Bar Association, Family Law Section and International Sections in particular have been asked by the President of the ABA at the request of Congressman Smith, to review these issues and to make recommendations on legislation that he has sponsored. Additionally, the American Chapter of the International Academy of Matrimonial Attorneys, have also offered their expertise both in evaluating proposed legislation. Both the members of the American Bar Association, Family Law Section and the International Academy Members have given thousands of hours of pro-bono assistance in support of the return of abducted children, and in advice and counsel

to our colleagues at the United States Department of State. I am personally appreciative of the continued willingness of Secretary Janice Jacobs to entertain my concerns and those of my colleagues in attempting to address these complex issues on a case by case basis. However her gracious accessibility is no substitute for a genuine, identifiable and transparent process to address issues involving all similarly situated parents diplomatically.

My colleagues continue to provide incredible insight and advice and a willingness to work with the members of Congress to improve the working of the Treaty, to enhance the diplomatic efforts on behalf of children at the Department of State by sharing the experiences of those actually practicing in the courts of the United States and abroad

My observations during my most recent visit to Japan, revealed the extraordinary access and contact that Congressman Smith was able to achieve which undoubtedly advanced the serious dialog with the Japanese government in which we are now engaged. I am honored to have been given the opportunity to participate in those meetings and to testify before this Sub-Committee in its efforts to bring every abducted child, home.

Thank you.

United States House of Representatives
Committee on Foreign Affairs

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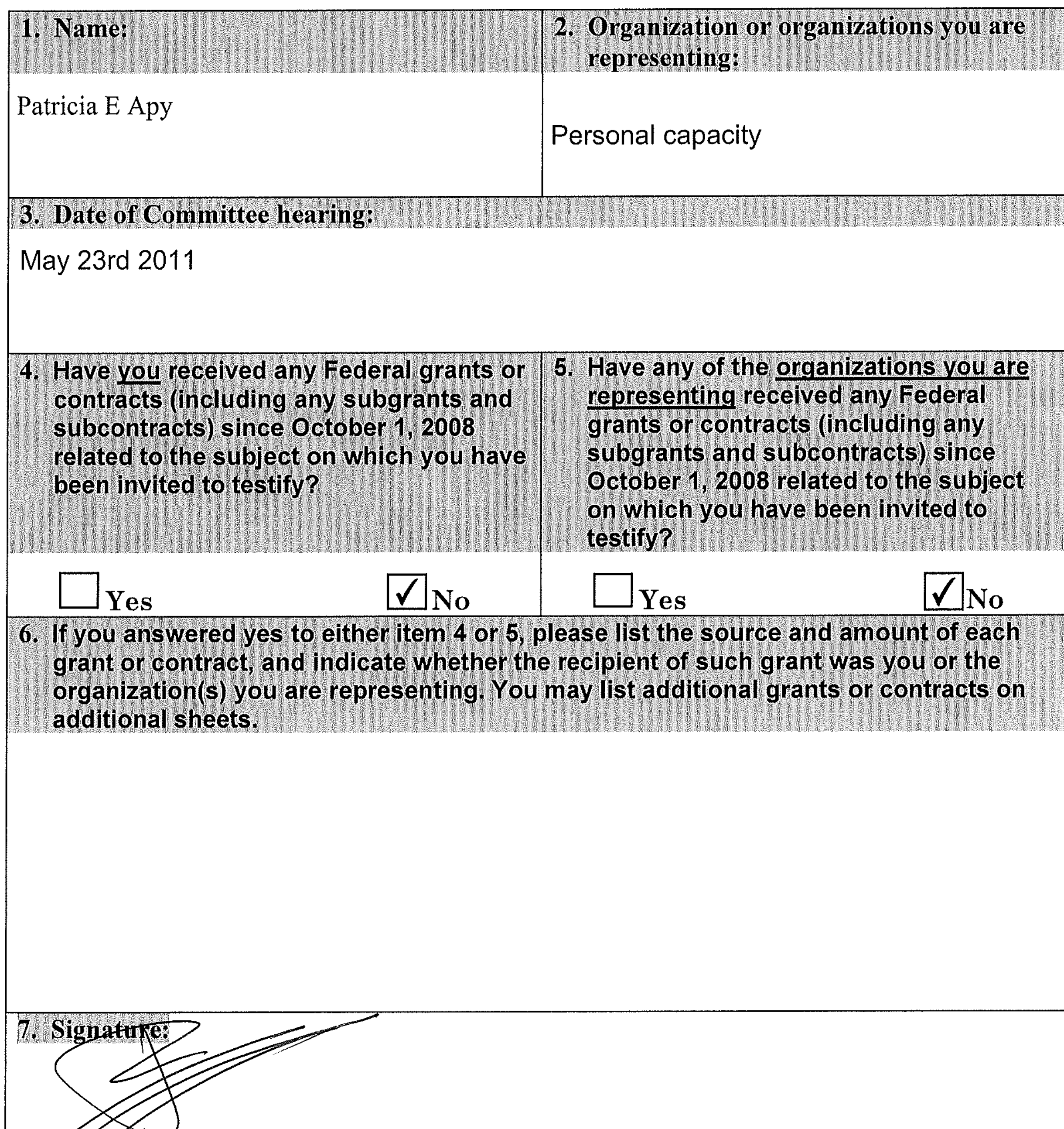

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Patricia E Apy	Personal capacity
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4. Have you received any Federal grants or contracts (including any subgrants and subcontracts) since October 1, 2008 related to the subject on which you have been invited to testify?	**5. Have any of the organizations you are representing 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?**
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