

Shrinking the Bench: Should United States Federal Courts have Exclusive or Any Jurisdiction to Adjudicate Icara Cases?

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In 2000 the United States Department of State hosted the Common Law Judicial Conference on International Child Custody. At the meeting's conclusion, the conference participants adopted resolutions, including one that lauded the advantages of a small judicial bench to resolve international child abduction cases. The resolution stated: "It is recognized that, in cases involving the international abduction of children, considerable advantages are to be gained from a concentration of jurisdiction in a limited number of courts/tribunals. These advantages include accumulation of experience among the judges and practitioners concerned and the development of greater mutual confidence between legal systems".¹

The advantages to which this resolution refers presumably flow to a variety of countries that are parties to the Hague Abduction Convention.² England, Australia, and Germany, for example, have limited the number of judges that adjudicate Hague Abduction Convention matters.³ In contrast, the United States does not enjoy such advantages. In 1988, when the United States enacted the International Child Abduction Remedies Act (ICARA), which is its domestic law that implements the Hague Abduction Convention, Congress conferred

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¹ The Common Law Judicial Conference on International Child Custody, *Best Practices* (2000), ¶ 1(d). Cf. 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 of 25 October 1980 on the Civil Aspects of International Child Abduction* (2001), § 3.1 ("The Special Commission calls upon Contracting States to bear in mind the considerable advantages to be gained by a concentration of jurisdiction to deal with Hague Convention cases within a limited number of courts").

² Article 26, Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, T.I.A.S. 11670 [hereinafter: Hague Abduction Convention].

³ See Hague Conference on Private International Law, *The Guide to Good Practice Under the Hague Convention of 25 October 1980 on Civil Aspects of International Child Abduction, Part II- Implementing Measures* (2003), § 5.1 (listing Australia, China, Cyprus, Finland, Germany, Ireland, Mauritius, Sri Lanka, United Kingdom, and Zimbabwe); 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* (2006), § 2 (listing Australia, Austria, Finland, Ireland, Sweden, and the United Kingdom).

jurisdiction on both federal and state courts for Hague Abduction Convention matters.⁴ As a result, the United States has thousands of judges, at both the federal and state level, who are authorized to adjudicate Hague Convention disputes.⁵

Relatively little attention has been given to Congress' jurisdictional choices since ICARA's passage. Yet, at the time of enacting ICARA, there was controversy surrounding the composition of the "Hague bench". The controversy centered around whether federal judges should hear international child abduction cases at all. Whereas some legislators wanted both state and federal courts to hear these cases (known as "concurrent jurisdiction"), the Executive Branch and the federal and state judiciaries themselves opposed requiring federal courts to adjudicate these "family law" cases. Almost no one, however, discussed the relative advantages of a smaller bench, or how Congress might reduce the number of adjudicators. Unexamined was the option of the federal judiciary alone adjudicating Hague Abduction Convention cases.

In the twenty-five years since ICARA was adopted, the controversy about whether concurrent jurisdiction is appropriate has virtually disappeared. The Executive Branch does not vilify or praise concurrent jurisdiction; instead, it defends the United States system against outsiders who suggest change might be needed.⁶ Judges have also accepted Congress's choice. Neither the state nor federal judiciaries have tried to change the law's jurisdictional provision. In fact, federal judges themselves now serve as Hague liaison judges, participate in Hague Judicial Network events, and speak at conferences on the topic of the Hague Abduction Convention. Some federal judges have even read ICARA expansively, declaring that federal courts have the power to decide transnational visitation (or "access") disputes,⁷ a position that greatly expands the federal court role in resolving transnational family law cases. Concurrent jurisdiction is now taken for granted by almost everyone, with one notable exception.

The practicing bar is one group that thinks a lot about concurrent jurisdiction and sometimes frets about its possible future elimination. Lawyers have cherished ICARA's concurrent jurisdiction over the years, expressing appreciation that federal courts are available to hear Hague Abduction Convention cases. Petitioners' lawyers, in fact, file their ICARA cases in federal court more often than in state court.⁸ Lawyers' acute awareness of the availability of federal jurisdiction manifests itself in their concern about its possible elimination if ICARA were ever subject to substantive amendments. For them, substantive amendments pose an unfathomable risk that federal court jurisdiction might be eliminated during the amendment process.

After twenty-five years' experience with ICARA's implementation, it is worth revisiting the issue of which courts in the United States should have jurisdiction to adjudicate Hague Abduction Convention cases. The purpose of the analysis is two-fold. First, such

⁴ 42 U.S.C. § 11603(a) (2012).

⁵ In estimating how many judges can hear applications under the Convention, the Department of State answered: "[P]otentially thousands of state and Federal court judges". Hague Conference on Private International Law, *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Country Profile of United States of America* (2011), § 10.1(b).

⁶ M. H. Weiner, "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", *Utah Law Review* (2008), p. 232.

⁷ See text accompanying notes 30-36 below.

⁸ See text accompanying notes 46-49 below.

an exploration should help allay fears that Congress would ever eliminate federal court jurisdiction. If federal courts are important to the adjudication of Hague Abduction Convention cases (which they are), then it becomes less likely that Congress would ever eliminate the ability of federal courts to hear these cases, especially if Hague Abduction Convention cases are not so numerous as to pose real burdens on federal courts (which they are not) and if litigants receive certain advantages from the federal venue (which they do). A close examination of the jurisdictional options makes it easier to dismiss any argument that federal court jurisdiction is threatened by substantive amendments to ICARA.

Second, revisiting the issue of which courts in the United States should have jurisdiction raises the intriguing possibility that the answer may be “the federal courts alone”. Perhaps ICARA’s jurisdictional provision should be amended to make federal jurisdiction exclusive. Congress has made federal jurisdiction exclusive for some categories of cases, including admiralty, patent and copyright, bankruptcy, and cases arising under the Securities Exchange Act of 1934 and the Employee Retirement Income Security Act.⁹ It is worth considering whether the United States would experience the sort of advantages alluded to by the Common Law Judicial Conference, or any other advantages, by consolidating Hague Abduction Convention jurisdiction in the federal bench. At least one commentator has suggested that exclusive federal jurisdiction might benefit domestic violence victims who are fleeing transnationally for safety and are unjustly disadvantaged by the Hague Abduction Convention.¹⁰ Another commentator has argued that exclusive federal jurisdiction would bring speed, expertise, and uniformity to Hague Abduction Convention adjudications.¹¹ These and other potential benefits are explored below, as are some of the potential drawbacks to consolidating jurisdiction. The examination suggests that while certain advantages are possible, many of them are overstated and offset by the advantages attending litigants’ choice of forum. Overall, this article argues that the United States should maintain the *status quo*, that is, both the federal and state jurisdictional options.

This article builds upon an earlier piece that explored whether it would be constitutional for Congress to place jurisdiction solely in the federal bench, and even in a specialized federal bench.¹² That analysis also considered whether a smaller bench with less geographical

⁹ M. E. Solimine, “Rethinking Exclusive Federal Jurisdiction”, *University of Pittsburgh Law Review*, LII (1991), p. 386.

¹⁰ S. King, “The Hague Convention and Domestic Violence: Proposals for Balancing the Policies of Discouraging Child Abduction and Protecting Children from Domestic Violence”, *Family Law Quarterly*, XLVII (2013), p. 310 (“A more aggressive way of standardizing decisions in Convention cases where domestic violence is alleged would be to restrict the judicial handling of Convention return cases to federal courts, on the theory that removing state courts from the responsibility for making these decisions would reduce the instance of conflicting theories on how to assess such allegations and would take out of the equation some of the differences in scheduling problems found in different court systems. International judicial and other conferences have stressed the desirability of limiting the number of jurisdictions and courts handling these cases in order to enhance the competence, consistency, and coordination of judges and practitioners. Such a change would require amending ICARA, and the problem of legislative delay makes this a less appealing solution, at least in the short term. Perhaps an initial step could be to follow the lead of HCPIIL and set up a working group to consider some of these changes and to establish some guidelines for judges and practitioners for cases where domestic abuse is claimed”).

¹¹ See E. Lesh, “Jurisdiction Friction and the Frustration of the Hague Convention: Why International Child Abduction Cases Should be Heard Exclusively by Federal Courts”, *Family Court Review*, LI (2011), p. 170.

¹² Weiner, note 6 above, pp. 231-238.

breadth would violate respondents' due process rights.¹³ As explained in that article, there appears to be no constitutional impediment to concentrating jurisdiction in the federal courts or even a specialized, geographically limited federal court. This article, therefore, assumes that the United States could concentrate jurisdiction in the federal bench. Instead of replicating the constitutional analysis, this article focuses on whether the United States ought to concentrate jurisdiction in the federal courts by looking closely at the purported benefits of a consolidated bench.

The article proceeds in five parts. First, it describes the current jurisdictional landscape for Hague Abduction Convention cases litigated in the United States. Second, it discusses why concurrent jurisdiction exists and explores the debate surrounding the jurisdictional options at the time of ICARA's enactment. Third, this article examines the potential advantages of changing the ICARA jurisdictional regime. In particular, it delves into topics of judicial expertise, speed and efficiency, uniformity, party access to services such as interpreters and *pro bono* counsel, and the effectiveness of the Central Authority and liaison judges. Fourth, the article explores some potential disadvantages of concentrating jurisdiction, including risking harmful amendments to ICARA, inconveniencing litigants, increasing the workload of the courts, and diluting the domestic relations exception to diversity jurisdiction. Fifth, and finally, the article concludes that, on balance, shifting all Hague Abduction Convention matters to the federal courts would not be beneficial. However, it also concludes that Congress is unlikely to eliminate federal court jurisdiction, given the advantages that accompany giving litigants a choice of forum. Therefore, attorney preference for concurrent jurisdiction should not be cited as a reason to oppose substantive amendments to ICARA. In sum, it is simply not worth the time or effort to worry further about Hague Abduction Convention jurisdiction at this time, either as a matter that needs affirmative change or as a matter that needs defending.

THE CURRENT REGIME

At present, ICARA confers concurrent jurisdiction on state and federal courts in cases arising under the Hague Abduction Convention.¹⁴ That means a petitioner can elect to initiate a Hague Abduction Convention case for a child's return in either state or federal court. The only limitation is that the court must be "authorized" to exercise its jurisdiction "in the place where the child is located at the time the petition is filed".¹⁵ This limitation is commonly understood as a requirement that the child be located within the geographical boundaries of the particular court's jurisdiction.¹⁶

If a petitioner files a case in state court, the respondent can remove the case to federal court because a Hague Abduction claim involves a "federal question".¹⁷ Removal is possible even if the respondent lives in the state in which the claim is brought, a fact

¹³ *Ibid.*, pp. 239-247.

¹⁴ 42 U.S.C. § 11603(a) (2012).

¹⁵ *Ibid.*, § 11603(b).

¹⁶ For an alternative possible meaning of that provision, see M. H. Weiner, "Uprooting Children in the Name of Equity", *Fordham International Law Journal*, XXXIII (2010), pp. 464-465.

¹⁷ See 28 U.S.C. § 1441 (2012). See *In re Mahmoud*, 1997 U.S. Dist. LEXIS 2158, at *3 (E.D.N.Y. Jan. 29, 1997).

that would defeat removal if the federal court's jurisdiction were premised on "diversity jurisdiction."¹⁸

If a Hague Abduction Convention case is heard in federal court, that court will not adjudicate the issue of child custody even if the child is not returned.¹⁹ The federal court would lack subject matter jurisdiction because custody disputes are not "federal question cases", nor can federal courts exercise diversity jurisdiction in domestic relations matters.²⁰ In addition, federal courts are prohibited from exercising supplemental jurisdiction over any state law claim relating to domestic relations.²¹ Consequently, a federal judge will not hear the underlying custody dispute even if the court does not return the child. The custody matter would be heard in the appropriate state court.

For a long time, federal courts were unanimous in their opinion that they only had jurisdiction under ICARA to adjudicate cases involving breaches of "rights of custody" and not cases involving breaches of "rights of access". Although they could afford petitioners the remedy of return, they could not establish or enforce visitation.²² The Fourth Circuit in *Cantor v. Cohen* explained that ICARA empowered courts "to determine only rights under the Convention".²³ Because ICARA gave a person a right "to initiate judicial proceedings 'under the Convention'" for the return of a child or for access to the child, the court had to look at the Convention to see if it "authorize[d] its jurisdiction".²⁴ The court concluded that the Hague Abduction Convention did not authorize an adjudication for access disputes. Article 12 of the said Convention gave judicial authorities the ability to return a child, but Article 21 required that a party apply to the Department of State to vindicate his or her access rights.²⁵ Therefore, the Fourth Circuit reasoned that it lacked the authority to

¹⁸ Diversity jurisdiction exists when the amount in controversy exceeds \$75,000 and the action is between, *inter alia*, citizens of different states or citizens of a state and citizens or subjects of a foreign State (unless the latter are lawful permanent residents of the United States and domiciled in the same state as the other party). 28 U.S.C. §1332 (2012). Removal is not available when the court jurisdiction is premised on diversity if the defendant is a citizen of the state in which the action is brought. 28 U.S.C. § 1441(b)(2).

¹⁹ Article 16, Hague Abduction Convention, requires that any custody contest be stayed until the abduction proceeding concludes, but if the child is not returned a custody proceeding may occur assuming the court has jurisdiction to do so.

²⁰ See text accompanying notes 434-436 below.

²¹ Often times federal courts have ancillary jurisdiction to entertain claims "that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution". However, that does not apply when the issue falls within the category of domestic relations. See *U.S. v. MacPhail*, 149 Fed. Appx. 449, 455-56 (6th Cir. 2005); *Wasko v. Com. of Puerto Rico*, 185 F. Supp. 2d 136, 142 (D. P.R. 2002). See also E. Rossi and B. Stark, "Playing Solomon: Federalism, Equitable Discretion, and the Hague Convention on the Civil Aspects of International Child Abduction", *Roger Williams University Law Review*, XIX (2014), p. 149, n. 281 ("It is clear ... that Congress intended to preclude federal courts from adjudicating any custody-related question other than those that were specifically set out in the Convention. In light of ICARA's legislative history, Congress likely intended to preclude federal courts from exercising supplemental jurisdiction over claims the adjudication of which would contravene the domestic relations exception. It therefore would be inconsistent with ICARA for a litigant to use supplemental jurisdiction as a means of circumventing the express language in ICARA prohibiting courts from adjudicating custody disputes pursuant to it").

²² See *Bromley v. Bromley*, 30 F. Supp. 2d 857, 860 (E.D. Pa. 1998); *Teijeiro Fernandez v. Yeager*, 121 F. Supp. 2d 1118, 1125-26 (W.D. Mich. 2000); *Neng Nhia Yi Ly v. Heu*, 296 F. Supp. 2d 1009, 1011 (D. Minn. 2003); *Wiggill v. Janicki*, 262 F. Supp. 2d 687, 689 (S.D.W. Va. 2003); *In re Application of Adams ex rel. Naik v. Naik*, 3363 F. Supp.2d 1025, 1030 (N.D. Ill. 2005); *Wiesel v. Wiesel-Tyrnauer*, 388 F. Supp. 2d 206, 211 (S.D.N.Y. 2005); *Cantor v. Cohen*, 442 F.3d 196 (4th Cir. 2006).

²³ *Cantor v. Cohen*, 442 F.3d at 201 (citing 42 U.S.C. § 11601(b)(4)).

²⁴ 42 U.S.C. § 11603(b) (2012).

²⁵ *Cantor v. Cohen*, 442 F.3d at 199-200. Article 21, Hague Abduction Convention, requires State Parties' Central

hear the access claim.²⁶ It also cited the Department of State Legal Analysis that suggested the only remedy in the Hague Abduction Convention for a denial of access was found in Article 21.²⁷ The Fourth Circuit conclusion was bolstered by the fact that “federal courts are courts of limited jurisdiction and generally abstain from hearing child custody matters”.²⁸ It determined that “access claims ... would be better handled by the state courts which have the experience to deal with this specific area of the law”.²⁹

The federal court’s unanimous refusal to hear visitation cases was broken when the Second Circuit followed the analysis of Judge Traxler, who dissented in *Cantor v. Cohen*. In *Ozaltin v. Ozaltin*³⁰ the Second Circuit said that ICARA “unambiguously” creates a federal right of action to enforce “access” rights.³¹ The Second Circuit, just as the Fourth Circuit, cited the language in ICARA that says both federal and state courts have concurrent original jurisdiction “of actions arising under the Convention”.³² It continued to quote the statute to illustrate the actions “falling within this category”:

Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.³³

The Second Circuit described Article 21 as a nonexclusive remedy for enforcing access rights and observed that a party could also go directly to federal or state court to seek a remedy.³⁴ Its conclusion was bolstered by Article 29, which says that the Convention “shall not preclude any person ... who claims that there has been a breach of custody or access rights within the meaning of article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention”.³⁵ So, even though Article 21 did not require a judicial remedy, federal law could, and did, provide one in federal court.³⁶

There is no longer a clear bifurcation of jurisdictional authority between federal and state courts for international access disputes. It is unknown whether other federal courts will follow the Second Circuit approach and hear transnational access cases. Foreign litigants seeking to vindicate rights of access might certainly prefer a federal forum, just as foreign litigants often prefer a federal forum to vindicate their rights of return of a child. Yet any enthusiasm for a federal forum might abate if federal courts resolve access

Authorities to co-operate “to promote the peaceful enjoyment of access rights”, to “take steps to remove, as far as possible, all obstacles to exercise of such rights”, and “either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights ...”.

²⁶ *Ibid.*, p. 200.

²⁷ *Ibid.*, pp. 201-202 (citing State Department, 51 Fed. Reg. 10,494, 10,513).

²⁸ *Ibid.*, p. 202.

²⁹ *Ibid.*

³⁰ *Ozaltin v. Ozaltin*, 708 F.3d 355 (2013).

³¹ *Ibid.*, p. 372.

³² *Ibid.*

³³ *Ibid.* (citing 42 U.S.C. § 11603(b)).

³⁴ *Ibid.*, pp. 373-374.

³⁵ *Ibid.*, p. 373 (citing Article 29, Hague Abduction Convention).

³⁶ *Ibid.*, p. 374.

cases less favorably for the left-behind parent than state courts. Because state courts have a reputation for vigorously protecting parental visitation,³⁷ there is a real possibility that federal courts will be a less favorable forum for petitioners. *Ozaltin*, therefore, may become more significant for respondents than petitioners. Petitioners may continue to file their access cases in state court, and respondents may remove those access cases to federal court.

As suggested above, petitioners invoking the Hague Abduction Convention to obtain the return of their abducted children overwhelmingly initiate their cases in federal courts.³⁸ The exact numbers are unclear, but a search of federal and state dockets from 2005 to 2013 in four states revealed a clear preference for federal court.³⁹ We surveyed the state and federal litigation dockets on Bloomberg Law in Alaska, Connecticut, Maryland, and Missouri. We chose these states and the federal district courts within them because they appeared to have the most complete coverage. After compiling all cases that included the term “Hague Convention”, we examined the cases individually to ensure that they involved the adjudication of petitions under the Hague Abduction Convention. To ensure that all possible cases were captured, we then searched for cases in the same four states in a Westlaw database. Westlaw contained a few cases that were not on Bloomberg, and *vice versa*. We included the trial court cases on Westlaw in our tally.⁴⁰

Admittedly, our methodology has limitations. The number of cases identified overall (19) may in fact suggest error, although it is hard to draw that conclusion confidently because the total number of petitions filed in United States courts in any one year is unknown. Although the United States Central Authority reports there are approximately 350 incoming cases a year,⁴¹ the said Central Authority does not report how many of these petitions result in a lawsuit.⁴² Yet Nigel Lowe analyzed data and reported that approximately half the petitions filed with the United States Central Authority end in voluntary returns or a withdrawal of the petition.⁴³ That suggests that roughly 175 cases a year may end up in court. Using that number, over our eight-year time period, one would expect left-behind parents to have filed approximately 1400 cases in courts throughout

³⁷ A. Blecher-Prigat, “Rethinking Visitation: From a Parental to a Relational Right”, *Duke Journal of Gender Law and Policy*, XVI (2009), p. 3 (“Parental visitation rights are strong and granted as a matter of entitlement, so that courts are usually reluctant to deny them or even restrict them”).

³⁸ See M. H. Weiner, “Navigating the Road between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction”, *Columbia Human Rights Law Review*, XXXIII (2002), p. 277 (“[T]he quantity of federal opinions now appears to dwarf the quantity of published state opinions ...”).

³⁹ The search term was “hague convention” for the date range 1/1/2005 to 12/31/2013, and was run in these databases: Alaska State Cases, Connecticut State Cases, Maryland State Cases, Missouri State Cases, Ninth Circuit Cases, Second Circuit Cases, Fourth Circuit Cases, and Eighth Circuit Cases. The search results for federal cases were limited further by searching within the results for the relevant state name (that is, Alaska, Connecticut, Maryland, and Missouri respectively). Here the cases were individually examined as they were under the Bloomberg research. The survey research was conducted by Marie Phillips, third-year law student, under my direction.

⁴⁰ It is possible that some Westlaw cases were filed before 2005, but resolved and reported during our timeframe.

⁴¹ United States Department of State, “New Incoming Cases –CY 2012”, available at www.travel.state.gov/content/dam/childabduction/statistics/Incoming_Open_CY2012pdf.pdf (indicating there were 344 incoming cases in 2012); Nigel Lowe, *Hague Conference on Private International Law, A Statistical Analysis of Applications Made in 2008 Under the Hague Child Abduction Convention, Part III - National Reports* (2011), p. 196 (indicating there were 283 incoming cases in 2008).

⁴² The Department of State reported that it did not have such information to share with us.

⁴³ Lowe, note 41 above, p. 202.

the United States.⁴⁴ If this number is divided by 50 states and is multiplied by 4 (for the four states we examined), one would expect to see 112 cases filed in court in our chosen states during this time period. Our total of 19 cases, therefore, seems quite low. The fact that our state sample includes at least one state that is probably not a popular destination for abducting parents (Alaska) might explain some of the discrepancy, but probably not all of it.

Despite the limitations of this study, the examination of the Bloomberg and Westlaw databases seemed to be the most practical method for obtaining the approximate number of court filings, save for going to each court and physically examining the dockets. Moreover, other data suggests that we may have captured all of the cases. Halabi estimates that approximately 6% of the incoming cases in the United States go to trial.⁴⁵ Based on Halabi's percentage, one would expect to see only twelve reported cases in our sample $((299 \times 8 \text{ years}) / 50 \text{ states} \times 4 \text{ states} \times 6\%)$,⁴⁶ and we identified 19.

As Table 1 indicates, from 2005 to 2013 the filings in the four states broke down as follows: two (2) cases were filed in a state court and seventeen (17) cases were filed in federal court.

Table 1

	2005-2013 Bloomberg	2005-2013 Westlaw cases that did not appear in Bloomberg	Total cases, 2005-2013 from Bloomberg and Westlaw
Alaska State	0	0	0
Alaska Federal	1	0	1
Connecticut State	1	1	2
Connecticut Federal	3	2	6
Maryland State	0	0	0
Maryland Federal	2	1	3
Missouri State	0	0	0
Missouri Federal	7	1	8

Only one of the above cases was removed to federal court by the respondent. None of these cases were access cases.

The results show a clear preference by petitioners for federal court over state court. This finding is consistent with the findings of other studies. One study, for example, reported that of the 373 federal or state cases reported in LEXIS or Westlaw until 16 August 2012,

⁴⁴ This number is probably high because the number of incoming petitions has risen over time.

⁴⁵ Sam F. Halabi, "Abstention, Parity, and Treaty Rights: How Federal Courts Regulate Jurisdiction under the Hague Convention on the Civil Aspects of International Child Abduction", *Berkeley Journal of International Law*, XXXII (2014), p. 186. He obtained the 6% figure by estimating the incoming cases to the United States each year, deducting the number that were resolved voluntarily, and then multiplying it by 24 years. He then divided that total number by the reported opinions he found on LEXIS and Westlaw over that 24 year period.

⁴⁶ There were 31% withdrawn (n87) and 18% voluntary returns (n51). Lowe, note 41, p. 202. Halabi subtracted voluntary returns, as do we here.

95 of the cases (or approximately 25%) were state court decisions and 278 of the cases (or approximately 75%) were federal court decisions.⁴⁷ Yet another study examined published opinions in which respondents to a Hague Abduction Convention proceeding raised the issue of domestic violence. A clear majority of these cases were heard in federal court. Of the 47 published opinions, 35 were litigated in federal court and 12 were litigated in state court.⁴⁸ Our finding is consistent with anecdotal reports. An experienced practitioner, Jeremy Morley, reported, albeit without citation to data: "In practice, the vast majority of Hague cases in the United States are brought in federal court".⁴⁹

The preference for federal court is consistent with other categories of federal question cases on different topics.⁵⁰ Although we have not found data that aggregates and compares the federal and state filings of all cases in which concurrent jurisdiction exists, one can imagine that cases frequently would end up in federal court. The petitioner has the initial choice of forum, and a respondent can only trump that decision by removing a state court case to federal court. Therefore, either party can elect to have a federal court adjudicate the claim, but both parties must agree to have a state court hear the claim.

As mentioned, our sample had a low removal rate. Only one respondent removed a case from state court to federal court. Although generalizations are difficult to make given the very small sample, the rate of removal appears lower than the rate of removal generally,⁵¹ and certainly lower than in some contexts where removal is known to be common. For example, the tort plaintiff frequently selects state court and the national corporation defendant will typically remove the case to federal court. The low rate of removal in ICARA cases suggests "removal" jurisdiction is not commonly used to delay proceedings,⁵² assuming removal contributes meaningfully to delay in any event.

It is helpful to consider why petitioners prefer a federal forum and why respondents are content with a state forum. It is interesting that Hague petitioners prefer federal courts for reasons other than the reasons federal courts were touted as necessary at the time of ICARA passage. Federal jurisdiction in Hague Abduction Convention cases was originally thought to be important for foreign petitioners who might otherwise feel disadvantaged by litigating a claim in the state court where the abductor lived.⁵³ Congressman Barney

⁴⁷ *Ibid.*, pp. 45-49.

⁴⁸ W. M. Vesneski, et al., "U.S. Judicial Implementation of the Hague Convention in Cases Alleging Domestic Violence", *Juvenile and Family Court Journal*, LXII (2011), p. 5 (looking at published opinions between 1993 and 2008).

⁴⁹ J. D. Morley, *The Hague Abduction Convention: Practical Issues and Procedures for Family Lawyers* (2012), p. 24.

⁵⁰ M. A. Schwartz, "Supreme Court § 1983 Decisions – October 2008 Term", *Tulsa Law Review*, XLV (2009), p. 271 ("The great majority of §1983 actions are filed in the federal courts").

⁵¹ There are 30,000 cases removed each year. See C. R. McFadden, "Removal, Remand, and Reimbursement under 28 U.S.C. § 1447(c)", *Marquette Law Review*, LXXXVII (2003), p. 123. It is estimated that 11-12% of all private litigant case filings are removed. See N. Miller, "An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction", *American University Law Review*, XLI (1992), p. 369.

⁵² L. Silberman, "Patching Up the Abduction Convention: A Call for a New International Protocol and A Suggestion for Amendments to ICARA", *Texas International Law Journal*, XXXVIII (2003), pp. 56-57 (arguing that removal jurisdiction should be considered a mistake).

⁵³ See *International Child Abduction Act: Hearing on H.R. 2673 and H.R. 3971 before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary*, 100th Cong. 65-66 (Feb. 3, 1988) [hereinafter "Feb. 3, 1988 House hearing"] (statement of Patricia Hoff, Co-Chair, Child Custody Committee of the Family Law Section, American Bar Association) (citing court that noted local bias occurs in interstate custody disputes, and opining that bias may be even greater against a foreigner); *International Child Abduction Act: Hearing on S. 1347 Before the Subcomm. on Courts and Admin. Practice of the S. Comm. on the Judiciary*, 100th Cong. 122 (Feb. 23, 1988) [hereinafter "Feb. 23, 1988 Senate hearing"] (statement of Philip Schwartz, American

Frank said the “bias question is *a fortiori* where we are talking about a foreign national”.⁵⁴ As one witness testifying before Congress argued, “It would enhance acceptance and compliance by a citizen of another country who likely will perceive the federal court as a neutral forum not prejudiced by parochial ties”.⁵⁵ Federal jurisdiction was also lauded because this would lead other countries to return children that had been abducted from the United States: foreign courts would see United States federal courts as being more “neutral arbitrators”.⁵⁶

The notion that a federal forum is insulated from local bias has a long history. This justification for federal jurisdiction supports both federal courts’ diversity jurisdiction,⁵⁷ as well as their federal question jurisdiction.⁵⁸ Yet one might reasonably question its applicability to the international child abduction context. The assumption that the foreign litigant would perceive a difference between a federal court and state court in the United States, rather than lump them together as both courts of the foreign country, is highly questionable. In fact, foreign litigants are unlikely to know about any of the facts that might make a federal judge less biased towards a local resident than a state judge, including that federal judges have life tenure and that state judges are often elected and may have to stand for reelection. After all, Americans themselves know few of these facts about their own courts. One famous survey of Americans by the National Center for State Courts showed that the general public’s knowledge of their courts was “low”,⁵⁹ and the public was “largely uninformed”.⁶⁰ In fact, three out of four survey respondents themselves claimed they knew little or nothing about state/local courts.⁶¹ One set of researchers reviewing this data noted: “The public is misinformed about many topics related to court jurisdiction, operation and procedure”.⁶² Foreign residents are likely to know even less.

Although American attorneys representing foreign litigants understand the differences between the selection process for federal and state judges, there is no empirical basis for believing that federal judges harbor any less sympathy for local litigants than state judges in Hague Abduction Convention cases. The Hague Abduction Convention cases typically involve a United States resident (and often a United States citizen) litigating against a foreign resident (and often a foreign national). Any judicial bias for the United States

Academy of Matrimonial Lawyers and U.S. Chapter of the International Academy of Matrimonial Lawyers).

⁵⁴ See Feb. 3, 1988 House hearing, note 53, p. 79 (statement of Mr. Frank).

⁵⁵ See *ibid.*, p. 77 (statement of Philip Schwartz, American Academy of Matrimonial Lawyers and United States Chapter of the International Academy of Matrimonial Lawyers).

⁵⁶ Feb. 23, 1988 Senate hearing, note 53 above, p. 125 (statement of Mr. Schwartz).

⁵⁷ See Charles Alan Wright, et al., *Federal Practice and Procedure* 3d. Ed. (2009), § 3601 (noting “the fear that state courts would be prejudiced against out-of-state litigants, particularly when opposed by an in-stater” is the “most often cited” reason federal judges and scholars give for diversity jurisdiction, drawing upon the reasoning of James Madison).

⁵⁸ *Ibid.*, § 3561 (“The Founders clearly envisioned that federal question jurisdiction would provide plaintiffs with a sympathetic forum for the vindication of federal rights. Indeed, this was one of the principal reasons that the Constitution authorized Congress to create a system of lower federal courts ...”). See also G. Seinfeld, “The Federal Courts as a Franchise: Rethinking the Justifications for Federal Question Jurisdiction”, *California Law Review*, XCVII (2009), pp. 104-106.

⁵⁹ National Center for State Courts, et al., *The Public Image of Courts: A National Survey of the General Public, Judges, Lawyers, and Community Leaders* (1978), p. 11.

⁶⁰ *Ibid.*, p. 12.

⁶¹ *Ibid.*, p. 13.

⁶² Yankelevich, Skelly, and White, Inc., “Highlights of a National Survey of the General Public, Judges, Lawyers, and Community Leaders”, in T. J. Fetter (ed.), *State Courts: A Blueprint for the Future* (1978), p. 6.

resident would presumably affect the decisions of federal and state court judges similarly, if at all.⁶³ Moreover, the federal judge is likely to have the same roots in the community as the state judge.⁶⁴ Whether bias exists in these cases at all is an open question, but since Hague Abduction Convention cases are tried before a judge and not a jury, bias is a legitimate concern even if there is little reason to differentiate between state and federal judges.

This questionable rationale for federal court jurisdiction in Hague Abduction Convention cases perhaps explains why petitioners who select a federal forum are not motivated by a fear that a state judge might favor an in-state resident more than a federal judge. Rather, petitioners appear to prefer federal courts because these courts have less expertise in family law than state courts, and therefore may be less inclined to pursue the merits of the underlying custody dispute. This might be classified as a fear that the state court will not respect the federal claim. In fact, a guide to attorneys litigating Hague Abduction Convention cases in the United States, co-authored by the National Center for Missing and Exploited Children, says:

Many practitioners recommend that Hague Convention return cases be filed in federal district court, not state court, for the simple reason that a Hague Convention return case is not supposed to focus on the best interests of the child but on the proper forum in which such a decision should be made. Federal judges are considered by many to be better equipped to analyze that issue, as opposed to state court judges, who are accustomed to making best interests of the child determinations and who may be more inclined to do so in Hague Convention cases.⁶⁵

Logically, a respondent would probably prefer a state court for this very same reason, and that fact may explain why few respondents remove Hague cases to federal court. When respondents do remove their cases to federal court, removal may be motivated by a feeling that the state court is a hostile forum. Conversations with an attorney in a case where a removal occurred, for example, indicated that the attorney considered removal important because of the close professional relationship between the petitioner's counsel and state judge, the informal nature of the proceedings in state court, and the formality of the proceedings in federal court (with which opposing counsel was "unfamiliar" and would find "uncomfortable").

These observations bring to the fore one other important reason petitioners (and sometimes respondents) favor federal court. It has to do with what *Seinfeld* has called "the

⁶³ Naomi Cahn has discussed state court bias in custody disputes when the other litigant is from another state in the United States. See N. Cahn, "Family Law, Federalism, and Federal Courts", *Iowa Law Review*, LXXIX (1994), p. 1119. She notes, however, that there is no guarantee that the federal courts would reach a different result than the state courts". *Ibid.*, p. 1120.

⁶⁴ R. A. Posner, "Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function", *Southern California Law Review*, LVI (1983), p. 786 ("We think of the federal court system as a unitary national system, but it is very rare that someone is appointed to the district court who is not a resident, usually a long-time resident, of the district, or that someone is appointed to the court of appeals who is not a resident not only of the circuit, but of the particular state of the circuit to which the judgeship has been informally allocated").

⁶⁵ Kilpatrick Townsend & Stockton LLP & the National Center for Missing and Exploited Children, *Litigating International Child abduction Cases Under the Hague Convention* (2012), pp. 68-69. See also Morley, note 49 above, p. 24 ("[P]etitioners often prefer to bring the case in a court that is not accustomed to applying 'best interests' analysis in conventional child custody cases").

Federal Franchise”.⁶⁶ By equating federal courts to Starbucks and state courts to the local coffeehouse,⁶⁷ Seinfeld effectively explains that federal courts have common characteristics that can make litigants and their counsel feel comfortable; for example, federal courts are “characterized by a high measure of procedural homogeneity, a standardized culture marked by a strong ethic of professionalism, and a bench that exhibits generally high levels of competence in the stuff of judge-craft”.⁶⁸ As a consequence, federal jurisdiction “bring[s] some parties into a procedural and cultural space that is more comfortable to them, while ousting others from more familiar (state court) surroundings. It carries the promise, that is, of inverting the dynamics of insider and outsider status that might otherwise be in play”.⁶⁹

This rationale explains petitioners’ preference for federal court in Hague Abduction Convention cases. Some petitioner counsel have a national Hague Abduction Convention practice. Being able to step into a courtroom anywhere in the country and feel comfortable is valuable.⁷⁰ In fact, studies of lawyer forum choices in concurrent jurisdiction cases find that attorneys “select the court with which they are most familiar”.⁷¹ In addition, a federal Hague Abduction Convention practice allows an attorney to say he or she is an “experienced federal litigator”,⁷² a credential that has prestige and justifies a higher fee. It probably helps that federal litigation is seen as more elite, with a higher amount of status, than state court litigation. As one commentator stated, “In contemporary legal culture, federal court is the place where important matters are decided by important people for important people”.⁷³

At the time ICARA was enacted, no one predicted that most Hague Abduction Convention cases would end up in federal court. Nor did attorneys testifying for concurrent jurisdiction say: “Federal court jurisdiction will enhance attorneys’ comfort and marketing, and we envision using the federal courts almost exclusively”. In fact, some attorneys advocating concurrent jurisdiction said almost the opposite. For example, Phillip Schwartz, representing the American Academy of Matrimonial Lawyers and the United States Chapter of the International Academy of Matrimonial Lawyers, predicted at the time of ICARA’s adoption that state courts would be preferred. He said: “After a period of years of federal court decisions, there will be greater use of state courts and less of federal courts. The reason for this is that state courts would then be able to look to federal decisions for authoritative interpretations of the Convention, rather than relying on sister state decisions”.⁷⁴ Regardless of the merit of the speaker’s assumptions, the prediction about the preferred forum has proven inaccurate.

The fact that most Hague Abduction Convention cases are heard in federal court prompts two questions. First, should federal courts have exclusive jurisdiction in these matters? Second, would Congress ever remove jurisdiction from the federal courts? To answer these questions, it helps to begin with the ICARA legislative history. This reveals

⁶⁶ Seinfeld, note 58 above.

⁶⁷ *Ibid.*, p. 139.

⁶⁸ *Ibid.*, p. 101.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*, p. 135.

⁷¹ Miller, note 51 above, p. 402. This research focused on removal cases so the plaintiff’s attorneys had chosen state court. *Ibid.*, pp. 393-394. This differs than the dynamic in Hague Abduction Convention cases.

⁷² *Cf.* Seinfeld, note 58, p. 142.

⁷³ *Ibid.*, p. 141.

⁷⁴ Feb. 23, 1988 Senate hearing, note 53 above, p. 125 (statement of Mr. Schwartz).

that Congress never seriously vetted the idea of exclusive federal jurisdiction. Although most legislators expressed a strong commitment to concurrent jurisdiction, the lawmakers' original preference does not preclude change, but it means that adopting either exclusive federal jurisdiction or exclusive state jurisdiction would reverse a prior Congress' will.

THE HISTORY BEHIND CONCURRENT JURISDICTION

Exclusive federal jurisdiction was never seriously considered as an option when ICARA was enacted. The principle issue was whether state courts would have exclusive jurisdiction or whether federal and state courts together would have concurrent jurisdiction. As Senator Dixon said during the hearings, the "biggest single question may be the disagreement we now encounter on the concurrent jurisdiction question",⁷⁵ although Congressman Barney Frank correctly predicted that nobody would vote against the bill based upon the jurisdictional issue.⁷⁶

At first, concurrent jurisdiction appeared uncontroversial. Initial versions of ICARA, first introduced in 1987 at the behest of President Reagan's Administration, contained concurrent jurisdiction provisions.⁷⁷ Senate Bill 1347,⁷⁸ which called for concurrent jurisdiction,⁷⁹ died an early death, however. To facilitate a quick passage of ICARA, on 8 October 1987, Senate Bill 1347 was added as an amendment to the Department of State Authorization Act for Fiscal Year 1988-90, H.R. 1777,⁸⁰ but the Conference Committee for H.R. 1777 killed the amendment.⁸¹ The Conference Committee thought that the House Judiciary Committee and the House Ways and Means Committee needed to consider the legislation and those committees had not yet done so.⁸² Among other things, those committees needed to evaluate whether federal courts should have jurisdiction in these matters.⁸³

A House bill denominated H.R. 2673 was introduced as a companion to the Senate bill in June 1987.⁸⁴ The Subcommittee on Administrative Law and Governmental Relations

⁷⁵ *Ibid.*, p. 89 (statement of Sen. Dixon).

⁷⁶ Feb. 3, 1988 House hearing, note 53, pp. 51-52 (statement of Rep. Frank).

⁷⁷ Feb. 23, 1988 Senate hearing, note 53, p. 89 (statement of Patricia Hoff, Co-Chair, Child Custody Committee of the Family Law Section, American Bar Association) (mentioning S. 1347 and H.R. 2673 "were developed by, and introduced on behalf of, the administration in June 1987").

⁷⁸ A Bill to Facilitate Implementation of the 1980 Hague Convention on the Civil Aspects of International Child Abduction and for Other Purposes, S. 1347, 100th Cong. (June 9, 1987) (the bill was referred by the Committee on the Judiciary to the Subcommittee on Courts and Administrative Practice where hearings were held, but no further action was taken).

⁷⁹ *Ibid.*, §102(a) ("The courts of the States, the District of Columbia, and the territories and possessions of the United States, and the United States district courts shall have concurrent original jurisdiction with regard to actions arising under the Convention and this Act").

⁸⁰ See Amendment 907, 133 CONG. REC. 26,995-6 (Oct. 8, 1987); R. A. Reimer, *CRS Report for Congress: Legal Analysis of "The International Child Abduction Act" (S. 1347 and H.R. 2673, 100th Congress)* (Feb. 3, 1988), p. 2, 13; Feb. 23, 1988 Senate hearing, note 53 above, p. 89 (statement of Ms. Hoff); 134 CONG. REC. 6,484 (Apr. 12, 1988) (statement of Sen. Simon).

⁸¹ See Conference Report to Accompany H.R. 1777, Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, H.R. REP. NO. 100-475, at 170 (Dec. 14, 1987); Feb. 23, 1988 Senate hearing, note 53 above, p. 15.

⁸² See 134 CONG. REC. 8,559 (1988) (statement of Rep. Gus Yatron); 134 CONG. REC. 6,484 (Apr. 12, 1988) (statement of Sen. Simon).

⁸³ *Foreign Relations Authorization Act, Hearing on H.R. 1777 Before the Joint Comms. of Senate Comm. on Foreign Relations and House Comm. on Foreign Affairs*, 100th Cong. 218 (Dec. 3, 1987) (statement of Rep. Rodino).

⁸⁴ See H.R. 2673, 100th Cong. § 102(a) (June 11, 1987) ("The courts of the States, the District of Columbia, and the territories and possessions of the United States, and the United States district courts shall have concurrent original jurisdiction with regard to actions arising under the Convention and this Act").

held a hearing on it on February 3, 1988. During the House hearing, debate emerged about whether concurrent jurisdiction was appropriate. The House bill underwent various revisions, and even had exclusive state jurisdiction proposed as an option at one point,⁸⁵ but the House legislation ended up embodying concurrent jurisdiction.

There were essentially two models of concurrent jurisdiction in the House bill, however, as reflected in H.R. 2673,⁸⁶ and its replacement H.R. 3971.⁸⁷ H.R. 2673 expressly gave federal and state courts concurrent jurisdiction for cases that arose under the Convention and ICARA, similar to Senate Bill 1347.⁸⁸ In contrast, one iteration of H.R. 3971 established concurrent jurisdiction more cryptically. It gave state courts original jurisdiction of “all actions arising under the Convention” and federal courts jurisdiction “of any action arising under the Convention to the extent authorized by chapter 85 of title 28, United States Code”.⁸⁹ Chapter 85 of title 28 includes section 1331, which gives federal courts jurisdiction to hear “all civil actions arising under the Constitution, laws, or treaties of the United States”. As explained by Thomas Boyd, Acting Assistant Attorney General from the Department of Justice, “The implication of this language seems to be that, because the Convention is a treaty of the United States, all actions ‘arising under the Convention’ would, by definition, fit within the federal courts’ section 1331 jurisdiction”.⁹⁰ He pointed out that the bill, as framed, might deny a respondent the ability to remove a case to federal court, however, because the provision for removal jurisdiction fell outside of chapter 85.⁹¹

H.R. 3971, with its more cryptic formulation, passed the House on 28 March 1988. The revised bill was then introduced in the Senate the next day and read twice. Within a couple of weeks, Senator Dixon offered an amendment that made concurrent jurisdiction explicit.⁹² The amendment said: “The courts of the States and the United States district courts shall

⁸⁵ See Feb. 23, 1988 Senate hearings, note 53 above, p. 84 (amendment no. 1).

⁸⁶ See International Child Abduction Act, H.R. 2673, 100th Cong. § 102(a) (as introduced in House June 11, 1987); International Child Abduction Remedies Act, H.R. 3971, 100th Cong. § 3(a) (as introduced in House Feb 18, 1988).

⁸⁷ After the February 3 hearing, on February 18, H.R. 3971 and H.R. 3972 were introduced. See Feb. 23, 1988 Senate hearing, note 53 above, p. 89 (statement of Ms. Hoff); International Child Abduction Remedies Act, H.R. REP. NO. 100-525, at 7 (Mar. 23, 1988). H.R. 3972 dealt only with the parent locator service and died in subcommittee. Hearings were held on H.R. 3971 in late February, at which time the Subcommittee on Administrative Law and Governmental Relations recommended a single amendment in the nature of a substitute. Then on 15 March 1988 the full Committee of the Judiciary again had a single amendment in the nature of a substitute for H.R. 3971. *Ibid.* At this point the cryptic language is evident. *Ibid.*, pp. 7-8.

⁸⁸ See H.R. 2673, 100th Cong. § 102(a) (June 11, 1987) (“The courts of the States, the District of Columbia and the territories and possessions of the United States, and the United States district courts shall have concurrent original jurisdiction with regard to actions arising under the Convention and this Act”).

⁸⁹ See International Child Abduction Remedies Act, H.R. 3971, 100th Cong. § 4(a)(1)-(2) (as received in Senate Mar. 29, 1988); H.R. Rep. No. 100-525, at 2, 6, 7, 11.

⁹⁰ Feb. 3, 1988 House hearing, note 53 above, pp. 124-125 (letter of Thomas M. Boyd, Acting Assistant Attorney General). The House Report indicated that this language “would include actions covered by section 1331 (federal question); section 1332 (diversity); section 1345 ([United States] as plaintiff); section 1346 ([United States] as defendant); and section 1351 (members of diplomatic missions as defendants).” H.R. Rep. No. 100-525, p. 8.

⁹¹ Feb. 3, 1988 House hearing, note 53, p. 125, n.12 (letter of Mr. Boyd). The removal provision is found in 28 U.S.C. § 1441 (2012).

⁹² See 134 CONG. REC. 6,482 (April 12, 1988) (statement of Sen. Dixon) (“Mr. President, this amendment states, ‘The courts of the States and the U.S. district courts shall have concurrent original jurisdiction of actions arising under the convention.’ My amendment has the same practical effect as the language of the House bill, it is simply clearer and more straight forward”). See H.R. 3771, 100th Cong. § 4(a) (1988) (enacted) (“The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention”).

have concurrent original jurisdiction of actions arising under the Convention".⁹³ Senator Dixon explained:

In practice, all actions arising under the convention involve interpretation of the Hague Convention Treaty and therefore could be removed to the Federal courts. Therefore, petitions for return under the convention could be heard in either State or Federal courts ... The reason I believe it is important to amend the House language regarding jurisdiction is that the complexity of the House language could very likely result in an endless series of litigation regarding whether the Federal court can hear each specific case ... My amendment would have the same practical effect as the House language, however, it is clearer and would avoid needless litigation which could delay the rightful return of a child to its custodial parent.⁹⁴

On 12 April 1988, the Senate passed the amended version of H.R. 3971 by voice vote.⁹⁵ On 25 April 1988 the House concurred in the Senate amendment to the bill.⁹⁶ Representative Rodino expressed his belief that the Senate amendment "is in large part the same as the house-passed version. The House-passed version provided for jurisdiction in state courts for actions seeking the return of an abducted child and jurisdiction in federal court for consideration of federal questions ... From a practical standpoint, the approaches by the two versions have the same result".⁹⁷ The Senate version had the advantage of "avoiding delay ... by preventing the possibility of any litigation over whether federal or state court jurisdiction is most appropriate in a particular case".⁹⁸

Although concurrent jurisdiction was the eventual outcome, the Administration argued against this outcome during the hearings. It preferred that only state courts have jurisdiction to adjudicate Hague cases. Although the Administration had proposed concurrent jurisdiction originally, Peter Pfund, Assistant Legal Adviser for Private International Law at the Department of State, explained that the Administration had changed its position and no longer supported concurrent jurisdiction.⁹⁹ Kevin Jones, Deputy Assistant Attorney General for Legal Policy at the Department of Justice, made the same point at the Senate hearings.¹⁰⁰ Although the Administration did not want federal courts adjudicating these matters, the Administration did support Supreme Court authority to hear questions of federal law that might arise, pursuant to 28 U.S.C. § 1331.¹⁰¹

⁹³ 134 CONG. REC. 8,557 (Apr. 25, 1988).

⁹⁴ *Ibid.*, p. 6,482 (April 12, 1988) (statement of Sen. Dixon). See also *ibid.*, p. 8,650 (April 25, 1988) (statement of Hon. Benjamin L. Cardin) (noting "From a practical standpoint, the approaches taken by the two versions have the same result. Litigation in these cases will always arise under this Federal law and under the convention, and thus will be subject to Federal court jurisdiction because they will involve Federal questions. They will also typically involve individuals who are citizens or subjects of Foreign states, and will therefore be able to be brought in Federal courts because of diversity jurisdiction").

⁹⁵ 134 CONG. REC. 6,485 (April 12, 1988).

⁹⁶ *Ibid.*, p. 8,559 (April 25, 1988) (describing voice vote).

⁹⁷ 134 CONG. REC. 8,558 (April 25, 1988) (statement of Rep. Rodino).

⁹⁸ *Ibid.*

⁹⁹ Feb. 3, 1988 House hearing, note 53 above, p. 30; Feb. 23, 1988 Senate hearing, note 53 above, p. 27 (statement of Peter H. Pfund, Assistant Legal Adviser for Private International Law, Department of State).

¹⁰⁰ Feb. 23, 1988 Senate hearing, note 53 above, p. 87 (statement of Kevin R. Jones, Deputy Assistant Attorney General for Legal Policy, Department of Justice).

¹⁰¹ Feb. 23, 1988 Senate hearing, note 53 above, p. 27 (statement of Mr. Pfund); Feb. 23, 1988 Senate hearing, note 53 above, p. 59 (statement of Mr. Jones).

Two particular events had caused the Administration to change its position between the time it initially vetted S. 1347 and H.R. 2673, both of which contained concurrent jurisdiction, and the time it stated its new position at the Congressional hearings. First, President Ronald Reagan issued Executive Order 12612 on Federalism.¹⁰² That was a general order “to restore the division of governmental responsibilities between the national government and the States that was intended by the Framers of the Constitution and to ensure that the principles of federalism established by the Framers guide the Executive departments and agencies in the formation and implementation of policies”.¹⁰³ The Executive Order did not specifically address ICARA or explain why its concurrent jurisdiction would violate principles of federalism, but the Administration used the Executive Order’s broad statements of principle to argue against concurrent jurisdiction.

The second important development that prompted the Administration’s change of position was the Supreme Court decision in *Thompson v. Thompson*.¹⁰⁴ That case was decided on 12 January 1988, only 42 days before the February 1988 hearings, and was cited by Administration officials testifying about the bill.¹⁰⁵ Technically, *Thompson* had nothing to do with whether federal courts should have concurrent jurisdiction in international child abduction cases. However, the opinion contained some language that buttressed the Administration’s new position.

Thompson involved the federal Parental Kidnaping Prevention Act (PKPA),¹⁰⁶ and whether the PKPA created a private cause of action in federal court to determine which of two conflicting state court custody determinations was valid. The PKPA, a full faith and credit statute, directs state courts to enforce a judgment if the judgment conforms to the PKPA requirements. Mr. Thompson, the petitioner, was a father who wanted a federal district court to enforce one state’s decision over another state’s decision.

The Supreme Court opinion focused almost exclusively on whether it could infer a private cause of action from this federal statute. The Court found that the “context, language, and legislative history of the PKPA all point sharply away from the remedy petitioner urges us to infer”.¹⁰⁷ As part of the analysis, the Court mentioned the PKPA legislative history, and in particular the rejection of a proposal to vest federal courts with diversity jurisdiction for purposes of enforcing state custody orders.¹⁰⁸ Congressman Conyers had mentioned during the PKPA legislative proceedings that “Federal courts have no experience in these kinds of matters”.¹⁰⁹ In addition, Assistant Attorney General Patricia Wald indicated that the Department of Justice opposed having enforcement occur in a federal forum. It would “increase the workload of the federal courts and entangle the federal judiciary in domestic relations disputes with which they have little experience and which traditionally have been the province of the States”.¹¹⁰

During the ICARA hearings, the Administration used the *Thompson* decision to suggest that federal courts should not have jurisdiction under ICARA because “exactly the same

¹⁰² Executive Order No 12,612, 52 Fed. Reg. 41,685 (Oct. 26, 1987).

¹⁰³ *Ibid.*

¹⁰⁴ *Thompson v. Thompson*, 484 U.S. 174 (1988).

¹⁰⁵ See Feb. 23, 1988 Senate hearing, note 53 above, p. 87 (statement of Mr. Jones).

¹⁰⁶ 28 U.S.C. § 1738A (2012).

¹⁰⁷ *Thompson*, 484 U.S. at 180.

¹⁰⁸ *Ibid.*, p. 184.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*, p. 185.

considerations relate to the Hague Convention, which ... includes a number of provisions as exceptions to the return obligation, that relate very closely to the traditional domestic relations inquiries".¹¹¹ Arguably, the analogy was inept. First, the Supreme Court in *Thompson* recognized that federal courts could address these issues. In fact, it mentioned that a federal court, notably itself, had the ability to decide which of two conflicting state decrees prevailed if the states were incapable of resolving the custody matter. It noted that it had the "ultimate review" for "truly intractable jurisdictional deadlocks".¹¹² Second, it recognized that Congress had made a policy choice in the PKPA, but that choice was not constitutionally required. Importantly, the Court recognized that Congress "may choose to revisit the issue" should state courts themselves repeatedly be unable to determine which of two conflicting decrees have precedence.¹¹³ By citing the Supreme Court decision, instead of simply citing the legislative history behind the PKPA, the Administration sought to elevate Congress' policy choice to the level of a constitutional mandate.¹¹⁴

The Executive Order and *Thompson* helped the Administration justify its changed position. The Administration thereafter argued vigorously that the subject matter of Hague Abduction Convention disputes, and the type of questions involved in an adjudication, were an area that had always been, and should remain, the province of state courts.¹¹⁵ The Administration pointed to Article 17 of the Convention, for example, which allows courts to take account of the reasons for a custody decision in applying the Convention, and argued that the Convention would "embroil [the courts] in contested custody cases".¹¹⁶ It argued that state courts were better positioned to adjudicate these disputes because they already had experience under Article 23 of the Uniform Child Custody Jurisdiction Act (UCCJA) with interpreting and enforcing foreign custody orders.¹¹⁷ In addition, the Administration identified several questions that could arise in a Hague Abduction Convention proceeding that were similar to questions that arise in traditional custody disputes, including, among others, the following: whether a child is "well settled"; whether a parent is exercising rights of custody; whether there is a grave risk that return would expose the child to physical or psychological harm; and, whether the child attained the degree of maturity and age so that it is appropriate to take account of the child's views.¹¹⁸ The Administration also noted that ICARA authorized courts adjudicating Hague Abduction Convention petitions to take "provisional measures" to protect the child's well-being or prevent further flight,¹¹⁹ and required courts to assure that state law had been satisfied before a child could be removed

¹¹¹ Feb. 23, 1988 Senate hearing, note 53 above, p. 87 (statement of Mr. Jones).

¹¹² *Thompson*, 484 U.S. at 187.

¹¹³ *Ibid.*

¹¹⁴ Thomas Boyd, acting Assistant Attorney General, emphasized that the Parental Kidnapping Prevention Act of 1980 did not vest jurisdiction in the federal courts even though it was a federal law, and that the Supreme Court, in *Thompson*, noted how anomalous it would be to expect a federal court to resolve conflicting state custody orders. Feb. 3, 1988 House hearing, note 53 above, p. 118 (letter of Mr. Boyd).

¹¹⁵ *Ibid.*, pp. 44, 47-49 (statement of Mr. Stephen Markman, Assistant Att'y Gen. for Legal Policy, Department of Justice).

¹¹⁶ See Feb. 23, 1988 Senate hearing, note 53 above, p. 72 (statement of Mr. Thomas Boyd, Acting Assistant Attorney General, in response to question posed by Senator Thurmond).

¹¹⁷ *Id.* at 60 (statement of Mr. Jones); *Id.* at 74 (statement of Mr. Boyd).

¹¹⁸ Feb. 3, 1988 House hearing, note 53 above, p. 119 (letter of Mr. Boyd). This was reiterated in the Senate hearings. See Feb. 23, 1988 Senate hearing, note 53 above, pp. 59, 67 (statement of Mr. Jones).

¹¹⁹ Feb. 3, 1988 House hearing, note 53 above, p. 119 (letter of Mr. Boyd); Feb. 23, 1988 Senate hearing, note 53 above, p. 68 (statement of Mr. Jones).

from his or her custodian.¹²⁰ Many of the issues, the Administration noted, “would be fact-specific and turn on the circumstances of the child”.¹²¹

Although federalism was the main reason the Administration wanted to vest jurisdiction exclusively in state courts, the Administration did make some other arguments. For example, one witness expressed a concern about the increased burden on federal courts.¹²²

The Administration’s position was supported by some prominent organizations. The Conference of Chief Justices¹²³ and the Judicial Conference of the United States¹²⁴ both wanted state courts to have exclusive jurisdiction in Hague Abduction Convention cases. They thought state courts had the expertise necessary for these child-centered cases.

Several prestigious groups, however, opposed the Administration’s desire for exclusive state jurisdiction. Those groups included the Family Law Section of the American Bar Association, the National Center for Missing and Exploited Children, the American Academy of Matrimonial Lawyers, and the United States Chapter of the International Academy of Matrimonial Lawyers. For example, the National Center for Missing and Exploited Children called concurrent jurisdiction “necessary in order to fully implement the convention”.¹²⁵ The American Academy of Matrimonial Lawyers called the Administration’s proposal for exclusive state jurisdiction “totally inappropriate because it would create the anomalous situation of Congress giving state courts exclusive power to interpret an international treaty”.¹²⁶

The witnesses representing those organizations attacked the Administration’s reasons for changing its position. They questioned whether either the Executive Order on Federalism or the decision in *Thompson* supported the Administration’s new position. The ABA representative, for example, said that the Executive Order on Federalism “would lead to exactly the opposite conclusion” to that reached by the Administration representatives.¹²⁷ Citing the Order’s admonition that it is important to distinguish between problems of “national scope, which may justify Federal action, and problems that are merely common to the states, which will not justify Federal action,” the witness said international child abduction “is clearly a problem of international dimension,” and the states “acting alone cannot adequately resolve” it.¹²⁸ The ABA representative also contended that the *Thompson* decision was not a valid reason for the Administration to change its position. She noted that the *Thompson* decision only meant that Congress needed to confer jurisdiction on the federal courts explicitly.¹²⁹

¹²⁰ Feb. 3, 1988 House hearing, note 53 above, p. 120 (letter of Mr. Boyd).

¹²¹ Feb. 23, 1988 Senate hearing, note 53 above, p. 61 (statement of Mr. Jones); Feb. 23, 1988 Senate hearing, note 53 above, pp. 71-72 (statement of Mr. Boyd). Linda Silverman has noted that the Administration also was motivated by the concern that if international abduction cases could be heard in a federal court, but domestic abduction cases could not be so heard, there would be consternation among domestic lawyers.

¹²² Feb. 3, 1988 House hearing, note 53 above, p. 49 (statement of Mr. Markman); Feb. 23, 1988 Senate hearing, note 53 above, pp. 68-69 (statement of Mr. Jones).

¹²³ Feb. 23, 1988 Senate hearing, note 53 above, p. 154 (letter from Harry Swegle, Washington Liaison, Conference of Chief Justices).

¹²⁴ Feb. 3, 1988 House hearing, note 53 above, p. 128 (letter of L. Ralph Mecham, Administrative Office of the United States Courts); *Ibid.*, p. 130 (report of the Proceedings of the Judicial Conference of the United States).

¹²⁵ Feb. 23, 1988 Senate hearing, note 53 above, p. 100 (statement of Mr. David W. Lloyd, General Counsel, National Center on Missing and Exploited Children).

¹²⁶ *Ibid.*, p. 116 (statement of Mr. Schwartz).

¹²⁷ *Ibid.*, p. 90 (statement of Ms. Hoff).

¹²⁸ *Ibid.*, pp. 90-91.

¹²⁹ *Ibid.*, p. 89.

The witnesses supporting concurrent jurisdiction also disputed the Administration's core premise: that Hague Abduction Convention cases would embroil federal courts in custody disputes. Proponents of concurrent jurisdiction pointed out that the Convention makes explicit that Hague Abduction Convention cases are not about deciding the merits of a custody dispute, which turn on the child's best interest.¹³⁰ As one witness emphasized, "Articles 12 through 20 do not require a federal or state judge to issue an order on the basis of 'the best interests of the child' – the traditional standard in domestic custody disputes, and one which state family court judges are clearly more experienced to ascertain than federal judges".¹³¹ Moreover, witnesses emphasized that the issues identified by the Administration as involving custody-like determinations were issues merely on the periphery of a Hague Abduction Convention adjudication, and were not custody decisions. In fact, witnesses argued that federal courts already were adjudicating these types of periphery issues in other contexts and had managed to stay out of the merits of the custody disputes. One witness explained that federal courts' involvement with deportation proceedings was similar to what would happen in Hague proceedings.¹³² In addition, federal courts already adjudicated diversity cases related to interstate parental kidnapping, and these cases did not "enmesh [courts] in the underlying custody disputes".¹³³ Witnesses denied that the Hague Abduction Convention cases would involve "fact-finding responsibilities" that required "expertise in domestic relations matters that state courts must have".¹³⁴ Even the exceptions to return "will not require custody-type evidentiary trials, which the Convention and Act specifically do not permit".¹³⁵

In addition to attacking the Administration's changed position, proponents of concurrent jurisdiction offered some reasons for the adoption of concurrent jurisdiction. They invoked traditional arguments regarding the prospect of local bias in state court,¹³⁶ and the importance of affording a petitioner a choice of forum.¹³⁷ Proponents also called for federal court involvement because federal courts had expertise in interpreting treaties, a power explicitly afforded federal courts under Article 3, section 2 of the United States Constitution.¹³⁸ Opponents countered that state courts had more competency over domestic relations matters, and these legal issues would be more frequent than issues of treaty interpretation.¹³⁹ Proponents also claimed that concurrent jurisdiction would

¹³⁰ Ibid., pp. 90, 114 (statement of Mr. Schwartz).

¹³¹ Ibid., p. 112 (statement of Mr. Lloyd).

¹³² Feb. 23, 1988 Senate hearing, note 53 above, p. 113 (statement of Mr. Lloyd).

¹³³ Feb. 3, 1988 House hearing, note 53 above, p. 65 (statement of Patricia Hoff, Co-Chair, Child Custody Committee of the Family Law Section, American Bar Association).

¹³⁴ Ibid., p. 101 (statement of Mr. Lloyd).

¹³⁵ Ibid., p. 125 (statement of Mr. Schwartz).

¹³⁶ Ibid., p. 90 (statement of Ms. Hoff).

¹³⁷ Feb. 3, 1988 House hearing, note 53 above, p. 66 (statement of Ms. Hoff); Feb. 23, 1988 Senate hearing, note 53 above, p. 90 (statement of Ms. Hoff).

¹³⁸ In relevant part, it states, "The judicial power 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 consuls;--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" (emphasis added).

¹³⁹ Feb. 23, 1988 Senate hearing, note 53 above, p. 60 (statement of Mr. Jones).

promote uniformity, citing concerns about divergent treaty interpretations¹⁴⁰ and divergent procedural rules.¹⁴¹ Opponents countered that concurrent jurisdiction would cause a multiplicity of interpretations and more conflicts between federal and state courts¹⁴² because neither federal nor state courts in the same state were bound by the decisions of the other.¹⁴³ This multiplicity would promote forum shopping.¹⁴⁴

Ultimately Congress did opt for concurrent jurisdiction. This brief history of ICARA's concurrent jurisdiction provision reveals several important lessons. First, exclusive federal jurisdiction was never vetted as an option. At the time of ICARA's enactment, only one person testified in favor of exclusive federal jurisdiction.¹⁴⁵ Phillip Schwartz of the International Academy of Matrimonial Lawyers recommended exclusive federal court jurisdiction because federal courts were "a lot swifter than the [s]tate courts"¹⁴⁶ and had expertise in interpreting treaties.¹⁴⁷ The Department of Justice spoke against exclusive federal jurisdiction, saying it would severely limit state court jurisdiction over family law matters,¹⁴⁸ although little else was said. This truncated response may be explainable, in part, because Congress rarely adopts exclusive federal jurisdiction,¹⁴⁹ and so the option in the context of ICARA was not considered a real possibility. The fact that exclusive federal jurisdiction was not considered as a serious option suggests that either it is unlikely to gain a footing now, or perhaps the opposite: Congress may be more amenable to change, especially in light of the new international call for limiting the number of judges that adjudicate Hague cases.

Second, Congress does not always do what judges desire when Congress decides issues of jurisdiction, although these issues obviously are of importance to the judges and the judges sometimes do carry great power.¹⁵⁰ Both the federal and state judiciaries opposed concurrent jurisdiction, yet it became the law anyway. The judiciaries' political ineffectiveness is reminiscent of other times when its jurisdictional preferences did not become law. For example, in 1994, when the Violence Against Women Act (VAWA) was passed, both the Judicial Conference of the United States and the Conference of Chief

¹⁴⁰ *Ibid.*, p. 113 (statement of Mr. Lloyd).

¹⁴¹ Feb. 3, 1988 House hearing, note 53 above, p. 80, 86 (statement of Mr. David W. Lloyd, General Counsel, National Council for Missing and Exploited Children); Feb. 23, 1988 Senate hearing, note 53 above, p. 104 (statement of Mr. Lloyd).

¹⁴² Feb. 23, 1988 Senate hearing, note 53 above, p. 60 (statement of Mr. Jones).

¹⁴³ Feb. 3, 1988 House hearing, note 53 above, p. 120 (letter of Mr. Boyd); Feb. 23, 1988 Senate hearing, note 53 above, p. 60 (statement of Mr. Jones).

¹⁴⁴ Feb. 23, 1988 Senate hearing, note 53 above, p. 61 (statement of Mr. Jones).

¹⁴⁵ See Feb. 3, 1988 House hearing, note 53 above, p. 77-78 (statement of Mr. Schwartz).

¹⁴⁶ *Ibid.*, p. 79.

¹⁴⁷ *Ibid.*, p. 80; Feb. 23, 1988 Senate hearing, note 53 above, p. 114 (statement of Mr. Schwartz).

¹⁴⁸ Feb. 23, 1988 Senate hearing, note 53 above, p. 76 (statement of Mr. Boyd).

¹⁴⁹ Seinfeld, note 58 above, pp. 121-122 ("[T]he Judiciary Act of 1789 rendered federal jurisdiction exclusive in connection with the prosecution of federal crimes, admiralty and maritime cases, and suits against consuls and vice-consuls of foreign states. And Congress enacted a handful of statutes during the first half of the twentieth century providing for exclusive jurisdiction in the federal district courts over certain causes of action contemplated by the relevant regulatory schemes. Since then, however, enactments calling for exclusive jurisdiction in the federal district courts have been few and far between") (citations omitted).

¹⁵⁰ J. H. Friedenthal, "New Limitations on Federal Jurisdiction," *Stanford Law Review*, XI (1959), p. 214, n.4 (describing influence of testimony of Committee on Jurisdiction and Venue of the Judicial Conference of the United States on the decision to retain diversity jurisdiction); P. Pether, "Constitutional Solipsism," *William & Mary Bill of Rights Journal*, XVII (2009), p. 1011 (describing the success of the Judicial Conference in stopping the conferral of Article III status on bankruptcy judges).

Justices actively lobbied against federal jurisdiction for VAWA civil rights remedy.¹⁵¹ The “principal argument” against the remedy was that it could embroil the federal courts in domestic relations disputes, the providence of state courts.¹⁵² Commentators thought there was little substance to this concern.¹⁵³ Although the judges were “effective” in narrowing the cases that would be heard in federal court,¹⁵⁴ they were not effective in precluding the cases altogether.¹⁵⁵ ICARA and VAWA remind us that if the judiciary sought to eliminate federal jurisdiction, or opposed exclusive federal jurisdiction, its political power might not be sufficient to have its way.

Third, the history of ICARA reveals that the Administration’s position is not determinative either. The Administration’s position was perhaps undercut by the fact that it had previously supported concurrent jurisdiction. Nonetheless, the Administration did take a strong stance against concurrent jurisdiction at the hearings,¹⁵⁶ and Congress in effect overruled its position. Consequently, if a future Administration either sought to eliminate federal jurisdiction, or opposed exclusive federal jurisdiction, its political power might also be insufficient to stop change.

Fourth, there were reasonable arguments on both side of the debate, and neither side was a clear winner in terms of the substance of their positions. At times, the debate between the Administration and its opponents even lacked clash, with both sides making cogent arguments. Take, for example, the issue of whether Hague proceedings would embroil the federal courts in custody-like cases. On one hand, the Administration was undeniably right. Hague Abduction Convention proceedings sometimes involve questions that are similar to the issues state judges decide when adjudicating a custody dispute. On the other hand, the proponents of concurrent jurisdiction were also right: courts adjudicating a Hague Abduction Convention petition are prohibited from deciding the merits of a custody dispute. At other times, the two sides clashed, but neither side necessarily had the better position. For example, state courts generally have more expertise deciding cases involving families, and federal courts may have more expertise with the interpretation of treaties. At bottom, both jurisdictional options were rational at the time of ICARA’s adoption. As shown below, today, likewise, there are compelling arguments for the various jurisdictional approaches, with no one set of arguments carrying the day.

Fifth, the debate did not vary much from the three reasons that are typically invoked to support federal court jurisdiction: bias, uniformity, and expertise.¹⁵⁷ There was no discussion of many other relevant issues, including the personal qualities of the adjudicators, the prestige of federal adjudication, the potential for lawyers to develop a national practice, and the resources of the federal court. The debate remained narrow in

¹⁵¹ S. F. Goldfarb, “‘No Civilized System of Justice’: The Fate of the Violence Against Women Act”, *West Virginia Law Review*, CII (2000), p. 510.

¹⁵² *Ibid.*, pp. 511-512.

¹⁵³ See *ibid.*, p. 511.

¹⁵⁴ *Ibid.*, p. 512, n.106 (describing amendments including bans on supplemental jurisdiction for state law domestic relations claims and removal jurisdiction when a case had been filed in state court).

¹⁵⁵ Once the judges accepted the compromise, they eventually tempered their opposition to one of silence. *Ibid.*, pp. 512-513; J. Resnik, “Reconstructing Equality: Of Justice, Justices, and the Gender of Jurisdiction,” *Yale Journal of Law & Feminism*, XIV (2002), pp. 402-403.

¹⁵⁶ See Feb. 23, 1988 Senate hearing, note 53 above, pp. 64-65 (statement of Mr. Jones).

¹⁵⁷ Seinfeld, note 58 above, pp. 102-109.

terms of the issues. Any reexamination of the wisdom of concurrent jurisdiction need not, and should not, stay so narrow.

Sixth, jurisdiction was an important topic that took up a good portion of the time at the hearings, but Congressman Barney Frank was right when he predicted that the topic was not so important that anyone would vote against the implementing legislation because of concurrent jurisdiction.¹⁵⁸ Perhaps one lesson to derive from ICARA's legislative history is that although people will argue about jurisdiction, no proposal was so objectionable that it would defeat a bill with important substantive content. A more difficult question is whether Congress today would see an alternative jurisdictional arrangement as a reasonable option. There are reasons to think that change would be unlikely, including strong support of concurrent jurisdiction at ICARA inception, *status quo* bias,¹⁵⁹ and the lack of compelling reasons to make federal jurisdiction either exclusive or a relic.

THE ARGUMENTS FOR EXCLUSIVE OR ANY FEDERAL JURISDICTION

In 2003, the Permanent Bureau's *Guide to Good Practice* recommended that countries consolidate jurisdiction and set forth a number of benefits from doing so. They were the following:

an accumulation of experience among the judges concerned; and, as a result, the development of mutual confidence between judges and authorities in different legal systems; the creation of a high level of interdisciplinary understanding of Convention objectives, in particular the distinction from custody proceedings; mitigation against delay; and greater consistency of practice by judges and lawyers.¹⁶⁰

These reasons remain the principal arguments today for consolidating jurisdiction. Consolidating jurisdiction might also have other advantages, however, especially related to services of the federal courts (such as the availability of interpreter services and pro bono counsel) or the effectiveness of third parties, such as liaison judges and the Central Authority. Therefore, a more complete list of the potential benefits of exclusive jurisdiction would include the following: enhanced expertise, a better understanding that Hague Abduction Convention cases are not custody disputes, expeditious adjudications, uniformity of interpretation, enhanced due process from interpreter services and pro bono representation, and more efficient processes involving the Central Authority and liaison judges.

Of course, these arguments in favor of exclusive jurisdiction – just as the arguments cited by each side during the ICARA Congressional hearing – have answers. A candid examination of these potential benefits suggests that some, but only some, of these benefits

¹⁵⁸ The vote on ICARA was by voice vote, so there was no vote recorded. See the text accompanying notes 95 and 96 above. No one raised an objection about concurrent jurisdiction on the floor at the time of the vote.

¹⁵⁹ Daniel Kahneman, Jack L. Knetsch, and Richard H. Thaler, "Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias", *Journal of Economic Perspectives*, V (1991), pp. 197-198 (explaining that *status quo* bias is the "strong tendency to remain at the status quo, because the disadvantages of leaving it loom larger than advantages" and citing research establishing its existence).

¹⁶⁰ Hague Conference on Private International Law, *The Guide to Good Practice Under the Hague Convention of 25 Oct. 1980 on Civil Aspects of International Child Abduction, Part II- Implementing Measures* (2003), § 5.1.

would materialize if Congress were to consolidate jurisdiction in the federal bench, and that the overall advantages may not be that great. On the other hand, the arguments about the benefits of the federal courts suggest that Congress would be unlikely to eliminate federal court jurisdiction.

Expertise Function

Proponents of consolidated jurisdiction often focus on judicial expertise as an advantage. “Expertise” is typically understood in this context as expertise in applying the Hague Abduction Convention. This understanding raises four distinct issues. First, and most obviously, will consolidation of jurisdiction in the federal bench lead judges to gain expertise more quickly? Second, are federal judges more likely than state judges to understand that the Convention is not a custody proceeding? Third, do issues arise within a Hague Abduction Convention proceeding that are better handled by one bench or the other, given judges’ work outside of the Hague Abduction Convention context? Fourth, is a wider understanding of expertise relevant and helpful? For example, might the racial or gender make-up of the respective benches implicate “expertise”? Are judges’ other personal qualities, such as intelligence, relevant to “expertise”? These four issues are considered in turn.

Hague expertise. Most American judges lack a high level of expertise in the Convention, to the extent that the number of cases heard equates with expertise. Silberman and Spector have noted that concurrent jurisdiction means that “Hague cases can come before any one of a vast number of judges, many of whom are not familiar with the Convention and may confront only a single such case in their judicial careers”.¹⁶¹ Morley, a legal practitioner, reports that in his experience: “[I]t happens quite often that a judge in a Hague case reports that, ‘This is my first Hague case,’ and perhaps even asks the lawyers to provide special support for that reason”.¹⁶²

These impressions are borne out by the available data. Cases that are reported on Westlaw reveal that most federal district court judges and state trial judges have heard only one or two cases, and few have heard three.¹⁶³ Even at the federal appellate level, only a few judges have heard a larger number of cases. For example, from 2000 to the present, only three federal appellate judges have heard five cases, but most judges have heard fewer.¹⁶⁴ For perspective, consider that a federal Court of Appeals judge typically decides

¹⁶¹ L. Silberman and R. Spector, “Dissecting *Chafin v. Chafin*: The Propriety of Appeal after Return of a Child Pursuant to the Hague Abduction Convention -- Mootness, Stays and Comity”, *International Family Law* (2013), p. 189.

¹⁶² Morley, note 49 above, p. 24.

¹⁶³ We examined Westlaw for all Hague Abduction Convention cases adjudicated in federal district and appellate court and in the state courts of California, New York, New Jersey and Florida from 2000 to 2013.

¹⁶⁴ On the First Circuit, two judges (Judges Lynch and Howard) heard four cases and Judge Lipez heard five cases; on the Second Circuit, Judge Wesley heard four cases; on the Third Circuit, Judge Roth heard five cases, and Judges Shedd, Motz, and Duncan heard three cases; on the Fifth Circuit, Judges Garza and DeMoss heard two cases; on the Sixth Circuit, Judge Kennedy heard three cases; on the Seventh Circuit, Judge Posner heard five cases, and Judge Bauer heard four cases; on the Eighth Circuit, Judge Bye heard four cases, and Judges Wollman, Shepherd, and Murphy heard three cases; on the Ninth Circuit, Judge O’Scannlain heard three cases; on the Tenth Circuit, Judge Baldock heard four cases; and on the Eleventh Circuit, Judge Carnes heard three cases.

approximately 372 cases per year.¹⁶⁵ The United States Supreme Court has only considered three Hague Abduction Convention cases since 1988, when ICARA was enacted.

Exclusive federal jurisdiction would produce some benefit in terms of having judges become frequent and repeat adjudicators of these cases. Most cases are brought in federal court. Although there are fewer federal judges than state court judges, and fewer still than the combined number of federal and state judges, there are still too many federal judges to effectuate a specialized, expert bench. There are 677 federal district court judges,¹⁶⁶ and 179 federal appellate court judges.¹⁶⁷ Therefore, whereas there are far fewer federal judges than the 11,860 state court judges of general jurisdiction,¹⁶⁸ and the 1,369 state appellate court judges,¹⁶⁹ the absolute number of federal judges might be too large to permit expertise to develop on the federal bench, at least without some additional consolidation measures.

A per capita comparison with consolidated benches in other countries is revealing. For example, England has 18 specialist judges of the Family Division of the High Court, for its 238 incoming cases a year.¹⁷⁰ Those numbers produce a per capita rate of 13 cases per judge per year. Australia has 30 judges on its federal Family Law court,¹⁷¹ for approximately 91 incoming cases,¹⁷² which produces a per capita rate of approximately 3 cases per judge per year. Without further consolidation of the United States federal bench, only about 25% of the federal district judges would hear a Hague Abduction Convention case in a particular year (350 cases¹⁷³ / 677 judges¹⁷⁴), at best.¹⁷⁵ Put another way, on average, a federal district judge would hear a Hague Abduction Convention case once every two years. Even if the United States assigned one judge per federal district to hear these cases,¹⁷⁶ the per capita rate would only be 1.86 cases per judge per year.

Although the goal of judicial expertise could be enhanced further if there were a specialized federal trial bench or appellate court, this possibility would probably be politically unpopular,¹⁷⁷ and the overall benefit is questionable. Empirical evidence suggests that specialized courts “do not adjudicate cases more quickly or accurately than

¹⁶⁵ Seinfeld, note 58 above, p. 125.

¹⁶⁶ See “Federal Judgeships”, *United State Courts*, www.uscourts.gov/JudgesAndJudgeships/FederalJudgeships.aspx (last visited 28 April 2014).

¹⁶⁷ *Ibid.* Federal appellate judges typically sit in panels of three.

¹⁶⁸ “Number of Authorized Justices/Judges in State Courts 2010”, *Court Statistics Project*, www.courtstatistics.org/Other-Pages/~media/Microsites/Files/CSP/SCCS/2010/Number_of_Authorized_Justices_and_Judges_in_State_Courts.ashx. This does not include almost 18,000 judges who sit in courts of limited jurisdiction. *Ibid.*

¹⁶⁹ The same source reports 1,013 appellate judges, and 365 judges who sit on the court of last resort. *Ibid.*

¹⁷⁰ N. V. Lowe, “The 1980 Hague Convention on the Civil Aspects of International Child Abduction: An English Viewpoint”, *New York University Journal of International Law and Politics*, XXXIII (2000), p. 185; Lowe, note 41 above, p. 180.

¹⁷¹ Family Court of Australia, Judges, at http://www.familycourt.gov.au/wps/scm/connect/FCOA/home/about/Court/Judges/FCOA_judges. This figure includes the judges on the Family Law Court for Western Australia, but does not include the Chief Justice or the Deputy Chief Justice of the Family Court, or the Chief Judge of the Family Court of Western Australia.

¹⁷² Lowe, note 41 above, p. 4. That broke down to be 75 return and 16 access cases in 2008.

¹⁷³ See text accompanying notes 43-44 above.

¹⁷⁴ See note 166 above.

¹⁷⁵ See text accompanying note 45 above.

¹⁷⁶ There would be 94 judges because there are 94 district courts. See U.S. Courts, District Courts, at www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/DistrictCourts.aspx.

¹⁷⁷ D. J. Meador, “Origin of the Federal Circuit: A Personal Account”, *American University Law Review*, XLI (1992), p. 587 (noting “a widespread sentiment ... among the bench and bar against having ‘specialized courts’”).

generalist judges”.¹⁷⁸ Moreover, there are well-articulated disadvantages associated with subject matter specific courts, as described by Judge Posner. First, there can be a trade-off between specialization of a bench and quality of the judge. As Judge Posner noted: “While there are able people who would like nothing better than to spend twenty or thirty years just judging appeals in tax or patent or social security or antitrust cases, I do not think it would be easy to maintain a high quality federal appeals bench on such a diet”.¹⁷⁹ Although a specialized Hague bench might also hear other cases also (because there are too few Hague Abduction Convention cases to justify a specialized bench focused solely those cases), the trade-off may still operate to some extent and must be considered.

Second, and more significantly, specialized benches are at risk of capture, at least by a particular perspective.¹⁸⁰ A specialized bench would likely hear from the same petitioners’ attorneys repeatedly, especially if the court were located in a place like Washington, D.C. Similarly, the court’s physical proximity to the Central Authority could affect its independence. As Judge Posner noted, “A specialized court will tend to be less independent of the political process than a generalist court because its work can be more effectively monitored and controlled by the political branches of government – that is, by the executive and legislative branches”.¹⁸¹ Monitoring and control can have the unfortunate effect of making a specialized court much more likely to internalize the government’s own goals and, consequently, much less likely to be a buffer between the government and the individual.¹⁸² The Executive Branch has said in various ways and contexts that “all abduction is wrong”, and that perspective would be more likely to influence adjudications if jurisdiction were concentrated. This perspective would be disadvantageous to the respondent and the child if the abduction were, for example, a flight to safety.

Third, a specialized bench would lack the cross-fertilization that generalist benches receive. Judges are advantaged by receiving ideas from other areas of the law. This problem might be minimized if the bench heard other, non-Hague Abduction Convention cases, but cross-pollination is an important consideration.¹⁸³

Fourth, even assuming more expertise could be achieved, the goal of expertise has to be kept in perspective. Frankly, Hague Convention cases often are not particularly complicated adjudications, and the need for “expertise” is arguably overstated. The

¹⁷⁸ M. Morley, “The Case Against A Specialized Court for Federal Benefit Appeals”, *Federal Circuit Bar Journal* XVII (2008), p. 383 (looking at reversal rates by Federal Circuit for appeals from generalist and specialist courts and assessing time to resolve appeals for U.S. Court of Appeals Veterans Claims and other circuits and concluding that empirical evidence suggests specialized courts “do not adjudicate cases more quickly or accurately than generalist judges”).

¹⁷⁹ Posner, note 64 above, p. 780.

¹⁸⁰ *Ibid.*, pp. 781-782 (“A ‘camp’ is more likely to gain the upper hand in a specialized court than in the entire federal court system or even in one circuit.”); David R. Cleveland, “Post-Crisis Reconsideration of Federal Court Reform”, *Cleveland State Law Review*, LXI (2013), pp. 94-95 (“[S]pecialized courts have traditionally been disfavored. The primary concern seems to be of the possibility of capture of the court by special interests, repeat litigants, and even the bench and bar of the specialized court itself.”).

¹⁸¹ Posner, note 64 above, p. 783.

¹⁸² *Ibid.*, p. 785 (“The federal courts play their role as a buffer between the political branches and the citizen more effectively when they are composed of generalists than when they are composed of specialists. A generalist court provides some insulation; a specialist court is apt to be a superconductor. Specialists are more likely than generalists to identify with the goals of a government program, since the program is the focus of their career. They may therefore see their function as one of enforcing the law in a vigorous rather than a tempered fashion.”)

¹⁸³ *Ibid.*, pp. 785-787. “Judicial monopoly has two effects. First, it reduces diversity of ideas and approaches—what in other contexts has been called ‘yardstick competition’”.

law is relatively straightforward. These cases are unlike other cases where a specialized bench is essential, such as patent law,¹⁸⁴ admiralty,¹⁸⁵ international trade,¹⁸⁶ and tax law.¹⁸⁷ Therefore, consolidating jurisdiction in the federal judiciary, or even a specialized bench for that matter, might not afford much actual benefit. For all of these reasons, a specialized federal bench is not explored further.

Different Competencies. Federal courts and state courts have different areas of emphasis in their caseloads, and whether this makes federal judges more attractive as adjudicators is debatable. Most notably, federal courts are less likely to adjudicate family law issues.¹⁸⁸ Some see this as a benefit of a federal forum, yet others see it as a disadvantage. Morley has said that the different backgrounds of federal and state judges “might have a major impact on the outcome of the case”.¹⁸⁹

Some proponents of federal adjudication think a federal judge is less likely than a state court judge to get into the merits of custody. These proponents presumably fear that a judge might determine custody *sub rosa*, and then conform his or her Hague Abduction Convention analysis to that determination. The fear usually is not that the judge will actually decide custody instead of adjudicating the Hague Abduction Convention petition, for Article 16 of the said Convention explicitly precludes such an act.¹⁹⁰ Certainly there have been instances in which state courts have decided custody during the pendency of a parallel Hague Abduction Convention proceeding,¹⁹¹ and federal courts are less likely to make the same mistake because they lack jurisdiction to issue the underlying custody decision. However, federal courts sometimes overstep by allowing a state court custody proceeding to move forward.¹⁹² But, generally, during a Hague Abduction Convention adjudication few judges decide custody or allow the custody case to continue because this error is so patent.

Despite the impression that state courts are more inclined to make *sub rosa* custody decisions during a Hague Abduction Convention adjudication, no one knows whether

¹⁸⁴ R. C. Dreyfuss, “Percolation, Uniformity, and Coherent Adjudication: The Federal Circuit Experience”, *Southern Methodist University Law Review*, LXVI (2013), p. 505 (noting that “Congress expected that the Federal Circuit would ... [take] patent cases – which many judges found technologically complex, legally esoteric, and time consuming – out of the regional appellate system”).

¹⁸⁵ Solimine, note 9 above, p. 409.

¹⁸⁶ “The expertise of the Court of International Trade, somewhat like the Tax Court, guides it in making complex determinations in a specialized area of the law.” *U.S. v. Haggard Apparel Co.*, 526 U.S. 380, 394 (1999).

¹⁸⁷ *Ibid.*

¹⁸⁸ Note 5 above, §17.1(d).

¹⁸⁹ Morley, note 49 above, p. 24.

¹⁹⁰ Article 16, Hague Abduction Convention.

¹⁹¹ See *Silverman v. Silverman*, 338 F.3d 886, 895, 901 (8th Cir. 2003) (finding state court custody order was of “dubious validity,” implying that the state court should not have decided custody given the Hague Convention controversy, and then returning the children to Israel pursuant to the Hague Convention despite the state court custody order in the respondents favor); *In re Lewin*, 149 S.W.3d 727, 735-37 (Tex. Ct. App. 2004) (vacating trial court custody order because trial court should have enforced Canadian court order issued pursuant to the Hague Convention).

¹⁹² See *Yang v. Tsui*, 416 F.3d 199 (3d Cir. 2005) (reversing the trial court because it erroneously dismissed the Hague petition on *Younger* abstention grounds); *Silverman v. Silverman*, 267 F.3d 788, 792 (8th Cir. 2001) (reversing trial court because it erroneously dismissed the Hague petition on *Younger* abstention grounds); *Gaudin v. Remis*, 415 F.3d 1028, 1035 (9th Cir. 2005) (criticizing trial court for believing it had discretion to determine that ongoing custody proceedings in Hawaii were a strong reason not to return the children to Canada).

state judges are any more likely than federal judges to let their views about the parties and the underlying custody issue influence their determination of the Hague Abduction Convention matter. All judges are human, and no judge is immune from considering irrelevant factors subconsciously.¹⁹³ Even if a federal judge is not thinking about the child's best interests doctrinally, he or she may be considering the child's best interests anyway. Hague Abduction Convention doctrine is sufficiently porous and fact dependent that a trial judge's *sub rosa* consideration of who should have custody would likely go both undetected and unremedied.

In fact, others have shown that it is not at all clear "that federal judges are generally more sympathetic to claims grounded in federal law than are state court judges".¹⁹⁴ Seinfeld astutely explains that a judge's political ideology can negate institutional differences between state and federal judges that might suggest federal judges would be better adjudicators of federal claims. So, for example, a federal judge's insulation from majoritarian pressures because of life tenure may mean little in a civil rights adjudication if the judge will not "take advantage of [his or her] insulation".¹⁹⁵ The same general point applies in the Hague Abduction Convention context, but perhaps the determinative factor is less political ideology than personal compassion. For example, if a federal judge finds it difficult to separate a child from its primary caregiver because the primary caregiver cannot return to the country of the child's habitual residence, then the federal judge may be more hostile to the federal law remedy than a state court judge.

Moreover, even assuming that a lack of family law expertise makes federal judges less likely to get into the merits of custody (although this is impossible to know for sure), there is another possible explanation for their reluctance. It may also make it harder for them to adjudicate well some issues that are expressly relevant to the Hague Abduction Convention, such as whether exposure to domestic violence will pose a grave risk to children, whether a child is mature enough to testify, or whether a flight risk necessitates providing provisional remedies. Although proponents of concurrent jurisdiction at the ICARA hearings predicted that the federal courts would not need to go "beyond their traditional lack of expertise in domestic relations matters ... because the exceptions to the return of the child under the Convention are so narrow",¹⁹⁶ those predictions have proven inaccurate. The exceptions are not as narrow as the witnesses imagined. In fact, federal judges have been criticized for their application of the Article 12 "age and maturity" defense because federal judges often know little about child competency.¹⁹⁷ Federal judges also have been criticized for their adjudication of the 13(b) defense because federal judges may lack the training and experience to make an informed decision.¹⁹⁸ Soon they

¹⁹³ See generally J. A. Dowsett, "Prejudice - The Judicial Virus", *Federal Court of Australia* (7 February 2009), <http://www.fedcourt.gov.au/publications/judges-speeches/justice-dowsett/dowsett-j-20090207>.

¹⁹⁴ Seinfeld, note 58 above, p. 110. Seinfeld has reported: "Numerous authorizes have expressed doubts as to whether the presumption of state-court bias in the adjudication of federal claims remains defensible". *Ibid.*

¹⁹⁵ *Ibid.*, p. 112.

¹⁹⁶ Feb. 3, 1988 House hearing, *supra* note 54, at 80 (statement of Mr. Lloyd).

¹⁹⁷ L. D. Elrod, "'Please Let Me Stay,' Hearing the Voice of the Child in Hague Abduction Cases", *Oklahoma Law Review*, LXIII (2011), p. 668.

¹⁹⁸ See C. Norris, "Immigration and Abduction: The Relevance of U.S. Immigration Status to Defenses Under the Hague Convention on International Child Abduction", *California Law Review*, XCVIII (2010), p. 190 (citing M. H. Weiner, "Strengthening Article 20", *University of San Francisco Law Review*, XLVIII (2004), p. 730 ("federal judges often have little experience with family violence cases or interviewing children"). *Cf.* J. Resnik, "'Naturally' Without Gender: Women, Jurisdiction, and the Federal Courts", *New York University Law Review*,

may be criticized for returning well-settled children pursuant to “equitable discretion”, if that doctrine sticks.¹⁹⁹ The point is that because the exceptions sometimes raise issues that implicate safety, autonomy, and human rights, or even a broader examination of the child’s well-being, a federal judge’s inexperience with domestic relations matters might actually be a drawback.

Apart from these consequences, empirical evidence now suggests that the stereotype about state court judges’ performance adjudicating Hague Abduction Convention matters is, in fact, simply false. Halabi, of the University of Tulsa, collected all reported cases through 16 August 2012, on Westlaw and LEXIS adjudicated by federal and state judges.²⁰⁰ He found 373 cases.²⁰¹ In the 95 state trial court decisions, courts found the treaty applied 78.9% of the time.²⁰² In the 75 cases where it applied, state judges ordered children returned 73.3% of the time.²⁰³ Where exceptions were raised, these were rejected in 69.7% of the cases.²⁰⁴ In comparison, in the 278 federal trial court decisions, courts found the treaty applied in 82.4% of the cases.²⁰⁵ In the 229 cases where the treaty applied, federal judges ordered children returned 71% of the time.²⁰⁶ Exceptions were rejected in 69.5% of

LXVI (1991), p. 1754 (noting “the claim is that federal judges are neither selected on the basis of knowledge of family law nor trained, once judges, to become knowledgeable [and] ... given the composition of the docket, federal courts would be unlikely to gain expertise because their involvement would be sporadic”). But see T. Lindhorst and J. L. Edleson, *Battered Women, Their Children, and International Law: The Unintended Consequences of the Hague Child Abduction Convention* (2012), pp. 132-133 (examining the adjudication of Hague Abduction Convention cases involving respondents who alleged they fled because of domestic violence and finding that federal courts returned children in 57% of the cases where domestic violence was alleged, compared to 50% in state court, but concluding that “the type of court was not a significant factor in determining the outcome of the Hague petition”). This study had a small sample and generalizations are difficult. As Judith Resnik reminds us, state gender bias task forces have found that state judges are biased in family law cases. Resnik, note 198 above, pp. 1755-1756.

¹⁹⁹ For example, in *Yaman v. Yaman*, 730 F.3d 1 (1st Cir. 2013), the First Circuit rejected the trial court’s analysis that Article 12 does not give a court discretion to return a settled child, because any discretion inherent in Article 18 attached to a full custody trial, something the federal court had no authority to engage in. Without deciding if its interpretation of Article 18 was correct, the First Circuit assured the trial court that federal courts had discretion to return a settled child. It existed in “both Article 12 and Congress’ grant to federal courts of jurisdiction over Hague Convention actions, which we presume was enacted with awareness of the broad equitable powers that those courts customarily enjoy”. In a most interesting passage, it considers whether “principles of federalism or comparative competence would have lead Congress to make state law the sole avenue for the return of settled children”. The federal district court thought the petition should go to state court (or have a federal court exercise pendent jurisdiction) to enforce a foreign custody determination. The First Circuit said: “We are doubtful that Congress intended for this traditional separation of authority to apply in cases of international child abduction, which are matters not just of family law but also of international relations. To the contrary, Congress decided to bring federal courts into the arena by granting them concurrent jurisdiction over Hague Convention actions. ...This is not surprising because the federal government is the usual venue for decisions bearing on foreign relations”. The full meaning of this passage is unclear, but it cannot mean that federal courts can now, within their equitable powers, decide custody, or decide to enforce foreign judgments. It seems to mean that the court can consider a petitioner’s bad acts and weigh those against returning a settled child, although in this author’s opinion the District Court was correct in its analysis, in part because federal judges lack the expertise to do the full best interests inquiry.

²⁰⁰ Halabi, note 45 above.

²⁰¹ *Ibid.*, p. 186..

²⁰² *Ibid.*, p. 187.

²⁰³ *Ibid.*, p. 188.

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*, p. 189.

²⁰⁶ *Ibid.*, p. 190.

the cases.²⁰⁷ As Halabi concluded, “[P]laintiffs have no greater difficulty vindicating treaty rights in state courts than in federal courts”.²⁰⁸

Federal judges are commonly thought to have a special type of expertise: they are experts in the interpretation of treaties.²⁰⁹ Sometimes the adjudication of a Hague Abduction Convention petition does require resolution of a unique treaty interpretation question, such as whether a *ne exeat* clause creates rights of custody or whether equitable tolling can preclude the application of the Article 12 defense.²¹⁰ Yet the split among the federal circuits in all three Hague Convention cases reaching the United States Supreme Court suggests that the federal judges themselves are not experts in treaty interpretation.²¹¹

The assumption of superior abilities of federal judges in this regard, moreover, is not grounded in empirical work, but rests more on a world view influenced by categorical federalism.²¹² State court judges, after all, also interpret treaties other than the Hague Abduction Convention. These include, for example, the Vienna Convention on Consular Relations, the Warsaw Convention, and various extradition treaties.²¹³ Parties’ reliance on

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ The United States Constitution allocates to the Supreme Court, and those inferior courts that Congress establishes, the power to interpret treaties. U.S. CONST. art. 3 § 2. Cf. M. P. Van Alstine, “The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection,” *Georgetown L. Journal*, XCIII (2000), p. 1896 (noting that “the express inclusion of treaties within the judicial power of Article III means that final authority over their interpretation also falls within the formal province of the federal courts” and not the political branches).

²¹⁰ See *Abbott v. Abbott*, 560 U.S. 1 (2010); *Lozano v. Alvarez*, 134 S. Ct. 1224 (2014).

²¹¹ See notes 299-301 below.

²¹² J. Resnik, “Categorical Federalism: Jurisdiction, Gender, and the Globe”, *Yale Law Journal*, CXI (2001), p. 620.

²¹³ See *State v. Peng*, 940 P.2d 1293 (Wash. 1997) (interpreting extradition treaty between U.S. and Brazil). See also M. A. Rogoff, “Interpretation of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme Court”, *American University Journal of International Law and Policy*, XI (1996), p. 665 (“A survey of treaty interpretation cases in state courts from 1985 to the present indicates that these cases involve treaties for cooperation in civil matters (approximately 40%), the Warsaw Convention (about 25%), treaties for cooperation in criminal matters (about 15%), and treaties involving other routine matters, such as diplomatic and consular relations and FCN treaties (about 20%). For a sampling of recent state court cases involving the interpretation of international agreements, see *David B. v. Helen O.*, 625 N.Y.S.2d 436 (N.Y. Fam. Ct. 1995) (Hague Convention on the Civil Aspects of International Child Abduction); *State v. Doering-Sachs*, 652 So.2d 420 (Fla. Dist. Ct. App. 1995) (Vienna Convention on Consular Relations); *Cortes v. Delta Air Lines, Inc.*, 638 So.2d 108 (Fla. Dist. Ct. App. 1994) (Warsaw Convention); *Compania Panamena de Aviacion, S.A. v. Gerstein*, 645 So.2d 55 (Fla. Dist. Ct. App. 1994) (Warsaw Convention); *In re Estate of Wright*, 637 A.2d 106 (Me. 1994) (United States-Switzerland Convention of Friendship, Reciprocal Establishments, Commerce and for the Surrender of Fugitive Criminals of Nov. 25, 1850); *Loos v. Manuel*, 651 A.2d 1077 (N.J. Super. Ct. Ch. Div. 1994) (Hague Child Abduction Convention); *Sneed v. State*, 872 S.W.2d 930 (Tenn. Crim. App. 1993) (U.S.-Mexico Extradition Treaty); *People v. Bustamante-Payan*, 856 P.2d 42 (Colo. Ct. App. 1993) (United States-Mexico Extradition Treaty); *In re Union Bank of Switzerland*, 601 N.Y.S.2d 253 (N.Y. Sup. Ct. 1993) (United States-Switzerland Convention on Mutual Assistance in Criminal Matters of May 25, 1973); *Lear v. New York Helicopter Corp.*, 597 N.Y.S.2d 411 (N.Y. App. Div. 1993) (Warsaw Convention); *In re Cohen*, 602 N.Y.S.2d 994 (N.Y. Sup. Ct. 1993) (Hague Child Abduction Convention); *Downes v. Ryobi Am. Corp.*, 1993 WL 78611 (Conn. Super. Ct. 1993) (No. 311959) (Hague Service Convention); *Roszkowski v. Roszkowski*, 644 A.2d 1150 (N.J. Super. Ct. Ch. Div. 1993) (Hague Child Abduction Convention); *Reuters, Ltd. v. Tax Appeals Tribunal*, 623 N.E.2d 1145 (1993) (United States-U.K. Convention for the Avoidance of Double Taxation of Dec. 31, 1975); *Viragh v. Foldes*, 612 N.E.2d 241 (Mass. 1993) (Hague Child Abduction Convention); *Tahan v. Duquette*, 613 A.2d 486 (N.J. Super. Ct. App. Div. 1992) (Hague Child Abduction Convention); *The Limited Stores, Inc. v. Pan Am. World Airways, Inc.*, 600 N.E.2d 1027 (Ohio 1992) (Warsaw Convention); *Stovall v. Northeast Airlines, Inc.*, 595 N.E.2d 330 (Mass. App. Ct. 1992) (Warsaw Convention); *Gapanovich v. Komori Corp.*, 605 A.2d 1120 (N.J. Super. Ct. App. Div. 1992) (Hague Service Convention); *Honda Motor Co. Ltd. v. Superior Court*, 12 Cal. Rptr.2d 861 (Cal. Ct. App. 6th Dist. 1992) (Hague Service Convention); *Knight v. Ford Motor Co.*, 615 A.2d 297 (N.J. Super. Ct. 1992) (Hague Evidence Convention); *In re Stephanie M.*, 14 Cal. Rptr.2d 104 (Cal. Ct. App. 1992) (Vienna Convention on Consular Relations and the United States-Mexico Consular Convention

international human rights treaties, particularly in the criminal context when clients are confronted with the death penalty or life without parole, has become more common.²¹⁴ In addition, state court judges “use[] international human rights treaties in the informative but non-binding way” to inform their decisions on controversial issues.²¹⁵ State court engagement with international treaties, especially human rights treaties, is predicted to increase.²¹⁶

Moreover, it is unlikely that treaty interpretation takes any unique skills separate and apart from the skills that most state judges possess. As one state court stated, “Treaty interpretation is similar to contract interpretation.”²¹⁷ At the time of ICARA adoption, the ABA recognized that both federal and state courts were qualified to adjudicate these matters.²¹⁸

Overall, neither federal nor state courts appear to have unique competencies that would benefit, or threaten, the adjudication of a Hague Convention claim.

Composition of the Benches. Arguably, the racial and gender composition of the benches might suggest that jurisdiction more appropriately rests with one or the other benches. For example, the United States Government might prefer a bench that has a representative number of non-white male and female judges because such a bench has “enormous symbolic – and no doubt political – import.”²¹⁹ A diverse bench increases the legitimacy of the decision making process. In addition, petitioners or respondents might also prefer adjudicators with particular characteristics. If we assume petitioners consider the potential local bias of state courts, then petitioners (and respondents) might also consider the potential impact of a judge’s background on the adjudication. Expertise, broadly defined, would include the perspective that a judge might have by virtue of being a member of a racial or gender group.²²⁰

As a general matter, the federal and state benches do not look that different on measures of gender and racial diversity. In 2004 Graham reported that the federal bench is more racially diverse than the state benches,²²¹ noting that the overall percentage of diversity (defined as judges who were African American, Asian/Pacific Islander, Latina/o,

of Aug. 12, 1942); *De Torres v. Arocena*, 587 N.Y.S.2d 495 (N.Y. Sup. Ct. 1992) (Inter-American Convention on Letters Rogatory of 1975); *Van Der Ploeg Schroen v. Daison*, 608 So. 2d 1080 (La. Ct. App. 1992) (Hague Service Convention); *In re Marriage of Ieronimakis*, 831 P.2d 172 (Wash. Ct. App. 1992) (Hague Child Abduction Convention).”).

²¹⁴ J. Kalb, “Human Rights Treaties in State Courts: The International Prospects of State Constitutionalism after *Medellin*”, *Penn State Law Review*, CXV (2011), pp. 1066-1067 (noting this “may help to build awareness of and engagement with these instruments among both jurists and litigants, even if the claims are unsuccessful”).

²¹⁵ *Ibid.*, p. 1059.

²¹⁶ *Ibid.*, p. 1070 (“Increasingly, there are educational opportunities for state court judges to learn to handle international claims. For example, international materials are becoming more accessible in legal education. More law clerks (and future judges) will be exposed in law school to basic international law principles and will have the opportunity to apply these principles in a human rights clinic”).

²¹⁷ *Pocatello v. State*, 180 P.3d 1048, 1056 (Idaho 2008) (citing *Bonanno v. United States*, 12 Cl. Ct. 769, 771 (1987)).

²¹⁸ Feb. 23 Senate hearing, note 56, p. 89.

²¹⁹ M. S. Hurwitz and D. N. Lanier, “Diversity in State and Federal Appellate Courts: Change and Continuity Across 20 Years”, *Justice System Journal*, XXIX (2008), p. 48.

²²⁰ There seems to be “conflicting evidence as to whether characteristics such as race and gender systematically affect a judge’s decision making.” *Ibid.*, p. 49 (citing studies).

²²¹ B. L. Graham, “Toward an Understanding of Judicial Diversity in American Courts”, *Michigan Journal of Race and Law*, X (2004), p. 153 (using 2001 data).

or American Indian) for federal judges sitting on an Article III district court was 19.8%,²²² whereas at the state level, courts of general jurisdiction had benches with an average of 9.8% diversity. Yet federal magistrates (to whom some Hague cases are tried) have a diversity rate of only 7.9%.²²³ In addition, although the federal bench looks better than state benches in the aggregate, there are tremendous differences by state regarding diversity. For example, while some states did not have a single African American judge on a court of general jurisdiction,²²⁴ and others showed a striking disproportion between the number of African American judges and the African American voting age population, other states looked better than the federal average. Alabama, for example, had an African American voting age population of 23.8%, but only six African American judges (4.2%) on courts of general jurisdiction.²²⁵ Yet Maryland exceeded the federal average in terms of the percentage of African Americans on the state bench.²²⁶

The gender of federal judges is overwhelmingly male, but that reality is not considerably worse than the gender composition of state benches. As of 2014, women comprised approximately 24% of sitting federal judges and 32% of active judges.²²⁷ Sitting judges include all judges that are capable of hearing cases, including active judges (with full dockets) and judges who have senior status. At the state level, women make up approximately 26% of the state court judges, with no distinction made by the researchers between sitting and active judges.²²⁸

The appellate benches are not that different from each other either, at least when one looks at the big picture. The federal appellate bench is only slightly more diverse overall than state appellate benches. One study examined the racial and gender composition of 1,310 judges on state courts of last resort and intermediate courts of appeals, as well as 167 judges on federal courts of appeals in 2005.²²⁹ It found that the state appellate courts had a combined total of approximately 34% female and minority judges,²³⁰ compared to 36% female and minority judges on the federal appellate courts.²³¹ However, large regional differences exist. For example, at the state level, the Midwest had a lower percentage of female and minority judges (34%) than did the West (37%).²³² The differences were even greater on the federal bench. For example, female and minority judges comprised 18% of the Eighth Circuit and 47% of the Fifth Circuit.²³³

These numbers do not suggest that it is always better to adjudicate a Hague Abduction Convention case in federal court if one's criterion is a diverse bench. Rather, these numbers

²²² *Ibid.*, p. 181, tbl.1.

²²³ *Ibid.*

²²⁴ *Ibid.*, pp. 185-86 tbl.3.

²²⁵ *Ibid.*

²²⁶ *Ibid.*, p. 185, tbl. 3 (showing 20.5% African American judges on Maryland courts of general jurisdiction compared to 13.2% on federal district courts).

²²⁷ "Biographical Directory of Judges", *Federal Judicial Center*, www.uscourts.gov/JudgesAndJudgeships/BiographicalDirectoryOfJudges.aspx (last visited 13 April 2014); "Frequently Asked Questions", *Federal Judicial Center*, <http://www.uscourts.gov/Common/FAQs.aspx> (last visited 18 April 2014).

²²⁸ "2010 United States State Court Women Judges", *National Association of Women Judges* (2 May 2010), http://www.nawj.org/us_state_court_statistics_2010.asp.

²²⁹ Hurwitz and Lanier, note 219 above, pp. 49-50.

²³⁰ *Ibid.*, p. 52, tbl.2. There were a higher percentage of females and minorities on courts of last resort (36.41%) compared to intermediate appellate courts (33.58%). *Id.* at 58, tbl.3.

²³¹ *Ibid.*, p. 61, tbl.6.

²³² *Ibid.*, p. 60, tbl.5.

²³³ *Ibid.*, p. 61, tbl.6, 63.

suggest that one must delve into the data on the particular state because variations exist among states, and sometimes the variations are large. Given these facts, concurrent jurisdiction has the advantage of affording litigants some choice given the reality in their area.

Independence. Other factors may influence the decision maker's perspective, including the way the judge obtained his or her position. Broadly conceived, independence is a type of expertise. At the federal level, judges are nominated by the President, confirmed by the Senate, and have life tenure. State judges come onto the bench in various ways, but many states have a system whereby judges stand for an initial or a retention election.²³⁴ Child abduction is a politically charged issue, and a judge who appears soft on child abduction may face political repercussions. This fact suggests that federal courts may be better for respondents,²³⁵ but the variation in judicial selection among states, and the fact that federal magistrate judges have only time-limited contractual positions,²³⁶ complicate the issue. These subtleties suggest that choice for litigants is advantageous.

Intellectual Ability on the Bench. It is a commonly held belief that there is a difference in competence as measured by the personal capabilities of the judges between the federal and state courts. Federal judges are generally perceived to be more intelligent than their state peers.²³⁷ In an article entitled "On Judging the Judges", Fred W. Friendly repeated what he had heard from a New York judge "with close ties to juvenile justice": "Family Courts are usually staffed by the least competent judges".²³⁸ In contrast, federal judges are thought to be the intellectual heavyweights. Those who subscribe to the "talent gap" theory point to institutional factors that lend this view plausibility. Federal judgeships are better paid, more prestigious, and better staffed, thereby drawing a better pool of applicants.²³⁹ Studies show that attorneys believe there is a talent gap, and they take this into account when selecting a forum.²⁴⁰

Even if federal judges are generally intellectually superior to state judges, two important caveats are necessary. First, not all federal judges are more intelligent than all state judges. Just as males are generally taller than females, not all men are taller than all women. Second, it is difficult to demonstrate that any alleged difference in quality has significance. It only matters if the state judges are below some norm for competent judging of Hague Abduction Convention cases. There is no evidence that Hague Abduction Convention cases are beyond the ability of state court judges.

²³⁴ American Bar Association, *Factsheet on Judicial Selection Methods in the States*, http://www.americanbar.org/content/dam/aba/migrated/leadership.fact_sheet.authcheckdam.pdf (last visited 7 May 2014) ("39 states hold elections – whether partisan, nonpartisan, or uncontested retention elections – for trial courts of general jurisdiction, 31 for intermediate appellate courts, and 38 for state high courts").

²³⁵ N. Devins and N. Mansker, "Public Opinion and State Supreme Courts", *University of Pennsylvania Journal of Constitutional Law*, XIII (2010), p. 456 (noting that state supreme court justices "who run in contested elections, like other politicians, personally value their reputation with the mass public much more than justices who sit on politically insulated courts").

²³⁶ 28 U.S.C. § 631 (judges of the district court appoint magistrate judges and a full-time magistrate judge has a term of eight years)

²³⁷ Miller, note 51 above, p. 433 (reporting on findings from survey of attorneys in removal cases).

²³⁸ Fred W. Friendly, *On Judging the Judges*, in *State Courts: A Blueprint for the Future* (1978), pp. 70, 71.

²³⁹ Seinfeld, note 558 above, p. 119.

²⁴⁰ *Ibid.*, p. 148.

In conclusion, there is little reason to believe that consolidating jurisdiction in federal courts would produce more “expertise”. The number of cases per judge is too low to achieve this goal, and there is no empirical evidence that federal judges are more faithful to the federal claim than state judges. Even though some differences may exist in judges’ racial or gender diversity, or insulation from political pressure, or even intelligence, these factors differ enough from place to place to justify giving litigants a choice of forum.

Speed and Efficiency Function

Speed is important in Hague Abduction Convention cases. The remedy of return is meant to happen quickly in order to minimize the harm to the child from the abduction. Article 11 directs judicial authorities to “act expeditiously in proceedings for the return of children” and sets a six week goal for resolution of the petition.²⁴¹ The Hague Abduction Convention calls upon countries to use “the most expeditious procedures available” to secure the return of a child to his or her habitual residence.²⁴² Many believe that consolidating jurisdiction expedites the processing of cases.²⁴³ The Permanent Bureau *Guide to Good Practice on Implementation* advises: “A limited jurisdiction for Convention cases has been found in many Contracting States to assist with the expeditious resolution of Convention proceedings”.²⁴⁴

Speed was a consideration at the time concurrent jurisdiction was adopted. When ICARA was being debated, proponents of concurrent jurisdiction pointed to the speed at which federal courts operate compared to state courts.²⁴⁵ Others disputed that federal courts were faster and claimed “state courts will often provide the best forum for these cases because their backlogs are often substantially less than those of the federal courts in many parts of the country”.²⁴⁶ The ABA representative, Pat Hoff, addressed this division of opinion by noting, pragmatically, that in some places federal courts will be faster than state courts, and in other places the opposite might be true. She argued that concurrent jurisdiction allowed litigants to choose the fastest forum in their area.²⁴⁷

Hoff’s observation applies today. Although state courts are reputed to have more crowded dockets than federal courts,²⁴⁸ the realities vary by court,²⁴⁹ and both federal and state courts have seen their workloads increase.²⁵⁰ It is difficult to compare the speed

²⁴¹ Article 11, Hague Abduction Convention.

²⁴² Article 2, *ibid.*

²⁴³ Hague Conference on Private International Law, note 160 above, §6.3 (2003) (“Most Expeditious Proceedings ... In some States, provision is made for all Convention cases to go specifically to designated courts in order to ensure that cases are heard by judges who have sufficient knowledge of the Convention’s provisions and to expedite proceedings”).

²⁴⁴ *Ibid.*, §5.

²⁴⁵ Feb. 23, 1988 Senate hearing, note 53 above, p. 114 (statement of Mr. Schwartz).

²⁴⁶ International Child Abduction Remedies Act, 134 CONG. REC. H2481-02 (1988) (statement of Rep. Rodino).

²⁴⁷ Feb. 3, 1988 House hearing, note 53 above, p. 79.

²⁴⁸ James P. George, “Jurisdictional Implications in the Reduced Funding of Lower Federal Courts”, *Review of Litigation*, XXV (2006), p. 74 (noting state courts “are historically more crowded than federal courts”).

²⁴⁹ For example, in federal district court, the median time from filing was 8.5 months in 2014, up from 7.8 months in 2012, with some districts having much longer median times. The Eastern District of Arkansas had a median time of 54.1 months for disposition of a case because of multidistrict litigation. This was up from 45.3 months in 2012. See “U.S. District Court Statistics”, USCourts.gov, <http://www.uscourts.gov/Statistics/JudicialBusiness/2013/us-district-courts.aspx> (last visited Apr. 8, 2014).

²⁵⁰ The number of civil filings in federal district court has increased 3% since 2009. *Ibid.* In addition, in 2003,

of adjudication in federal and state courts because different timeframes are measured. Nonetheless, using some available data, it appears that the federal district courts may take longer than state courts to adjudicate a Hague Abduction Convention case based solely on the time it takes to process cases generally. On average, the processing of a case heard before a judge in state court in 2005 was 21 months (for tort, contract and real property cases).²⁵¹ In federal court in 2012-13, the median time interval from filing through trial in civil cases (with no differentiation between cases tried to the bench or a jury) was 24.1 months.²⁵²

As suggested above, one sees tremendous variation in processing times when one focuses on particular locations. Although the median time from filing through trial in United States district court was 24.1 months, the District of West Virginia had a median time of 11.5 months and the District of Nevada had a median time of 40.9 months.²⁵³ Similarly, while the United States Courts of Appeals have a median time of 11.2 months from filing of the notice of appeal to the last opinion or final order in civil cases decided on their merits, there was a range of 6.3 months in the Fourth Circuit to 19.5 months in the Ninth Circuit.²⁵⁴ State courts are similar,²⁵⁵ and there can be considerable variations even within a state, by county or district.²⁵⁶

Unfortunately, no existing data reveals whether the federal or state courts resolve Hague Abduction Convention cases more quickly. Lowe has shown that Hague Abduction Convention cases in United States courts take a long time, and more expedition is needed,²⁵⁷ but his data did not include information about the relative speed in state and federal courts. Consequently, we do not know which courts take more time, and whether there are great differences by location. Anecdotal evidence suggests that federal courts are faster in resolving these cases,²⁵⁸ but those conclusions are challenged by particular examples.

it appears, "by any measure, the district courts' workload is growing faster than their raw caseload, which itself has skyrocketed ...". McFadden, note 51 above, p. 128. In state courts one study found that pending cases had increased for a 25 out of 44 courts examined because outgoing cases were resolved at a slower rate than incoming cases arrive, even though the percentage of incoming cases had generally fallen). See "Examining the Work of State Courts: An Analysis of 2010 State Court Caseloads", CourtStatistics.org, <http://www.courtstatistics.org/Civil/20123Civil.aspx>.

²⁵¹ Lynn Langton and Thomas H. Cohen, *Bureau of Justice Statistics, Civil Bench and Jury Trials in State Courts* (2008), p. 8. Seventy-three (73%) of bench trials were completed within two years of filing.

²⁵² "U.S. Courts, U.S. District Courts – (Median Time Intervals from Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition During the 12-Month Period Ending September 30, 2013)" (2013), p.1, available at www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/C05Sep13.pdf.

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*, p. 2.

²⁵⁵ See Michael Heise, "Justice Delayed? An Empirical Analysis of Civil Case Disposition Time", *Case Western Reserve Law Review*, L (2000), p. 837, tbl. 5.

²⁵⁶ *Minnesota Judicial Branch, Performance Measures, Key Results and Measures, Annual Report* (2013), p. 24 (noting "Use of overall statewide averages masks the large variation in Time to Disposition by District, by County and by case type").

²⁵⁷ According to Lowe's study, judicial returns took 202 days in the United States, compared to 166 days globally. A judicial refusal took 421 days to conclude, in comparison to 286 days worldwide. Lowe, note 41 above, p. 206. For appeals, the United States also took longer than the global average. Cases appealed took 209 days in the United States to reach a decision at first instance, and 441 days to finalize the case after appeal. This compares to 168 days and 324 days globally for the time to decision at first instance and the time until the case is finalized after appeal. *Ibid.*, p. 207.

²⁵⁸ Morley, note 49 above, p. 24 ("Another [reason cases are brought in federal court] is that swift action might be more likely in a federal court, whose dockets are shorter and whose enforcement procedures are clear and

For example, *Abbott v. Abbott*, which reached the United States Supreme Court, took approximately fourteen months from filing to decision at first instance, and four years overall (until the Supreme Court issued its decision).²⁵⁹ In contrast, a Texas trial court decided the case of *Livanos v. Livanos* within three days from filing and denied a motion for a new trial within approximately ten weeks of the initial filing.²⁶⁰

Moreover, we know that a large part of the delay in the United States is attributable to the United States Central Authority, for it holds applications longer than is typical in the world at large. According to Lowe, “In the USA it took an average of 207 days before the application was sent to court and then a further 106 days for the court to conclude it. This can be compared with the global averages of 76 days to send the application to court and a further 153 days before a final decision”.²⁶¹ Vesting the federal courts with exclusive jurisdiction, therefore, might not accelerate proceedings much, absent other measures aimed at the Central Authority, even assuming federal courts are, in fact, faster.

Despite the absence of data on the relative speed of state and federal courts, the consolidation of jurisdiction in the federal courts might help with speed if procedural reform were also contemplated. The Special Commission has encouraged timetables at the trial and appellate level to ensure expeditious treatment of cases.²⁶² No uniform timetables or other procedures apply to trial or appellate court proceedings in the United States involving the Hague Abduction Convention. The Department of State noted: “[T]rial timetables are governed by applicable federal, state and local rules, and thus vary from case to case and, for state courts, from state to state.”²⁶³ The same is true of appellate procedure, although some federal appellate courts may have adopted expedited procedures already.²⁶⁴ Judge Garbolino reported: “Expedited procedures for briefing and handling of [return-order] appeals have become common in most circuits”.²⁶⁵

As a practical matter, procedural reform at both the trial and appellate level would be facilitated if the federal courts had exclusive jurisdiction in Hague Abduction Convention cases. Reforming state procedure is more complicated than reforming federal procedure because each of the fifty states would have to adopt the reform for their courts. In contrast, federal procedure could be changed by the Judicial Conference.²⁶⁶ The Federal Rules

forceful”).

²⁵⁹ *Abbott v. Abbott*, 560 U.S. 1, 7 (2010). See also *Silverman v. Silverman*, 338 F.3d 886, 891-92 (8th Cir. 2003) (describing a nineteen month period of time between filing and ruling at first instance, and another fifteen months until the appellate court ruled).

²⁶⁰ *Livanos v. Livanos*, 333 S.W.3d 868, 871-73 (2010); *R.S. v. D.O.*, 2012 NY Slip Op. 50479(U) (N.Y. Sup. Ct. March 14, 2012) (taking less than three months).

²⁶¹ Lowe, note 41 above, p. 207.

²⁶² See Hague Conference on Private International Law, note 1 above, ¶ 4.2.

²⁶³ Hague Conference on Private International Law, note 5 above, § 4.2, p. 16.

²⁶⁴ Compare 1st Cir. R. VII.B. (effective through Dec. 1, 2013) (noting “motion should be made shortly after the case is docketed in the Court of Appeal”) with 9th Cir. R. 34-3 (noting that party “shall file a motion for expedition with the clerk at the earliest opportunity”).

²⁶⁵ See James D. Garbolino, *The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges* (2012), p. 116, n. 435.

²⁶⁶ Pursuant to the Rules Enabling Act of 1934 (28 U.S.C. §§ 2071-2077 (2012)), Congress delegated to the United States Supreme Court the ability to enact rules of procedure. The Supreme Court delegated that responsibility to the Judicial Conference and its committees. Congress gave its imprimatur to this system through a 1988 amendment to the Rules Enabling Act. Rules Enabling Act of 1934, 28 U.S.C. § 2072 (2012) (amended by Judicial Improvements and Access to Justice Act of Nov. 19, 1988, Pub. L. No. 100-702, § 401(a), 102 Stat. 4648, 4649 (1988)). See also “How the Rulemaking Process Works”, *U.S. Courts*, www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking/how-rulemaking-process-works.asp.

of Civil and Appellate Procedure govern federal court proceedings, and the Judicial Conference could amend these with an instant effect on all federal courts.²⁶⁷ The Judicial Conference Advisory Committee on Appellate Rules considered potential rule changes to expedite Hague appeals and decided instead to rely on judicial education.²⁶⁸

Alternatively, Congress could legislate procedural reform by amending ICARA. In fact, Justice Ginsburg made this suggestion when discussing a way to expedite proceedings in her concurrence in *Chafin v. Chafin*.²⁶⁹ Joined by Justice Scalia and Justice Breyer, she proposed that Congress consider fixing the delays in appellate processes by requiring leave to appeal, instead of making appeal available as a matter of right.²⁷⁰ Silberman and Spector disagreed with the specifics of Justice Ginsburg's suggestion, that is, to have a trial court give the applicant leave in order to appeal,²⁷¹ but they suggested that the trial court should be able to issue a "brief automatic stay of a return order, ... pending an expedited hearing for a stay in the appellate court".²⁷² If the appellate court agreed that the stay is appropriate, an expedited appeal would follow. Silberman and Spector did not discuss how such change would occur and which level of court would be bound,²⁷³ but as discussed next, an Act of Congress that imposed such a procedure on state courts might raise constitutional concerns and be politically unpopular.²⁷⁴

As a general matter, Congress can mandate state court procedure when a federal claim is at issue. "[T]he Supremacy Clause imposes on state courts a constitutional duty 'to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected'".²⁷⁵ One commentator stated, "state courts ... must enforce federal procedural rules that are part and parcel of an adjudicated federal claim".²⁷⁶ Although preemption is not found easily, federal law will displace state law if state law

²⁶⁷ The Judicial Conference itself could not change state court procedure. Neither the 1934 Rules Enabling Act nor the 1988 Amendment gave the Supreme Court, or the Judicial Conference, express authority to change state court procedure. See 28 U.S.C. § 2071-77 (2012).

²⁶⁸ Letter from Jeffrey S. Sutton to Justice Ruth Bader Ginsburg, 20 September 2013, in Advisory Committee on Appellate Rules, Apr. 28-29, 2014, at 539 (The advisory committees concluded that judicial education efforts should supplement the Court's urging in *Chafin* that Convention cases be treated as expeditiously as possible and that such efforts should be prioritized as the first level of response to the concerns highlighted in *Chafin*"), at www.uscourts.gov/RulesAndPolicies/rules/archives/agenda-books/committee-rules-appellate-procedure.aspx

²⁶⁹ See *Chafin v. Chafin*, 133 S. Ct. 1017, 1029 n.3 (2013) (Ginsburg, J. concurring) (*Chafin* "highlights the need for both speed and certainty in Convention decision making.").

²⁷⁰ See *ibid.*, p. 1030.

²⁷¹ Silberman and Spector, note 161 above, p. 190.

²⁷² *Ibid.*, p. 191.

²⁷³ *Ibid.* The authors mention that this might be accomplished by legislation or rules of court.

²⁷⁴ The Supreme Court has already decided that Congress cannot force state legislatures or state executives to implement federal law, so, as the author asked, "what authority does it have to 'commandeer' state judiciaries?" A. J. Bellia Jr., "Federal Regulation of State Court Procedures", *Yale Law Journal*, CX (2001), p. 950.

²⁷⁵ *Felder v. Casey*, 487 U.S. 131, 151 (1988) (striking a Wisconsin notice-of-claim statute that the state court applied to a federal civil rights claim because it "interferes with and frustrates the substantive right Congress created").

²⁷⁶ Bellia Jr., note 274 above, p. 951. See also M. H. Redish and S. G. Sklaver, "Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism", *Indiana Law Review*, XXXII (1998), pp. 100-107 (discussing the converse-Erie doctrine in the context of Congressional settlement of tobacco litigation); N. Mitchell, "Preserving the Privilege: Codification of Selective Waiver and the Limits of Federal Power Over State Courts", *Boston University Law Review*, LXXXVI (2006), pp. 727-740 (discussing the federal government's ability to regulate the scope of state attorney-client privilege law).

“stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”.²⁷⁷

However, Bellia Jr. has explained that there are limits to what state courts can be required to do.²⁷⁸ The federal government’s power to compel states on matters of procedure, even if to enforce federal rights, is not unlimited.²⁷⁹ Although “federal law may preempt state procedures”, it is generally necessary for state procedures to conflict “with a federal procedure that is part and parcel of a federal claim, or state procedures ... unnecessarily burden a federal [substantive] right”.²⁸⁰ It is debatable whether certain procedural reforms would fall into these categories. For example, appellate procedures do not bar anyone from obtaining relief, as a statute of limitations might, and so are less likely to be part of the claim or even to burden the right.

Even if the Constitution would not impede Congressional action, prudential considerations may prevent the federal government from dictating state court procedure. Congressional action might raise the hackles of states’ rights proponents. Typically, “[i]n adjudicating federal-law claims, state courts apply federal law on clearly substantive questions, and generally state courts apply state law on clearly procedural questions”.²⁸¹ Congress has previously run into political difficulty changing state court procedures. For example, when Congress tried to regulate state court procedure in the context of civil claims related to Y2K, it ran into considerable objections.²⁸²

If federal courts alone had jurisdiction to adjudicate Hague Abduction Convention cases, changes to court procedure would avoid the constitutional and prudential obstacles mentioned above. However, concurrent jurisdiction need not necessarily preclude change, and in fact, change might occur quite organically. That is, federal courts themselves can reform their own procedure and state courts might voluntarily apply those changes to the cases they adjudicate. The reverse-Erie doctrine could be used for this purpose, as it tells courts to treat procedure as a choice of law question. It encourages state courts to apply the federal procedural rule if the federal interests outweigh the state interests. This would be likely if the federal procedural rule had a potential substantive effect. Nothing prevents a state court from defining broadly the federal interests in a reverse-Erie context as both deterring abduction and redressing abduction swiftly. While procedural uniformity could not be assured, one commentator noted, “Most reverse-Erie cases come out in favor of

²⁷⁷ A. Van Wieren, “The Silent Sovereign: Tipping the Scales in Reverse-Erie Applications of Indian Law”, *Oregon Law Review*, XCI (2012), p. 305 (citations omitted).

²⁷⁸ *Ibid.*, pp. 984-985. See also *Jinks v. Richland Cnty.*, 538 U.S. 456, 461-2 (2002) (“[W]e need not (and do not) hold that Congress has unlimited power to regulate practice and procedure in state courts ...”) (upholding the constitutionality under the Necessary and Proper Clause of 28 U.S.C. § 1367(d), which requires tolling of state statutes of limitations for state claims while the action is pending in federal court).

²⁷⁹ He gives three reasons: 1) “the conflicts language invoked by the Founders” “protects” “state sovereignty over ‘procedure’”. Bellia, note 274, p. 977. 2) The Supreme Court has “implied that states retain exclusive control over the jurisdiction and procedures of their own courts”. *Ibid.*, p. 980. 3) The Supreme Court sees “state court procedures as a matter of sovereignty” in “other legal contexts”. *Ibid.*, p. 977.

²⁸⁰ *Ibid.*, pp. 983, 986.

²⁸¹ K. M. Clermont, “Reverse-Erie”, *Notre Dame Law Review*, LXXXII (2006), pp. 29-30.

²⁸² See Bellia Jr., note 274 above, pp. 953-954 (explaining that the Act’s procedural requirements, including a prelitigation notice requirement and heightened pleading requirements, and rules for class actions caused senators and the Department of Justice to “question[] its constitutionality,” and led the Department of Justice to say “that there was ‘a serious risk that courts would view [the Y2K Act’s] procedural instructions to State courts as constitutionally impermissible intrusions on State governmental autonomy”). The Y2K Act eventually passed and is found at 15 U.S.C. §§ 6601-6617.

federal law”.²⁸³ The reverse-Erie doctrine provides promise for effecting change across the two systems, although admittedly the unsettled nature of the doctrine might foster litigation in the near term.²⁸⁴

Although consolidating jurisdiction in the federal courts would make procedural reform easier, that benefit might be offset by the negative effect of increased gamesmanship by some petitioners intent on getting two bites at the apple. Some litigants initiate custody proceedings in the state courts, and then use the federal courts to “re-litigate unfavorable state court orders”.²⁸⁵ Federal courts have been reluctant to hold that the unsuccessful state litigant is precluded by abstention-like doctrine (embodying *res judicata*) from litigating the Hague Abduction Convention claim in federal court.²⁸⁶ The relevant doctrine takes different forms,²⁸⁷ but generally allows federal courts to refrain from hearing an action when the same or a similar proceeding has been brought in state court. Federal appellate courts reject the applicability of abstention in Hague Abduction Convention cases so long as the Hague claim was not raised in state court,²⁸⁸ often citing the “countervailing and compelling federal policies” and the “express” grant of jurisdiction to federal courts in ICARA.²⁸⁹ The Supreme Court has not addressed the issue.

The ability to invoke abstention to foreclose this type of gamesmanship would be made virtually impossible if the federal court had exclusive jurisdiction. A petitioner can bring a custody action and the Hague Convention matter simultaneously in state court because the state court has concurrent jurisdiction, but this would be impossible if the federal courts had exclusive jurisdiction over the Hague Abduction Convention matter. Then a petitioner would have an unassailable claim that the custody litigation should not preclude the federal court from adjudicating the Hague Abduction Convention matter. Additional legislative reform might become necessary to address the problem.²⁹⁰

In sum, there is no evidence that there is anything to be gained in terms of speed if Congress made federal jurisdiction exclusive. Rather, maintaining choice for parties

²⁸³ Van Wieren, note 277 above, p. 310.

²⁸⁴ Redish and Sklaver, note 276 above (discussing three potential approaches).

²⁸⁵ Halabi, note 45, p. 161.

²⁸⁶ *Holder v. Holder*, 305 F.3d 854 (9th Cir. 2002) (refusing to apply *res judicata*, issue preclusion, or *Colorado River* case to preclude adjudication of Hague claim in federal court after petitioner had already filed custody case in state court, but did not raise Hague claim there); Halabi, note 45 above, p. 174 (“federal courts have been overwhelmingly hostile to abstention decisions”).

²⁸⁷ See *Younger v. Harris*, 401 U.S. 37, 54 (1971) (holding that a federal court cannot use its equity power to enjoin a state criminal action if the proceeding allows a party an adequate opportunity to adjudicate the federal constitutional concern); *Moore v. Sims*, 442 U. 415 (1979) (extending *Younger* abstention to the civil proceeding context); *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817-820 (1976) (permitting an abstention-like response when, inter alia, the principles of wise judicial administration (including avoidance of duplicative litigation), inconvenience of federal forum, the desirability of avoiding piecemeal litigation, the order in which jurisdiction was obtained, outweigh the obligation to exercise the jurisdiction that was conferred by Congress); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 486-87 (1983) (otherwise known as the *Rooker-Feldman* doctrine) (precluding lower federal courts from reviewing final decisions of state courts when the decision does not involve a challenge to the constitutionality of the rule, but that even a challenge that focuses on the constitutionality of the rule may be barred by *res judicata*).

²⁸⁸ Halabi, note 45 above, pp. 174-175. See also *Yang v. Tsui*, 416 F.3d 199, 203 (3rd Cir. 2005).

²⁸⁹ See *Holder v. Holder*, 305 F.3d 854, 864-65 (9th Cir. 2002).

²⁹⁰ See Silberman, note 52 above, pp. 58-59 (“Solutions in the different contexts are best framed by formal changes to ICARA rather than by the uncertainties and vagaries of courts’ applications of the various abstention doctrines.”). *Ibid.*, p. 59, n.121 (discussing *Holder* and calling it a “close case,” acknowledging that “it was never envisioned that a party should be able to wait until he has lost a fully litigated custody case and then get a second bite via a Hague return application”).

makes the most sense given the unknowns and the differences between areas. Although procedural reform would be facilitated by exclusive federal jurisdiction, states might follow federal efforts anyway through the reverse-Erie doctrine or through reform of state level court rules. Exclusive federal jurisdiction might increase delay if this were to prompt petitioners to litigate first in state court for custody and then in federal court for return.

Uniformity Function

Judicial interpretations of the Hague Abduction Convention in the United States have not been uniform. Since 2010, three cases have reached the United States Supreme Court because of divergent interpretations of key Hague Convention concepts,²⁹¹ and those cases did not resolve all of the discordance in the interpretation of the Convention by courts in the United States. Silberman and Spector noted: “Uniformity of interpretation of the Abduction Convention has also remained difficult given the numerous courts that hear such cases”.²⁹² Presumably uniformity is a goal because differences in the law can produce more appellate litigation (and delay), a sense of unfairness among litigants, and even forum shopping.

Although the appellate process helps harmonize the interpretation of the Hague Abduction Convention in the United States, concurrent jurisdiction hampers efforts to achieve uniformity. In the United States, decisions by federal appellate courts do not bind state courts even though ICARA is a federal law.²⁹³ Nor are federal trial courts bound to follow state appellate courts on questions of federal law, even when the state appellate court is physically in the vicinity of the federal trial court. It is not until a case reaches the United States Supreme Court that issues are resolved and uniformity imposed between the state and the federal courts.

That is not to say that federal and state courts do not voluntarily try to harmonize their interpretations of the Hague Abduction Convention. Some state courts explicitly defer to federal courts in their state.²⁹⁴ For example, the Supreme Court of Connecticut deferred to the Second Circuit expressly on a question of first impression for the Supreme Court of Connecticut. The Supreme Court of Connecticut held that a trial court must examine “ameliorative measures” that can reduce the “grave risk” before holding the Article 13(b) defense is made out.²⁹⁵

In general, we look to the federal courts for guidance in resolving issues of federal law ... Decisions of the Second Circuit Court of Appeals, although not binding on us, are particularly persuasive ... It would be a bizarre result if this court [required the trial court to make particular findings under article 13b] when in another

²⁹¹ *Abbott v. Abbott*, 130 S. Ct. 1983 (2010) (deciding that a *ne exeat* clause gives its holder “rights of custody”); *Chafin v. Chafin*, 133 S. Ct. 1017 (2012) (deciding that a case is not moot for purposes of an appeal when the child has been returned); *Lozano v. Alvarez*, 134 S. Ct. 1224 (2014).

²⁹² Silberman & Spector, note 161 above, p. 189.

²⁹³ See *Evans v. Thompson*, 518 F.3d 1 (1st Cir. 2008) (“state courts are not bound by the dictates of the lower courts, although they are free to rely on the opinions of such courts when adjudicating federal claims”).

²⁹⁴ *Turner v. Frowein*, 752 A.2d 955, 971 (Conn. 2000). See also *Maurizio R v. L.C.*, 201 Cal. App. 4th 616, 633 (2011) (citing the Ninth Circuit for the proposition that “Exceptions to the Hague Convention must be narrowly interpreted lest they swallow the rule of return”).

²⁹⁵ *Turner v. Frowein*, 752 A.2d at 972.

courthouse, a few blocks away, the federal court, being bound by the Second Circuit rule, required [alternative findings].²⁹⁶

Therefore, although having two levels of courts adjudicating Hague Abduction Convention matters can complicate achieving uniformity, it need not do so. If state courts were attentive to federal decisions, and *vice versa*, disharmony could be minimized.

Nonetheless, if federal courts alone adjudicated Hague Abduction Convention cases, there might be more uniformity in the Hague Convention interpretation. The decisions of federal appellate courts bind the federal trial courts in the circuit where the federal appellate court sits. In addition, there are only twelve circuits for the federal appellate courts. It would be easier for these appellate courts to harmonize their approaches with each other, even without Supreme Court involvement, than when the appellate courts of fifty states and the twelve federal circuits are ruling on an issue. In addition, federal circuit courts probably defer more to each other than state courts defer to other state courts.²⁹⁷

Yet the benefit of more uniformity must not be overstated. Even though uniformity is a valuable objective and an express goal of ICARA,²⁹⁸ the consolidation of jurisdiction in the federal courts would not achieve uniformity. It was the split in the federal circuits that caused the Supreme Court to grant a writ of *certiorari* in *Abbott v. Abbott*,²⁹⁹ *Chafin v. Chafin*,³⁰⁰ and *Lozano v. Alvarez*.³⁰¹ Federal courts differ in their interpretation of other Hague Abduction Convention concepts, such as habitual residence. Some federal circuits define habitual residence by emphasizing the parents' shared intent, following *Mozes v. Mozes*,³⁰² and others use a more fact-based approach focused on the child, following *Robert v. Tesson*.³⁰³ The federal courts themselves have been a major source of the differences in Hague Abduction Convention interpretation.

²⁹⁶ *Ibid.*

²⁹⁷ Seinfeld, note 58 above, p. 119.

²⁹⁸ International Child Abduction Remedies Act, 42 U.S.C. § 11601(b)(3)(B) (2012).

²⁹⁹ *Abbott v. Abbott*, 560 U.S. 1 (2010). The issue of whether a *ne exeat* clause created a right of custody was decided one way by the Courts of Appeals for the Second, Fourth and Ninth Circuits and a different way by the Court of Appeals for the Eleventh Circuit. *See id.* at 7.

³⁰⁰ *Chafin v. Chafin*, 133 S. Ct. 1017 (2013). The issue of whether the return of a child rendered an appeal moot was decided one way by the Court of Appeals for the Eleventh Circuit (*Bekier v. Bekier*, 248 F.3d 1051, 1055 (11th Cir. 2001)) and another way by the Third Circuit (*Whiting v. Krassner*, 391 F.3d 540, 545 (3d Cir. 2004)) and Fourth Circuit (*Fawcett v. McRoberts*, 326 F.3d 491, 495-96 (4th Cir. 2003) and Fifth Circuit (*Larbie v. Larbie*, 690 F.3d 295 (5th Cir. 2012)).

³⁰¹ *Lozano v. Alvarez*, 134 S. Ct. 1224 (2014). The issue of whether equitable tolling applies in the context of the Article 11 well-settled defense was decided one way by the Courts of Appeals for the First and Second Circuits and the other ways by the Ninth and Eleventh Circuits. *Id.*

³⁰² *Mozes v. Mozes*, 239 F.3d 1067, 1081 (9th Cir. 2001).

³⁰³ *Robert v. Tesson*, 507 F.3d 981, 993 (6th Cir. 2007). *See Londono v. Gonzalez*, 2013 WL 6093782 *9 n.1 (D. Mass 2013) ("The circuits are split as to whether this is the proper test for a change in habitual residence. The Second, Fourth, Seventh, Ninth, and Eleventh Circuits have adopted a two-part test, considering first the parents' shared settled intention, and second the extent of the child's acclimatization to the new country of residence. *Gitter v. Gitter*, 396 F.3d 124, 131-32 (2d Cir.2005); *Maxwell v. Maxwell*, 588 F.3d 245, 251 (4th Cir.2009); *Koch v. Koch*, 450 F.3d 703 (7th Cir.2006); *Mozes v. Mozes* 239 F.3d at 1075; *Ruiz v. Tenorio*, 392 F.3d 1247, 1252-54 (11th Cir.2004). The Sixth and Eighth Circuits have concluded that the settled purpose of a child's move must be viewed from the child's perspective. *Robert v. Tesson*, 507 F.3d 981, 988 (6th Cir.2007); *Stern v. Stern*, 639 F.3d 449, 452 (8th Cir.2011). The Third Circuit takes into account intent from both the parents' perspective and the child's. *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir.1995)"). But see *Redmond v. Redmond*, 724 F.3d 729 (7th Cir. 2013) ("Conventional wisdom thus recognizes a split between the circuits that follow *Mozes* and those that use a more child-centric approach, but we think the differences are not as great as they might seem. Although the Third, Sixth, and Eighth Circuits focus on the child's perspective, they consider parental intent, too ... The same

Concentrating jurisdiction in the federal bench will not eliminate these divergent interpretations. Although uniformity was perhaps a viable jurisprudential goal when the federal judiciary had only “thirteen districts and three circuits, staffed by a total of nineteen judges”,³⁰⁴ the federal bench has over six hundred judges. Even the specialized Federal Circuit for patent claims, which sits in different panels, has not created uniformity.³⁰⁵ Moreover, competing interpretations are to be expected. All federal law, including ICARA, contains ambiguities. United States courts also consider foreign court interpretations of the Hague Abduction Convention, increasing the chance for multiple perspectives. Even a genuine desire for uniformity and a willingness to try to achieve it may not outweigh a court’s desire to issue an opinion that describes what it perceives to be the correct interpretation of the law.³⁰⁶

The desire for uniformity does not itself provide a sufficient basis for consolidating jurisdiction in the federal bench, nor would there be any real gain in uniformity if Congress were to eliminate federal court jurisdiction. There is no evidence that there is so much disharmony at the federal and state level that any real harm has been caused. Some would argue that the disharmony is beneficial because issues need to “percolate” in the lower courts before reaching the Supreme Court.³⁰⁷ Congress did not think that uniformity was so important that it justified a specialized court. Overall, the goal of uniformity does not justify change.

Court Services: Interpreters and Pro Bono Counsel

A further reason to concentrate jurisdiction might exist if federal courts provided ancillary services for Hague Abduction Convention litigants that were better than state court services. Two court services seem particularly important in Hague Abduction Convention cases: interpreter services and *pro bono* counsel offices. Given that Hague Abduction Convention cases are transnational, some litigants will need translation or interpreter services. In addition, given the complexity inherent in transnational litigation, both petitioners and respondents may have a serious need for legal representation.

Interpretation Services. For litigants with limited English proficiency, interpreter services are essential for justice. As the American Bar Association (ABA) has said, “Access to justice is unattainable for those who are not proficient in English unless they also have access to language services that will enable them to understand and be understood”.³⁰⁸ The ABA also notes that access to language services is a “fundamental principle of law”, essential

is true on the other side. Although the *Mozes* framework focuses on the shared intent of the parents, the child’s ‘acclimatization’ in a country has an important role to play. We have emphasized that the *Mozes* approach is ‘flexible’ and takes account of ‘the realities of children’s and family’s lives despite the parent’s hopes for the future.’ *Koch*, 450 F.3d at 715–16. In substance, all circuits —ours included — consider *both* parental intent *and* the child’s acclimatization, differing only in their emphasis. The crux of disagreement is how much weight to give one or the other, especially where the evidence conflicts”).

³⁰⁴ Seinfeld, note 58 above, p. 116.

³⁰⁵ Dreyfuss, note 184 above, pp. 519-520.

³⁰⁶ Seinfeld, note 58 above, p. 119.

³⁰⁷ Solimine, note 9 above, p. 407.

³⁰⁸ American Bar Association, *Standards for Language Access in Courts* (2012), Foreword.

for “fairness”, and implicates the “integrity and accuracy of judicial proceedings”.³⁰⁹ It is not clear how many parties in Hague proceedings need, but lack, competent interpretation services, but some might.

The level and quality of interpreter services can differ in the federal and state judicial systems. As a general proposition, state courts appear to be the better forum for limited-English-proficient litigants (LEP). A commentator in 2013 stated: “as a general matter, federal district courts ... usually do not provide interpreters ...”.³¹⁰

Although federal courts are subject to the Court Interpreters Act,³¹¹ that Act has limited applicability to Hague litigation. The Act requires that federal courts, and only federal courts,³¹² appoint an interpreter for actions instituted by the United States³¹³ if the judge determines that a person has limited English proficiency and the person’s language would “inhibit such party’s comprehension of the proceedings or communication with counsel or the presiding judicial officer, or [would] ... inhibit such witness’ comprehension of questions and the presentation of such testimony”.³¹⁴ The Act requires that the interpreter be “certified or otherwise qualified”,³¹⁵ unless a party waives his or her right to an interpreter with these credentials.³¹⁶ The cost of translation is typically assumed by the party, unless the person is indigent.³¹⁷ Despite these important provisions, the Act does not apply because Hague Abduction Convention proceedings in the United States are typically instituted by private parties (or, in California, by the state district attorney), and not the United States.

State courts, in contrast, are governed by a patchwork of rules, statutes, common law, and policies, thereby creating a more “ad hoc approach” to the availability of interpreter services.³¹⁸ For years this discretion led to inadequate interpretation services in state court,³¹⁹ exacerbated by state funding crises.³²⁰ As recently as 2010, state courts were described as having a reduced capacity to provide “fair and impartial justice and even access to the justice system” compared to the federal courts.³²¹

³⁰⁹ *Ibid.*, p. 15.

³¹⁰ L. K. Abel, “Language Access in the Federal Courts”, *Drake Law Review*, LXI (2013), p. 607.

³¹¹ 28 U.S.C. § 1827 (2012).

³¹² *Ibid.*, § 1827(i).

³¹³ *Ibid.*, § 1827(a), (d).

³¹⁴ *Ibid.*, § 1827(d).

³¹⁵ *Ibid.*, § 1827(k).

³¹⁶ *Ibid.*, § 1827.

³¹⁷ See B. A. Shue, “Rights to Language Assistance in Florida: An Argument to Remedy the Inconsistent Provisions of Court Interpreters in State and Federal Courts”, *FIU Law Review*, VI (2011), p. 416 (citing 28 U.S.C. § 1827(g)). But see Abel, note 310 above, pp. 610-611 (noting that reimbursement for interpreters typically only occurs when the court has appointed legal counsel for the party).

³¹⁸ Shue, note 317 above, p. 396 (describing Florida’s practice). “States differ considerably on the issue of whether interpreters should be provided free of charge to LEP’s in all civil and criminal cases.” *Ibid.*, p. 418.

³¹⁹ The Brennan Center for Justice examined interpretation services in 35 states in 2009 and found: “1. 46% fail to require that interpreters be provided in all civil cases; 2. 80% fail to guarantee that the courts will pay for the interpreters they provide, with the result that many people who need interpreters do not in fact receive them; and 3. 37% fail to require the use of credentialed interpreters, even when such interpreters are available”. Laura Abel, *Language Access in State Courts* (2009), available at <http://www.brennancenter.org/publication/language-access-state-courts>.

³²⁰ J. L. Brown, “Funding and the Future of Justice”, *Judges Journal*, XLIX (2010), p. 1.

³²¹ *Ibid.*

However, state court interpreter services have recently improved dramatically,³²² prompted by Department of Justice investigations and warning letters as part of its enforcement of Title VI of the Civil Rights Act of 1964, increased state membership in the Consortium for Language Access in the Courts, and the 2012 adoption of the American Bar Association Standards for Language Access in Courts.³²³ Consequently, federal courts, “which once led the way”, have now fallen behind as state courts “have expanded language access far beyond what federal courts can provide”.³²⁴ For example, one author reported that the federal district courts for the Southern District of New York and the District of Massachusetts do not provide interpreters, but tell litigants to bring “a trusted family member or friend” to interpret for them; in contrast, the New York and Massachusetts state courts provide interpreters for litigants with LEP.³²⁵

Just as with almost everything else, however, categorical conclusions are difficult. Despite state level improvements, only about half of the states provide interpreters in all civil matters.³²⁶ Moreover, the level of services in the two systems is in flux. Department of Justice investigations and pressure may cause more states to improve their services. Substandard federal practice may change as shame, and even constitutional concerns, become factors.³²⁷ Litigants are advantaged when they can choose between federal and state courts depending upon the services that are offered in an area.

The above observations illustrate why federal jurisdiction should not be made exclusive. Interpreter services may be important to a litigant, and there are differences that exist among the federal and state courts. Petitioners should have the freedom to choose the best forum. Similarly, a respondent who needs translation services should be able to remove the Hague Abduction Convention case to federal court if the federal court happens to provide better services. Admittedly, in some cases an English-speaking respondent might use removal to deny a LEP petitioner needed state-level translation services, but this type of problem is inherent to removal jurisdiction generally. The best remedy for such a problem is to expand translation services in the federal courts, not to take away choice or to tinker with the broader, and well-established, removal framework.

Representation for Indigent Respondents. The availability of other services also differs between state and federal courts, and these differences provide a good reason to continue concurrent jurisdiction and litigant choice. Help in securing legal counsel is an example.

³²² See L. K. Abel and M. Longobardi, “Improvements in Language Access in the Courts”, *Clearinghouse Review*, XLVI (Nov. – Dec. 2012), p. 334 (noting “several state court systems have significantly improved their assistance to limited-English-proficient court users over the past three years. Much of this has come in response to United States Department of Justice guidance documents, warning letters, and investigations pursuant to Title VI of the Civil Rights Act of 1964. The American Bar Association has weighed in, too, adopting the landmark Standards for Language Access in Courts in February 2012. Civil legal aid attorneys encouraged these developments by filing civil rights complaints, helping with Justice Department investigations, working with the American Bar Association, and collaborating with courts to improve conditions in individual states”).

³²³ Abel, note 310 above, pp. 596-598.

³²⁴ *Ibid.*, pp. 594-595. Federal courts both deny interpreters and have “serious quality issues” with respect to the interpretation services. *Ibid.*, p. 612.

³²⁵ *Ibid.*, pp. 612-613.

³²⁶ *Ibid.*

³²⁷ There is no recognized constitutional right to an interpreter in a civil case, although the argument differs in criminal proceedings and an argument can be made that the due process clause requires one in some civil proceedings too. See D. Weissman, “Between Principles & Practice: The Need for Certified Court Interpreters in North Carolina”, *North Carolina Law Review*, XXXVIII (2000), pp. 1927-1931.

Parties to Hague Abduction Convention proceedings need legal assistance because a Hague proceeding has all the qualities that make a proceeding hard for a *pro se* litigant to navigate on his or her own. First, the proceeding involves the litigant's child, and the result of the proceeding is potentially akin to a termination of parental rights. If the judge denies the petition for return, the petitioner may live physically distant from his or her child. If the child is returned and the abducting parent cannot also return, the respondent may end up physically distant from the child. Many courts have recognized the need for legal counsel in termination of parental rights cases,³²⁸ or similar proceedings involving a litigant's children.³²⁹ The Supreme Court has recognized that the absence of representation can at times rise to the level of a constitutional concern.³³⁰

Second, litigants (both petitioners and respondents) can be the victims of domestic abuse.³³¹ Domestic violence victims are particularly in need of legal representation. Their own trauma can inhibit their ability to navigate the legal system and present evidence in a coherent way.³³²

The United States system is set up to make it more likely that the petitioner will receive legal counsel than the respondent. At times, the outcome is a lop-sided adjudication, as an unrepresented respondent faces a petitioner represented by a sophisticated member of the Hague Abduction Convention bar. Whereas the United States, unlike most countries, does not provide petitioners with free legal counsel pursuant to Article 26 of the Hague Abduction Convention,³³³ the United States Central Authority does help locate private counsel for petitioners, and even screens counsel for their availability and interest before passing their names on to petitioners.

The Department of State efforts are aided by two resources: the Department of State attorney referral network and the International Child Abduction Attorney Network (ICAN). The Department of State describes its "all-volunteer" Hague Convention

³²⁸ See *Dep't of Public Welfare v. J.K.B.*, 393 N.E.2d 406, 408-09 (Mass. 1979) (involuntary termination of parental rights); *Lyndia S. v. Okla.*, 580 P.2d 983 (Okla. 1978 (same)).

³²⁹ See *Cleaver v. Wilcox*, 499 F.2d 940 945 (9th Cir. 1974) (child dependency hearing) ("[D]ue process requires the state to appoint counsel whenever an indigent parent, unable to present his or her case properly, faces a substantial possibility of the loss of custody or of prolonged separation from a child"); *In re D.B.*, 385 So. 2d 83 (Fla. 1980) (child dependency hearing) (requiring counsel when parents are faced with a permanent loss of custody or when criminal charges may arise from the proceeding, and requiring the *Cleaver* test be applied on a case-by-case basis in all other circumstances).

³³⁰ *Lassiter v. Dep't of Social Services of Durham County, N.C.*, 101 S. Ct. 2153, 2161-62 (1981) (holding that it is for the trial court to decide on a case-by-case basis whether Due Process, and the three factors articulated in *Matthews v. Eldridge*, 424 U.S. 319 (1976), require the appointment of counsel for indigent parents in termination proceedings).

³³¹ Weiner, note 6 above, pp. 222-223 (discussing respondents). See Geoffrey L. Greif and Rebecca L. Hegar, *When Parents Kidnap* (1993), pp. 18-19, 36 (discussing abductors who were violent).

³³² See J. K. Stoever, "Stories Absent from the Courtroom: Responding to Domestic Violence in the Context of HIV and AIDS", *North Carolina Law Review*, LXXXVII (2009), p. 1190 ("The courtroom environment itself can also be traumatizing for victims of violence, because 'victims are forced to tell their stories again and again, participate in lengthy, repetitive, and confusing proceedings, repeatedly face or confront their abuser, and give up even the semblance of privacy'") (footnote omitted); cf. B. Balos, "Domestic Violence Matters: The Case for Appointed Counsel in Protective Order Proceedings", *Temple Political and Civil Rights Law Review*, XV (2006), p. 568 (discussing problem of women who are unrepresented and seeking restraining orders).

³³³ Article 26, Hague Abduction Convention. United States Reservation to Article 26 of the Hague Convention on the Civil Aspects of International Child Abduction, Apr. 29, 1988, 1504 U.N.T.S. 457. See also Hague International Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. 10494-01, 10508 (March 26, 1986).

Attorney Network,³³⁴ as “the primary resource for developing attorney referral lists for Convention applicants who request *pro bono* or reduced fee legal assistance”.³³⁵ In addition, petitioners can obtain help from ICAAN, a group of private attorneys who agree to handle at least one case *pro bono*, and thereby receive support from the National Center for Missing and Exploited Children.³³⁶

Petitioners’ ability to secure counsel is enhanced by the attorney fee provision in federal law that favors petitioners. ICARA requires that a court award attorney fees to the prevailing petitioner unless it would be clearly inappropriate to do so.³³⁷ Consequently, petitioners’ *pro bono* counsel can typically receive their attorney fees if they win, and kudos for their *pro bono* service if they lose.

Unfortunately, the same structures do not exist to help respondents obtain counsel, especially indigent respondents. Although the Department of State provides respondents with general information about legal resources, the information is not targeted to the litigant. It often points indigent individuals to Legal Aid, but Legal Aid can meet only a small fraction of the need of those who request legal services and qualify.³³⁸ Busy Legal Aid attorneys triage cases, and an international child abduction case can seem to be both daunting and an inefficient use of meager resources. Moreover, Legal Aid guidelines are so stringent that they exclude many indigent individuals.³³⁹ Add to this scenario the fact that prevailing respondents are not entitled to their attorney fees. Consequently, it is more difficult for respondents than petitioners to find legal counsel, especially if the respondent is indigent or low-income.

Given these structural dynamics, it is no surprise that respondents lack counsel more than petitioners. Looking at the proceedings with unrepresented parties on Westlaw from 2012-2013, and counting only once cases where a party was in two similar proceedings (such as before a magistrate and on review before the district court), one sees more unrepresented respondents than petitioners. There were eight unrepresented respondents and three unrepresented petitioners.³⁴⁰

³³⁴ See “Join the Hague Convention Attorney Network”, United States Department of State, <http://travel.state.gov/content/childabduction/english/legal/for-attorneys/join-the-attorney-network.html> (last visited 1 May 2014).

³³⁵ See *ibid.*

³³⁶ “Join the International Child Abduction Attorney Network”, *National Center for Missing and Exploited Children*, <http://www.missingkids.com/ICAAN> (last visited May 01, 2014).

³³⁷ 42 U.S.C. § 11607(b)(3) (2012).

³³⁸ A. W. Houseman, “The Future of Civil Legal Aid: A National Perspective”, *University of the District of Columbia Law Review*, X (2007), p. 45.

³³⁹ See Lua Kamal Yuille, “No One’s Perfect (Not Even Close): Reevaluating Access to Justice in the United States and Western Europe”, *Columbia Journal of Transnational Law*, XLII (2004), p. 875 (noting that the Legal Services Act requires that grantees “establish a maximum income level for persons eligible to receive assistance, which cannot exceed 125% of the levels set by Federal Poverty Income Guidelines”) See also J. P. Gross, “Too Poor to Hire a Lawyer but Not Indigent: How States Use the Federal Poverty Guidelines to Deprive Defendants of the Sixth Amendment Right to Counsel”, *Washington and Lee Law Review*, LXX (2013), p. 1208 (“A defendant making just above 125% of the Federal Poverty Guidelines receives federal assistance to pay for food, heat, and medical care for his children but is somehow not regarded by some states as too poor to hire a lawyer. The LSC’s income eligibility guidelines (125%), when considered in context, reflect a desire to devote scarce resources to the poorest of clients and not a realistic estimate of an income level at which someone could be expected to hire an attorney”).

³⁴⁰ The petitioners were unrepresented in the following cases: *White v. White*, 2014 WL 642553 (2d Cir. 2014) (affirming *White v. White*, 2013 WL 1340145 (S.D.N.Y. 2013)); *Holmes v. Holmes*, 887 F.Supp. 2d 755 (E.D. Mich. 2012); *Guzzo v. Cristofano*, 719 F.3d 100 (2nd Cir. 2013) (unrepresented on appeal only). The respondents were

Although federal and state court judges have the power to appoint *pro bono* attorneys for indigent respondents,³⁴¹ federal courts appear better equipped to find *pro bono* representation for indigent respondents. Court-affiliated *pro bono* programs “exist throughout the federal court system”.³⁴² We have confirmed that at least one-third of the federal districts have panels, sometimes created by local rule,³⁴³ that help the court find *pro bono* counsel for civil litigants.³⁴⁴ As described by the Committee on Court Administration and Case Management of the Judicial Conference of the United States, “Some courts, by local rule, require *pro bono* service as a condition of admission to the bar. A number

unrepresented in the following cases: *Mauvais v. Herisse*, 2013 WL 6383930 (D. Mass. 2013); *Kufner v. Kufner*, 2013 WL 4047437 (D. R.I. 2013) (although unrepresented, Ms. Kufner was the plaintiff in this action to correct several docket entries and the order as well as reopen the case; Ms. Kufner was the respondent in the Hague proceeding and was more properly classified as the respondent for our purposes here); *Vilen-Burch v. Burch*, 2013 WL 1909472 (S.D. Ind. 2013); *East Sussex Children Servs. v. Morris*, 919 F. Supp. 2d 721 (N.D. Va. 2013); *Mlynarski v. Pawezka*, 2013 WL 7899192 (1st Cir. 2013) (respondent unrepresented on appeal only).

³⁴¹ J. E. Zelin, “Court Appointment of Attorney to Represent, without Compensation, Indigent in Civil Action”, *American Law Reports*, LII (1987), § 2(a) p. 1064 (“It has been said that courts have inherent power to do all things that are reasonably necessary for the administration of justice within the scope of their jurisdiction. This includes the power to provide counsel for indigents”). This power is explicit in the federal system. Federal law permits a federal court to “request an attorney to represent any person unable to afford counsel”. 28 U.S.C. § 1915(e)(1).

³⁴² T. J. Benshoof, “Appointments in the Federal Court Pro Bono Program”, *DuPont County Bar Association*, XXIII (2011), p. 30, n.4. See also *Synergy Associates, Inc. v. Sun Biotechnologies, Inc.*, 350 F.3d 681, 683-84 (7th Cir. 2003) (“In an effort to ensure that all deserving litigants, including those without financial means, have access to counsel in the federal court system, the Northern District’s *pro bono* program requires all members of its trial bar to be available for appointment by the court to represent or assist in the representation of those who cannot afford to hire a member of the trial bar ...”); *United States ex. rel Green v. Washington*, 917 F. Supp. 1238, 1279 (N.D. Ill. 1996) (“It is worth observing that in addition to this District Court’s ability to appoint counsel on a compensated basis under the Criminal Justice Act, 18 U.S.C. § 006A, it imposes on members of its trial bar the requirement that they be available for appointment to render services to indigent litigants on a *pro bono publico* basis – without any payment of fees (General Rules 3.82-3.92), and our Court of Appeals similarly provides counsel for indigent parties in both civil and criminal appeals.”). See *Gordon v. Leeke*, 574 F.2d 1147, 1153 (4th Cir.), cert. denied, 439 U.S. 970 (1978) (“If it is apparent to the district court that a *pro se* litigant has a colorable claim but lacks the capacity to present it, the district court should appoint counsel to assist him.”).

³⁴³ See, e.g., D.D.C. R. 83.10, 83.11; D.N.J. R. Appendix H §8, available at <http://www.njd.uscourts.gov/sites/njd/files/Apph.pdf>.

³⁴⁴ The districts with panels appear to include Arizona, Northern District of California, Colorado (on a trial basis), Connecticut, District of the District of Columbia, Middle District of Florida, Southern District of Florida, Idaho, Central District of Illinois, Northern District of Illinois, Southern District of Illinois, Massachusetts, Western District of Michigan, Nebraska, New Jersey, Eastern District New York, Northern District New York, Southern District New York, Western District of New York, North Dakota, Northern District of Ohio, Northern District of Oklahoma, Western District of Oklahoma, Oregon, Middle Pennsylvania, Puerto Rico, South Carolina, Western District of Texas, Western District of Washington, Southern District of West Virginia, Eastern District of Wisconsin, and Western District of Wisconsin. Others are in the process of creating them, such as the Eastern District of Missouri. See Press Release, James G. Woodward, Pro Bono Public Service Opportunity, U.S. District Court, Eastern District of Missouri (Oct. 1, 2013). See also “Eastern District of Missouri, Pro Bono Service Announcement”, available at <http://www.moed.uscourts.gov/pbps> (last visited 12 April 2014). A few districts appear to specifically lack the ability to appoint *pro bono* attorneys, or chose not to do so. The Southern District of Iowa, for example, emphasizes there are “limited resources and programs available to provide free legal assistance”. See “Self-Representation (Pro Se)”, United States District Court, Southern District of Iowa, www.iasd.uscourts.gov/index.php?option=com_moofaq&view=category&id=233&Itemid=293. This information on District Courts was generally collected from District Court websites and supplemented by miscellaneous sources, such as “Judicial Promotion of Pro Bono”, American Bar Association, americanbar.org/legalservices/probono/judicial/courtprobonoprograms.html; David Rauma and Donna Stienstra, *The Civil Justice Reform Act Delay and Expense Reduction Plans: A Sourcebook* (1995), pp. 241-252, tbl.10, available at [www.fjc.gov/public/pdf.nsf/lookup/Sourcebk.pdf/\\$File/Sourcebk.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Sourcebk.pdf/$File/Sourcebk.pdf). (listing a number of district courts’ local rules that set out *pro bono* panels or other procedures for *pro se* litigants).

of districts have civil pro bono panels of attorneys who have volunteered to represent indigents; some bar associations also provide such panels.³⁴⁵ While many of the federal district court programs are modest,³⁴⁶ anecdotal evidence suggests that courts do employ such resources for indigent respondents in Hague cases.

While some states also have pro bono panels from which attorneys are drawn to provide trial level representation,³⁴⁷ these resources appear to be far less prevalent than at the federal level. That is, one-third of the state trial courts do not appear to have pro bono panels, although complete information is not readily available. State courts may not have gone down this path with the same enthusiasm because of the tremendous need at the state level for legal representation. For example, one author estimates that in California alone, there are 4.3 million self-represented court users.³⁴⁸

The situation at the appellate level is similar. While “there is a significant need for pro bono legal services at both the state and federal appellate levels,”³⁴⁹ there are more pro bono panels, and a greater acknowledgement of the courts’ ability to appoint pro bono counsel, at the federal level. That is, a higher percentage of federal appellate courts have programs or express a willingness to appoint counsel than state appellate courts.³⁵⁰ That makes sense since the number of federal appellate courts that have to organize such programs is far smaller than the number of state appellate courts. Although Hague respondents presently have the ability to remove a case to federal court to access these services, an unrepresented respondent would probably not know how to do so. In this way, exclusive federal jurisdiction might be better for connecting indigent respondents with counsel.

Federal jurisdiction facilitates *pro bono* representation in another way. Petitioners’ *pro bono* attorneys prefer to be in federal court, and therefore concurrent jurisdiction makes *pro bono* representation more likely. “Many volunteer lawyers in the Attorney Network in the United States are willing to take return cases pro bono or at a reduced fee because

³⁴⁵ The Judicial Conference of the U.S. Comm. on Court Admin. and Case Management., “Civil Litigation Management Manual”, in *Department of Justice Manual*, Comment. 4-1.000, *4-1030 (2d ed.; 2014).

³⁴⁶ See “Pro Bono Program”, United States District Court of Arizona, www.azd.uscourts.gov/attorneys/pro-bono-program (noting that appointment of counsel “is infrequent,” and “exceptional,” but that approximately thirty appointments have been made in two years).

³⁴⁷ “Overview of Municipal Court Pro Bono Program”, *Illinois Pro Bono*, http://www.illinoisprobono.org/index.cfm?fuseaction=home.dsp_content&contentID=7827.

³⁴⁸ Task Force on Self-Represented Litigants, Judicial Council of California, *Statewide Action Plan for Serving Self-Represented Litigants* (2004), p. 11, available at www.courts.ca.gov/documents/selfreplitsrept.pdf.

³⁴⁹ *Ibid.*, p. 14. See also Jacinda Haynes Suhr, *Ensuring Meaningful Access to Appellate Review in Non-Criminal Cases Involving Self-Represented Litigants* (2009), available at www.ncsc.org/~media/Files/PDF/Education%20and%20Careers/CEDP%20Papers/2009/Suhr_AccessToAppellateReview.ashx. Some states, such as California, have developed assistance programs for state appellants. See M. Rasch, “Development: A New Public-Interest Appellate Model: Public Counsel’s Court-Based Self-Help Clinic and Pro Bono ‘Triage’ for Indigent Pro Se Civil Litigants on Appeal”, *Journal of Appellate Practice and Process*, XI (2010), pp. 487-488. Other states which are mentioned include New Mexico, New Hampshire, and Wisconsin. Boyd & Bray, note 350 below, pp. 13-14.

³⁵⁰ See Thomas H. Boyd and Stephanie A. Bray, *Report on Pro Bono Appellate Programs*, Appendix (2005) (Of the twelve federal circuit Courts of Appeals and the Supreme Court, ten identified appointments, whereas of the 159 state appellate courts that handle civil appeals, no more than sixteen courts said that they had some sort of program or made appointments.). It is unclear if the courts with nothing next to their name regarding *pro bono* services on the Boyd and Bray data chart reflects an inability to get data or the absence of programs/services. Even if the former, it is clear from the data obtained that state courts overwhelmingly provide information to *pro se* litigants about appeals, instead of having panels of attorneys to help or often appointing attorneys.

they can be brought in federal court and do not generally involve substantive custody matters”.³⁵¹ Consistent with this preference for federal court, the United States Department of State reports that it is “challenging” to find *pro bono* attorneys for cases involving the modification or establishment of custody or visitation. “These cases are heard in state courts and typically include a review of the merits of custody”.³⁵² Because petitioners can choose their forum, exclusive federal jurisdiction should not make it any easier to attract *pro bono* counsel for petitioners and may, in fact, discourage *pro bono* representation by those attorneys who prefer state court. However, removing federal court jurisdiction might make it harder for petitioners to find legal counsel.

The topics of interpreter services and *pro bono* representation illustrate that courts may have administrative features that make one court system better suited than the other to adjudicate a particular Hague Abduction Convention case. To the extent that such differences exist and vary by court, then maintaining concurrent jurisdiction seems sensible.

Making Third Party Jobs Easier: The Central Authority and Liaison Judges

United States Central Authority. The consolidation of jurisdiction in the federal bench would probably make the task of the United States Central Authority easier in several respects. One task of a Central Authority is to train the judges in the jurisdiction. Although not expressly part of the duties laid out in Article 7 of the Hague Abduction Convention, such training is ancillary to the Central Authority’s duty to “initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child ...”.³⁵³ The *Guide to Good Practice* recommends that Central Authorities engage in this function.³⁵⁴ In fact, the United States Central Authority trains judges as one of its functions, primarily by making available a website with some primary materials, articles, and advice.³⁵⁵

The current number of judges makes it difficult for the United States Central Authority to train judges in other ways. It has said, “literally thousands of judges ... can potentially hear a Hague return petition ... [and this fact] presents a continuous challenge to the United States Central Authority (USCA) to provide training and outreach materials to all of the judges who need such information”.³⁵⁶ It might be easier if the Central Authority

³⁵¹ Note 334 above.

³⁵² Hague Conference on Private International Law, *Response of United States of America to the Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and 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* (2010), p. 11 [hereinafter: *Response of the U.S.*].

³⁵³ Article 7(f), Hague Abduction Convention.

³⁵⁴ Hague Conference on Private International Law, *The Guide to Good Practice Under the Hague Convention of 25 Oct. 1980 on Civil Aspects of International Child Abduction Part I – Central Authority Practice* (2003), §6.2.

³⁵⁵ “For Judges”, United States Department of State, Bureau of Consular Affairs, <http://travel.state.gov/content/childabduction/english/legal/for-judges.html> (last visited 4 April 2014).

³⁵⁶ United States Central Authority, “U.S. Response to Questionnaire on The Role and Functions of Central Authorities” (2006), p. 7, available at http://www.hch.net/upload/abd_2006_us.pdf. Although the Federal Judicial Center has published a guide for judges on the Convention, Garbolino, note 265 above, as have a few states, Gender and Justice Commission, Washington State Courts, “The Hague Convention on International Child Abduction: A Child’s Return and the Presence of Domestic Violence” (2005), available at <http://www.courts.wa.gov/committee/pdf/dvAndTheHagueConvention.pdf>, and whereas these manuals are accessible on the internet, the written materials do not always touch upon the important issues on the periphery

only had to train the 677 federal district court judges,³⁵⁷ and not also thousands of state trial court judges. However, 677 judges is still a large number of people to train. Moreover, webinars and video could help minimize the training burden regardless of the number of judges.

A smaller bench might facilitate the Central Authority's simplest administrative functions. For example, the Central Authority "reminds courts of the need to process ... applications expeditiously".³⁵⁸ It contacts the court initially, and then after six weeks it asks for an "update on the progress and reminds the court that the case should be handled expeditiously".³⁵⁹ Presumably the Central Authority could eliminate this function if a court had heard multiple Hague Abduction Convention cases, and thereby internalized its obligation for expedition.

The advantages to the Central Authority of a smaller bench are plausible, but relatively minor. It has managed to operate well for over twenty years with a decentralized bench. To the extent that the large bench is a burden, the burden could be addressed with additional Central Authority personnel instead of shrinking the size of the bench. Moreover, other Central Authority functions might become harder if jurisdiction were solely in the federal bench. For example, the United States Central Authority has "worked closely" with the four United States Hague Network judges "to promote direct communications between and among judges in international family law cases".³⁶⁰ Direct judicial communication might become more difficult with a purely federal bench, and that might affect the Central Authority, albeit in ways that are hard to articulate.

Liaison Judges and Direct Judicial Communication. The concept of an International Hague Network of Judges was conceived approximately fifteen years ago.³⁶¹ The organization has grown and is legitimized by the involvement of a Permanent Bureau.³⁶² The network is a voluntary association of judges who are designated by their respective country to serve as representatives. The United States has four "geographically diverse" liaison judges, i.e., three state judges and one federal judge.³⁶³ Liaison judges have a variety of functions. They may educate domestic colleagues about the Convention, answer questions from foreign judges about general matters, participate in international judicial conferences,³⁶⁴ help

of a Hague adjudication, such as how to interview children or the effect on children from exposure to domestic violence.

³⁵⁷ Note 166 above.

³⁵⁸ Note 352 above, p. 15.

³⁵⁹ *Ibid.*, p. 16. This is pursuant to Article 11 of the Hague Abduction Convention.

³⁶⁰ *Ibid.*, p. 14.

³⁶¹ The birth of the network is attributed to a judicial seminar held in De Ruwenberg, Netherlands, in 1998. See Hague Conference on Private International Law, *Report on Judicial Communications in Relation to International Child Protection* (2006), p. 5.

³⁶² Hague Conference on Private International Law, *Direct Judicial Communication* (2013), p. 3-7, available at http://www.hcch.net/upload/brochure_djc_en.pdf.

³⁶³ Note 352, p. 7. They are the Honorable James Garbolino, Retired Judge, California Superior Court; the Honorable Judith Kreeger, Judge, Circuit Court, Miami-Dade County; the Honorable Mary Sheffield, Presiding Judge, 25th Judicial Circuit, Missouri; and the Honorable Peter J. Messitte, Senior Judge, U.S. District Court for the District of Maryland.

³⁶⁴ *Ibid.* See also Robyn Moglove Diamond, *International Judicial Initiatives Dealing with Cross Border Child Protection* (2012) pp. 2-4, available at www.lawrights.asn.au/papers/International%20Judicial%20Initiatives%20Dealing%20%20Robyn%20Diamond.doc.

coordinate or participate in direct judicial communications, and promote international judicial collaboration generally.³⁶⁵

The task of a United States liaison judge might be made easier in some respects, although more difficult in other respects, if Hague Abduction Convention jurisdiction were vested in the federal courts exclusively. Certain aspects of the job (for example, international communication at conferences, education of domestic colleagues about the Convention, and serving as a call center for calls between judges) probably would be marginally easier or would not change much with a smaller bench. Other aspects, such as direct judicial communication by liaison judges themselves, might become more difficult.

Direct judicial communication between judges is becoming more popular; it is encouraged by the Network and its members, as well as by the Permanent Bureau. Network judges are supposed to encourage this type of communication,³⁶⁶ as well as facilitate or engage in it themselves.³⁶⁷ A document drawn up by the Permanent Bureau explains that direct judicial communication by a Network judge is “to address any lack of information that the competent judge has about the situation and legal implications in the State of the habitual residence of the child”.³⁶⁸ It continues:

In this context, members of the Network may be involved in facilitating arrangements for the prompt and safe return of the child, including the establishment of urgent and/or provisional measures of protection and the provision of information about custody or access issues or possible measures for addressing domestic violence or abuse allegations. These communications will often result in considerable time saving and better use of available resources, all in the best interests of the child.³⁶⁹

The United States Government is supportive of direct judicial communications in Hague Abduction Convention cases.³⁷⁰ It has said such communication “can be extremely effective in facilitating the prompt and safe return of a child to the country of habitual residence”.³⁷¹ The United States answers to a Permanent Bureau questionnaire indicates that the United States Hague Network judges “have participated in and facilitated judicial communication on many occasions...”.³⁷²

Assuming direct judicial communication should occur at all,³⁷³ concentrating Hague Abduction Convention jurisdiction in the federal bench and making liaison judges federal

³⁶⁵ See *Hague Conference on Private Int'l Law, Report on Judicial Communications in Relation to International Child Protection* (prepared by Philippe Lortie, 2006), p. 14 [hereinafter: Lortie]. Over time, the range of instruments for which the network might be useful has increased. Specifically, the 1996 Hague Jurisdiction Convention is mentioned. The United States has signed and is expected to eventually ratify this treaty. *Hague Conference on Private International Law, Emerging Guidance Regarding the Development of the International Hague Network of Judges and General Principles for Judicial Communications, including Commonly Accepted Safeguards for Direct Judicial Communications In Specific Cases, within the Context of the International Hague Network of Judges* (2012), p. 7 [hereinafter: Emerging Guidance].

³⁶⁶ Note 362 above, §5.1.

³⁶⁷ *Ibid.*, p. 12; *ibid.*, §5.2; Note 364, p. 5.

³⁶⁸ Emerging Guidance, note 365, pp. 7-8.

³⁶⁹ *Ibid.*, p. 8.

³⁷⁰ Note 352, p. 21, §6.4.

³⁷¹ *Ibid.*, p. 21.

³⁷² *Ibid.*, p. 22.

³⁷³ Not all jurisdictions may have rules that authorize such communications, and calls have been made for legal changes to accommodate them. Diamond, note 364, p. 6. Some courts and prominent jurists have raised serious concerns about the process. See *D. v. G.* [2001] 1179 HKCU 1, INCADAT cite HC/E/CNh 595; Shireen

judges, would probably have little impact on direct judicial communication for Hague cases adjudicated in the United States. Typically, it would make no difference if the liaison judge were a federal or state court judge when a United States judge wants to communicate with a foreign judge to find out information about the foreign legal system. For instance, the United States Central Authority reported that in one instance a United States judge wanted to know the child's custodial status prior to removal, and this required determining which of two conflicting court orders was in effect at the time of removal.³⁷⁴

However, for Hague Abduction Convention cases adjudicated abroad, direct judicial communication might become more difficult if the liaison judge were a member of the federal bench or if the direct judicial communication had to occur with a member of the federal bench. Foreign courts are likely to seek information about what would happen to the child after the child returns to the United States. These sorts of questions implicate state family law and process. In fact, some of the subjects that have been discussed with United States Network judges include "U.S. laws on the enforceability of return orders, U.S. laws with respect to jurisdiction over custody matters",³⁷⁵ and "the ability of the requesting State to protect the child should the judge of the requested State order the child returned".³⁷⁶ Therefore, it makes sense for the liaison judges to be members of the state judiciary.³⁷⁷ A state court liaison judge would be most likely to have the relevant information or to know the appropriate state law judge with whom the foreign judge should speak. The Permanent Bureau recommends that the judges designated "should be sitting judges with authority and present expertise in that area [for international child protection matters]".³⁷⁸

Matters may be otherwise if jurisdiction were consolidated in the federal bench. Admittedly, a federal liaison judge might be able to connect a foreign judge with a state court judge, or the United States might retain state judge liaisons and federal judge liaisons. Yet because the state court judge would have no Hague Abduction Convention experience, the interaction between the foreign judge and the state judge will miss the benefits that come with common knowledge and experience regarding the Hague Abduction Convention. Moreover, the efficiencies involved with direct judicial communication may be lost if the United States liaison judge does not have a role, even remotely, with the Hague Abduction Convention itself. This disconnect will become more acute if liaison judges are to have a role coordinating communications with regard to all the international child protection

Fisher, *Report on LAWJ Participation in Part II of the Sixth Meeting of the Hague Conference on Private International Law Special Commission for Review of The Hague 1980 Child Abduction Convention, held 25-31 Jan. 2012* (3 February 2012). Although Principles for Judicial Communication have been drafted to help judges navigate concerns about due process and other issues, see Emerging Guidance, note 365, §6, they are not mandatory and are quite limited. *Ibid.*, p. 13. There are serious questions about the propriety of the liaison judge, or another judge, becoming a fact witness in a proceeding, but without cross-examination, being sworn in, and so on.

³⁷⁴ Note 352, p. 22.

³⁷⁵ *Ibid.* The United States response also mentioned "how a U.S. court may weigh the opinion of a child in a petition for return, and U.S. immigration laws".

³⁷⁶ *Ibid.*

³⁷⁷ The United States Central Authority said that such communication in family law matters "is very familiar to U.S. state court judges" because of the UCCJEA. *Ibid.*, pp. 21-22.

³⁷⁸ Note 365 above, §1.2. The importance of experience in the area of "international child protection matters" was also emphasized in a conclusion and recommendation of the Joint E-HCCH Judicial Conference in 2009 regarding direct judicial communications on family law matters and the development of judicial networks. See Hague Conference on Private International Law, *Direct Judicial Communications on Family Law Matters and the Development of Judicial Networks, Conclusions and Recommendations* (2009), available at www.hcch.net/upload/judcomm_concl2009e.pdf.

conventions to which the United States might become party. Although different judges in a country could have responsibility for different conventions (for example, the Hague Abduction Convention, the 1996 Hague Jurisdiction Convention, and the 2007 Child Support Convention), this solution would probably lead to duplication of effort and inefficiencies.

ARGUMENTS AGAINST EXCLUSIVE JURISDICTION AND FOR CONCURRENT JURISDICTION

This article has shown that the benefits of exclusive federal jurisdiction are not so overwhelming that jurisdiction should rest exclusively in the federal courts. It has been suggested that the current benefits associated with concurrent jurisdiction make it unlikely that federal jurisdiction would ever be eliminated. Next this article will suggest that there may be certain disadvantages to shifting jurisdiction to the federal court exclusively. Making federal jurisdiction exclusive might open ICARA up to harmful amendments, decrease the parties' convenience, increase the workload of the federal courts, and dilute the rationale for the domestic relations exception to federal diversity jurisdiction. As to be discussed below, only some of these concerns have merit, and none is really compelling. Nonetheless, in combination, they add another reason not to make federal jurisdiction exclusive, especially when coupled with the law of unintended consequences.³⁷⁹ Admittedly, unforeseen consequences may be beneficial instead of harmful, but the uncertainty itself supports caution.

Risking Harmful Amendments to ICARA

The United States Department of State is worried that amending ICARA would "potentially result in amendments to the implementing legislation that may impede the function of the Convention".³⁸⁰ It is impossible to assess the merits of this concern. It is unclear why narrowly-tailored legislation on jurisdiction would not stay narrow, or why harmful proposals could not be adopted even absent an amendment to ICARA's jurisdictional provisions. Nor has the Department of State articulated what those harmful proposals might be so that observers can assess whether they would actually be problematic or have any chance of passing. Because this disadvantage does not relate to the merits of shrinking jurisdiction specifically, and because it is so speculative and undefined, this disadvantage is lumped into the category of potential unanticipated consequences, which, again, can either be negative or positive. This concern is not considered further.

Convenience of Petitioners

The Department of State is concerned about the convenience of litigants if the number of courts available for adjudication were reduced. It claims "a concentration of courts for Convention cases would be problematic for litigants due to the large geographic area

³⁷⁹ R. K. Merton, "The Unintended Consequences of Purposive Social Action", *American Sociological Review*, I (1936), p. 898.

³⁸⁰ Note 352, p. 15.

of which the United States is composed".³⁸¹ One gets a better sense of the convenience argument by considering a rural litigant. For example, if someone were living in Point Barrow, Alaska, the northernmost point in the United States, that person would have to travel 504 miles to the nearest federal courthouse, which is in Fairbanks,³⁸² but only a short distance to the state courthouse, which is in Barrow itself.³⁸³ While extreme, the example reflects the fact that state courts are more numerous, and often more convenient, than the nearest federal courthouse for people who live in rural areas.

Presumably the Department of State is concerned most about petitioners' convenience and not respondents' convenience because a respondent's convenience is subordinated to the petitioner's ability to choose a federal forum. That is, there is no guarantee that the case will be in state court because a petitioner can file in federal court. Under ICARA, the respondent's convenience has the same limited importance as in any other concurrent jurisdiction case. However, even the petitioner's convenience is not assured. The petitioner in Barrow who files in Alaska state court might find that the respondent removes the case to the federal court in Fairbanks.

In thinking about party convenience, it is not helpful to point to other nations that have concentrated jurisdiction and then uncritically draw conclusions about the convenience of parties in the United States. Sometimes the comparison is inapt because the petitioner adjudicating in the foreign country does not need to initiate proceedings or appear for an evidentiary hearing, thereby rendering the geographical distance to the courthouse less meaningful. Consequently, for example, although Australia is close in size to the United States³⁸⁴ and is a large federated jurisdiction that has consolidated jurisdiction, it is not a particularly useful analogy for the United States.³⁸⁵ Nonetheless, the Permanent Bureau's *Guide to Good Practice* states: "The Australian model, of concentration of jurisdiction in one federal court, is well suited to a federated State with a large geographic area ...".³⁸⁶

To be clear, Australia's reliance on its Family Court to adjudicate Hague abduction matters does not mean that the court only has one physical location. In fact, it is wrong to equate a single court with a single physical location.³⁸⁷ The Australian Family Court has judges that sit in every state and territory of Australia except Western Australia, which has a separate Family Court of Western Australia. There are approximately twenty-seven

³⁸¹ *Ibid.*, p. 15.

³⁸² See Offices, U.S. District Court for the District of Alaska, <http://www.akd.uscourts.gov/offices.htm> (last visited 7 May 2014).

³⁸³ See Alaska Courts Directory (last visited 7 May 2014), <http://courts.alaska.gov/court/idx.htm#barrow>.

³⁸⁴ See "Australia's Size Compared", Australian Government, <http://www.ga.gov.au/education/geoscience-basics/dimensions/australias-size-compared.html> (last updated 18 November 2010).

³⁸⁵ Although the Australian implementing legislation confers jurisdiction on both the Family Court of Australia (and the Family Court of Western Australia) as well as the various courts of summary jurisdiction, but "in practice, jurisdiction is ... restricted to the Family Court of Australia and the Family Court of Western Australia". 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* (2006), p. 62.

³⁸⁶ Note 160, p. 29, n.103.

³⁸⁷ Sometimes it is easy to read material that way, although the interpretation would be incorrect. See *Ibid.*, p. 3, n.107 ("Cyprus has modified its legal system to limit jurisdiction to its two Family Courts; in Finland (s 31), China (Hong Kong Special Administrative Region) (s 6), Hungary (Art 3(2) of the decree no. 7/1988. (VIII. 1) of the Ministry of Justice), Ireland (s 71)), Mauritius (s 5(1)), Sri Lanka (s 9), the United Kingdom (s 4) and Zimbabwe (s 6) only one court has jurisdiction at first instance to decide on Hague Convention cases").

Family Courts sprinkled throughout the states and territories.³⁸⁸ As of 2013, there were thirty-five judges in the Family Court, including Western Australia.³⁸⁹ The Family Court of Australia has its own appeal division.³⁹⁰ Ultimately, cases are appealed to the High Court of Australia, which sits primarily in Canberra, but special leave applications can be heard by video link if the advocate is in another location.³⁹¹

Assuming federal jurisdiction became exclusive in the United States, the experience of American litigants may differ from the convenience enjoyed by Australian litigants. An important difference between Australia and the United States is that the Crown Solicitor in Australia typically takes the case to the Family Court of Australia, and the applicant is the Australian Central Authority.³⁹² In the United States, however, a state authority does not initiate proceedings (with the exception of California, where the District Attorney brings the petition),³⁹³ nor is the action on behalf of the Central Authority. In addition, in Australia, the left-behind parent generally does not need to appear in person in the proceeding. The left-behind parent can give evidence by affidavit; this is “normally” how the views of the left-behind parent are presented.³⁹⁴ In the event of an evidentiary hearing, telephone and video conferencing are available.³⁹⁵ Similarly, although Finland has consolidated jurisdiction in a court that sits in only one physical location, the applicant is not required to participate at all, and oral evidence, which can be presented through a variety of means including by video, telephone, or a legal representative, is only required if “the court finds it necessary for the resolution of the case”.³⁹⁶ In contrast, participation in the proceedings in the United States is required, and the United States courts commonly have evidentiary hearings.

If one were to use another country’s experience to inform a decision about jurisdiction in the United States, then it would be useful to gather information about party convenience

³⁸⁸ See “Court Lists”, Family Court of Australia, www.familycourt.gov.au/wps/wcm/connect/FCOA/home/court_lists (last visited 2 May 2014).

³⁸⁹ See “Judges”, Family Court of Australia, www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/Court/Judges/FCOA_co_Judges_Appeal_Division (last visited 2 May 2014); “Family Court of Western Australia”, Family Court of Australia, www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/Court/Judges/FCOA_co_Family_Court_WA (last visited 2 May 2014). *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Country Profile of AUSTRALIA* (2011), p. 27 [hereinafter: Australia Country Profile] (noting 37 judges, including appellate judges, who hear cases).

³⁹⁰ Three judges of the Full Court of the Family Court of Australia typically hear appeals, including judges from the Family Court of Australia and Family Court of Western Australia. “Judges of the Appeal Division”, Family Court of Australia, www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/Court/Judges/FCOA_co_Judges_Appeal_Division (last visited 2 May 2014).

³⁹¹ High Court of Australia, *Visitor’s Guide to Oral Argument*, available at www.hcourt.gov.au/assets/publications/brochures/hca-guide-to-oral-argument.pdf (last visited 19 April 2014).

³⁹² See Australia Country Profile, note 389 above, pp. 18-19; Nigel Lowe, et al., *International Movement of Children. Law, Practice, and Procedure* (2004), pp. 512-513; Andrew Davies, *Australia’s Approach to International Child Abduction: Practical Experiences and Lesson Learnt*, available at www.lawgazette.com.sg/2009-7/feature1.htm (last visited 6 April 2014). Private applicants are not precluded from initiating proceedings themselves, but the State does not cover costs in that case. Lowe, above, p. 514. The cadre of specialist lawyers who handle the cases helps the system work well. Davies, note 392 above, p. 2.

³⁹³ Note 5 above, p. 21.

³⁹⁴ Australia Country Profile, note 389 above, pp. 27-28 (“Is the applicant generally required to participate in the return proceedings? Yes . . . Usually not in person, but of course the applicant will be required to provide material to support the application in the form of affidavit evidence”).

³⁹⁵ *Ibid.*

³⁹⁶ *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Country Profile of FINLAND* (2011), pp. 19-22.

in Hungary. Hungary concentrates jurisdiction solely in the Central District Court of Budapest, with appeals to the Municipal Court of Budapest.³⁹⁷ Hungary is a useful example because it is approximately 36,000 square miles in size, close in size to South Carolina, which is 30,000 square miles.³⁹⁸ South Carolina has one federal district that is comprised of four district courthouses.³⁹⁹ Therefore, if litigants in Hungary do not feel inconvenienced by the concentration of jurisdiction, then arguably litigants in the United States should not feel inconvenienced. Hungary's system is akin to that of the United States in many respects. In Hungary, it is not strictly required that the applicant participate in proceedings, but it is "advisable".⁴⁰⁰ There will "always" be a hearing and oral evidence will "always" be admissible.⁴⁰¹ It also has private parties initiate their own actions,⁴⁰² although it will find and pay for private representation for applicants.⁴⁰³

To the extent that one focuses solely on the United States, any concern about the convenience of petitioners seems overstated. First, there are federal district courts throughout the United States,⁴⁰⁴ and most United States residents have relatively convenient access to these courts because they tend to be placed in population centers. Second, and more importantly, Hague Abduction Convention petitioners are typically located abroad. For them, it is no less convenient to adjudicate in a court 2,100 miles away than 2,000 miles away. Most attorney offices are located near the federal courthouses,⁴⁰⁵ so concentrating jurisdiction in the federal courts would not be a problem for them either. To the extent a petitioner is coming to the United States for the hearing, the federal courthouse is likely to be located near an airport. Third, most petitioners file in federal court,⁴⁰⁶ and a petitioner can never be assured that he or she will be in state court even if that is his or her preference. The respondent always has the option of removing the case to the federal court. Finally, issues of convenience can always be addressed through technology, as the United States already does with several specialized courts.

Technology is used to foster party convenience in various contexts in the United States. For example, the United States Court of International Trade, which has exclusive jurisdiction to decide civil actions against the United States arising out of any law pertaining

³⁹⁷ *Ibid.*, pp. 21-22.

³⁹⁸ See Central Intelligence Agency, *The World Factbook: Hungary* (2014), available at www.cia.gov/library/publications/the-world-factbook/geos/hu.html; United States Census Bureau, *United States Summary: 2010 tbl.18* (2012), available at www.census.gov/prod/cen2010/cph-2-1.pdf.

³⁹⁹ See "Court Locator", U.S. Courts, www.uscourts.gov/Court_Locator/CourtLocatorSearch.aspx (last visited 6 April 2014).

⁴⁰⁰ *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Country Profile of HUNGARY* (2011), p. 23.

⁴⁰¹ *Ibid.*, p. 24.

⁴⁰² *Ibid.*, p. 23.

⁴⁰³ *Ibid.*, pp. 18-19.

⁴⁰⁴ See note 176 above.

⁴⁰⁵ In a random sample of four states, Washington, Arizona, Indiana, and Oklahoma, the number of lawyers as a percentage of the county has grown. Specifically, the 1996 Hague Child Protection Convention is mentioned, and this is a treaty that and on average, there was 100% or more lawyers in those places than in the rest of the state. For example, in Arizona, there were 0.81 lawyers per 100 people in counties containing district courts, and only 0.29 lawyers per 100 people in the other counties. That means that there were 176% lawyers on a per capita basis in counties containing federal district courts. See United States Census Bureau, *County Business Patterns Database (North American Industry Classification System)* (2011), available at <http://censtats.census.gov/>; "Court Locator", U.S. Courts, http://www.uscourts.gov/Court_Locator/CourtLocatorSearch.aspx (last visited Apr. 6, 2014).

⁴⁰⁶ See text accompanying notes 47-50 above.

to international trade and which reviews administrative actions dealing with imports, sits primarily in New York City. It uses technology to enhance party convenience.⁴⁰⁷ Similarly, the United States Court of Federal Claims, which hears claims against the United States Government that do not sound in tort, such as cases involving eminent domain, military or civilian pay disputes, contract claims, patent or copyright infringement by the United States,⁴⁰⁸ uses technology to reduce party inconvenience. As the United States Court of Federal Claims says, “The majority of proceedings are held in Washington, D.C., where judges share courtrooms and make effective use of electronic communications, including teleconferencing, video conferencing and computer technology”.⁴⁰⁹ In Hague Abduction Convention cases, the United States Central Authority attends to the petitioner’s convenience, and this help should make use of technology more feasible. The Central Authority has said that it “makes every effort to make arrangements to ensure that resources are made available to the left behind parent for the purpose of participating in court proceedings that are taking place in the United States”.⁴¹⁰

The petitioners who are the most likely to be inconvenienced by exclusive federal court jurisdiction are those who live on the border of Mexico or Canada and whose children are abducted to the nearest United States state that abuts the border. There might be a state courthouse closer to their home, assuming the venue rules and the child’s location within the state permitted such a choice. Admittedly, there are more incoming cases from Mexico and Canada than any other countries,⁴¹¹ so the convenience of these petitioners is important to consider. However, the numbers are relatively small. Over a four year period (encompassing 2010 to 2013), there were approximately 26 cases a year from Canada and 91 cases a year from Mexico,⁴¹² with the high in any one year being 28 from Canada in 2010 and 117 from Mexico in 2012. In addition, as an absolute matter, the inconvenience from having to litigate in a federal courthouse would not be extreme. Although the calculation is rather crude, one can get a rough sense of the distances involved. Assuming that a petitioner stood on the United States-Canada border or the United States-Mexico border, one could use the Pythagorean theorem to find out the furthest average distance to the

⁴⁰⁷ “About the Court”, *U.S. Court of International Trade*, <http://www.cit.uscourts.gov/AboutTheCourt.html#practice> (last modified 3 December 2013) (“Since the geographical jurisdiction of the court extends throughout the United States, the procedures are designed to accommodate the needs of parties not located in New York City. Most significantly, judges of the court are assigned by the chief judge, as needed, to preside at trials at any place within the United States. These trials are held in the United States Courthouses. The court is equipped with conference telephones to hear oral arguments and conduct conferences with parties at other places”).

⁴⁰⁸ See 28 USC § 1491 (2012). See also United States Court of Federal Claims, *Court History Brochure*, available at http://www.uscfc.uscourts.gov/sites/default/files/court_info/Court_History_Brochure.pdf (last visited 6 April 2014).

⁴⁰⁹ Note 408, p. 2.

⁴¹⁰ Note 5 above, p. 27.

⁴¹¹ Mexico and Canada had the first- and second-most incoming abduction cases in every year save 2012, when the United Kingdom had five more cases than Canada. United States Department of State, Bureau of Consular Affairs, *New Incoming Cases – CY 2013*, available at travel.state.gov/content/dam/childabduction/statistics/CY2013%20-New%20Reported%20Incoming%20Cases.pdf (last visited 10 April 2014); id, *New Incoming Cases – CY 2012*, available at http://travel.state.gov/content/dam/childabduction/statistics/Incoming_Open_CY2012.pdf (last visited 10 April 2014); id, *New Incoming Cases – CY 2011*, available at travel.state.gov/content/dam/childabduction/statistics/Incoming_Stats2011.pdf (last visited 10 April 2014); id, *2010 USCA Incoming Case Statistics*, available at travel.state.gov/content/dam/childabduction/statistics/2010IncomingCaseStats4-27-2011.pdf#html (last visited 10 April 2014).

⁴¹² *Ibid.*

closest federal courthouse. This was done by estimating the average distance between the border and each district courthouse in a border district (going due north or south),⁴¹³ and then the distance between federal courthouses along the border.⁴¹⁴ Using these numbers, a Canadian petitioner would have to travel roughly 129 miles to a federal court in the United States ($125^2 \times 33^2 = c^2$) from the border and a Mexican petitioner would have to travel roughly 82 miles to a federal court in the United States ($28^2 \times 77^2 = c^2$) from the border.

Of all the states in the United States, only the federal districts of Delaware and Rhode Island (1,900 square miles and 1,000 square miles, respectively) have a single federal courthouse.⁴¹⁵ These are small states. Rhode Island, for example, is only 48 miles from top to bottom and only 37 miles from side to side.

Overall, issues of convenience should not preclude the consolidation of jurisdiction.

Increase the Workload of Federal Courts

Federal courts have a substantial workload. A report by the Brennan Center for Justice at the New York University School of Law indicated that there has been a 20% increase in the number of pending cases on federal judicial dockets from 1992 to 2012.⁴¹⁶ This has been due, in part, to a growing number of filings,⁴¹⁷ but also to a growing number of judicial vacancies.⁴¹⁸ In fact, the Judicial Conference of the United States has recommended that Congress create 65 new permanent judgeships and 20 additional temporary judgeships (8 of which would be eventually converted to permanent judgeships) to address the workload issues.⁴¹⁹ The workload is something that federal judges continually lament.⁴²⁰

The impact of Hague cases on the federal bench's workload was a consideration when Congress considered concurrent jurisdiction. Whereas some witnesses raised the concern

⁴¹³ If one were in the either Mexico or Canada and proceeding to the nearest federal district court in a district that abutted the border from a place in the foreign country immediately north or south of that court (without traveling on a diagonal), one would have on average 28 miles on highways to go from Mexico and 125 miles to go from Canada. To do this calculation, we disregarded district courts whose path to the border traveled through a closer city with a district court, and counted only the closer city. See "Court Locator", U.S. Courts, www.uscourts.gov/Court_Locator/CourtLocatorSearch.aspx (last visited 8 April 2014).

⁴¹⁴ Thirteen states share a boundary with Canada and four states share a boundary with Mexico. Janice Cheryl Beaver, *CRS Report for Congress, U.S. International Borders: Brief Facts* (2006). There are 25 federal courthouses in border districts along the United States-Mexico Border, and 47 federal courthouses in border districts along the United States-Canada border. See "Court Locator", U.S. Courts, www.uscourts.gov/Court_Locator/CourtLocatorSearch.aspx (last visited 8 April 2014). The length of the United States-Mexican border is 1,933 miles and the length of United States-Canadian border is 1,538 miles (excluding Alaska). Beaver, *ibid.* Crudely, therefore, there is a federal district courthouse approximately every 77 miles along the United States-Mexico border and every 33 miles along the United States-Canada border (excluding Alaska).

⁴¹⁵ *Ibid.*; United States Census Bureau, *United States Summary: 2010 (2012)*, tbl.18, available at www.census.gov/prod/cen2010/cph-2-1.pdf.

⁴¹⁶ Alicia Bannon, *Federal Judicial Vacancies: The Trial Courts* (2013) (noting an average of 388 pending cases on a judicial docket in 1992, and an average of 464 in 2012).

⁴¹⁷ *Ibid.*, p. 6 (noting pending felony and civil cases have increased by nearly 40 percent since 1992).

⁴¹⁸ *Ibid.*, p. 6 (noting a "vacancy crisis" that "has significantly exacerbated the burden on sitting judges from these record caseloads").

⁴¹⁹ See "Judicial Conference Judgeship Recommendations", *U.S. Courts* (2013),

available at www.uscourts.gov/uscourts/JudgesJudgeships/docs/judgeship-recommendations.pdf.

⁴²⁰ C. M. Bradley, "Federalism and the Federal Criminal Law", *Hastings Law Journal*, LV (2004), pp. 590-591 ("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").

of the federal court workload, many witnesses pointed out that the number of cases to be adjudicated was quite small.⁴²¹ Experts estimated that the Hague Abduction Convention caseload would only be 30 to 50 cases a year during the initial years of implementation, and these cases would not burden any one court because the cases would be dispersed throughout the country.⁴²² The Department of State even admitted that the estimate of 30 to 50 cases a year “may be somewhat high” because of the deterrent effect of the Convention.⁴²³ Senator Dixon found the small number of cases “the most persuasive” argument “of all, probably” for why concurrent jurisdiction should exist, that is, for why federal courts should have jurisdiction at all in these cases.⁴²⁴

The earlier estimate of adjudicated Hague Abduction Convention cases is probably lower than the number of cases actually filed in United States courts annually, although as mentioned above, no one knows for certain. Even if 175 cases were filed a year,⁴²⁵ that is still a small number of cases. Therefore, confining Hague Abduction Convention jurisdiction exclusively to the federal courts would not create a large workload problem for them, or arguably cause any workload problem at all. Although the average case takes approximately 106 days from filing to resolution,⁴²⁶ only a fraction of that time involves an evidentiary hearing or the drafting of the decision.

Even though the workload issue gives little reason to reject exclusive federal jurisdiction, a subtle, but real, trade-off would occur if jurisdiction became exclusively federal. Hague Abduction Convention cases, which may need a federal forum less, would delay and potentially deter the filing of some cases that are arguably more worthy of a federal forum. The non-Hague cases may be more technical, more in need of the federal staffing resources, more in need of the judicial brainpower, more likely to involve constitutional rights or affect large numbers of people,⁴²⁷ or even more needy of the aura of a federal courthouse. If this concern has merit, then perhaps more Hague Abduction Convention cases should not be funneled into federal court.

Threatening the Domestic Relations Exception to Federal Diversity Jurisdiction

At the time ICARA was adopted, Congressman Rodino emphasized that Congress had “no intention of expanding federal court jurisdiction into the realm of family law”.⁴²⁸ He continued: “Congress reaffirms its view that states have traditionally had, and continue to have, jurisdiction and expertise in the area of family law”.⁴²⁹

⁴²¹ Feb. 23, 1988 Senate hearing, note 53 above, p. 113 (statement of Mr. Lloyd) (There “are less than 100 such cases per year in the United States”).

⁴²² Feb. 3, 1988 House hearing, note 53 above, p. 66 (statement of Ms. Hoff); *ibid.*, p. 81 (statement of Mr. Lloyd); Feb. 23, 1988 Senate hearing, note 53 above, p. 90 (statement of Ms. Hoff).

⁴²³ Feb. 23, 1988 Senate hearing, note 53, p. 55 (written response of Department of State to Senator Charles E. Grassley); *ibid.*, p. 101 (statement of Mr. Lloyd).

⁴²⁴ *Ibid.*, p. 100 (statement of Senator Dixon).

⁴²⁵ See text accompanying notes 44-45 above.

⁴²⁶ Lowe, *Hague Conference on Private Int’l Law, A Statistical Analysis of Applications Made in 2008 Under the Hague Child Abduction Convention Part I -Global Report* (2011).

⁴²⁷ Seinfeld, note 58 above, pp. 152-53.

⁴²⁸ International Child Abduction Remedies Act, 134 CONG. REC. 8651 (Apr. 25, 1988) (statement of Rep. Rodino).

⁴²⁹ *Ibid.*

In the United States, state courts generally have the sole ability to hear most family law matters. In 1930 the United States Supreme Court rejected the proposition that a divorce and alimony action by a United States citizen against the Vice-Consul of Romania had to be heard in federal court, instead of Ohio state court.⁴³⁰ Despite the “sweeping language” of the Constitution and the language in a federal statute that vested exclusive jurisdiction in federal courts for “suits against consuls and vice-consuls”, the Court determined that the words could not be interpreted to include those actions that would have “formerly ... belonged to the ecclesiastical Courts”.⁴³¹ The “common understanding” at the time the Constitution was adopted was that “the domestic relations of husband and wife and parent and child were matters reserved to the States”,⁴³² and that understanding must guide the interpretation of the Constitution and federal law.⁴³³

The clearest manifestation of federal courts insulation from family law questions is found in the domestic relations exception to federal diversity jurisdiction. Normally, federal courts will have subject matter jurisdiction if the parties live in different states and the amount in controversy exceeds \$75,000.⁴³⁴ However, the federal courts have carved out an exception for domestic relations matters. In 1992, in *Ankenbrandt v. Richards*,⁴³⁵ the Supreme Court reaffirmed the vitality of the exception for diversity cases addressing issues of divorce, alimony, or child custody.⁴³⁶

In *Ankenbrandt*, the plaintiff initially brought suit in federal court on behalf of her daughters against her former husband and his female companion for his alleged sexual and physical abuse of the girls, invoking diversity jurisdiction.⁴³⁷ Both the federal district court and the Court of Appeals dismissed the plaintiff’s claim, citing the domestic relations exception to diversity jurisdiction. The Supreme Court, after affirming the existence of a domestic relations exception to diversity jurisdiction, reversed because the plaintiff’s case did not fall within it.⁴³⁸

The Court explained that the exception rested on the Court’s earlier understanding of the scope of the Judiciary Act of 1789 and the Court of Chancery’s practices. It stated that regardless of whether the earlier Supreme Court had interpreted history accurately, Congress had not acted to change that understanding over the last century.⁴³⁹ Citing *stare decisis* and Congressional inaction, the Court reaffirmed the exception.⁴⁴⁰ Justice Blackmun concurred, although he disagreed that the federal courts’ limitation stemmed from

⁴³⁰ *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379 (1930).

⁴³¹ *Ibid.*, p. 384.

⁴³² *Ibid.*, pp. 383-384.

⁴³³ Many other examples exist of the federal courts refusing to adjudicate a family law matter. See Resnik, note 198 above, p. 1746, n. 337 (citing cases where federal courts declined habeas corpus jurisdiction over child custody cases).

⁴³⁴ See note 18 above.

⁴³⁵ *Ankenbrandt v. Richards*, 504 U.S. 689 (1992).

⁴³⁶ *Ibid.*, p. 703.

⁴³⁷ *Ibid.*, p. 691.

⁴³⁸ *Ibid.*, pp. 705-706. Nor did it think the doctrine of abstention was applicable to the case at bar.

⁴³⁹ *Ibid.*, p. 700. The historical basis had been questioned. One court stated: “The historical reasons relied upon to explain the federal courts’ complete lack of matrimonial jurisdiction are not convincing. Colonial courts and the English Chancery were not without power in matrimonial affairs”. *Spindel v. Spindel*, 283 F. Supp. 797, 806 (E.D.N.Y. 1968).

⁴⁴⁰ *Ankenbrandt v. Richards*, 504 U.S. at 703.

Congressional legislation. He affirmed the existence of the domestic relations exception as part of a prudential limitation applied by the federal courts themselves.⁴⁴¹

In *Ankenbrandt*, the Court articulated the policy considerations that supported its holding. First, state courts are more closely associated with the state and local governmental resources, such as social workers, that are involved in the family law disputes.⁴⁴² Second, state courts have more “judicial expertise” in domestic relations matters, given the existence of the exception for the last 150 years.⁴⁴³

Would exclusive federal jurisdiction for Hague Abduction Convention cases weaken the policy basis for the domestic relations exception sufficiently to threaten the exception itself? If so, would that be a good or bad outcome? Whether the exception itself is beneficial or harmful is the subject of extensive scholarly debate,⁴⁴⁴ which will not be repeated here. The other, more relevant, question is whether exclusive federal jurisdiction for Hague Abduction Convention matters would threaten it. Evaluating the merits of this concern involves considerable speculation. Perhaps investing the federal courts with exclusive jurisdiction in Hague Abduction Convention matters would threaten the exception sufficiently to cause its demise, although three facts suggest the domestic relations exception to diversity jurisdiction would likely survive.

First, one of the two policy reasons for the exception would still exist. State courts have court-annexed or court-affiliated services that are often important in divorce and custody cases. These tend to be services such as mediation and parental education,⁴⁴⁵ although historically these services had included counseling too.⁴⁴⁶

Second, the exception exists by virtue of the federal judiciary’s interpretation of federal law granting the federal courts’ jurisdiction, in light of subsequent Congressional inaction.⁴⁴⁷ In *Ankenbrandt*, the Court emphasized, “[W]e are unwilling to cast aside an understood rule that has been recognized for nearly a century and a half.”⁴⁴⁸ Even if the federal courts obtained increased comfort with family cases from Hague Convention adjudications, Congress would have to explicitly permit federal courts to adjudicate divorce, alimony, or child custody matters.

Third, Hague Abduction Convention cases are already heard predominantly in federal court, and the *Ozaltin* case is creating new encroachments on state family law authority.⁴⁴⁹ The incremental addition of more Hague Abduction Convention cases would be unlikely to change views about the domestic relations exception beyond what might already be

⁴⁴¹ *Ibid.*, p. 707 (Blackmun, J., concurring)

⁴⁴² *Ibid.*, p. 704.

⁴⁴³ *Ibid.*

⁴⁴⁴ Cahn, note 63 above, pp. 28-34.

⁴⁴⁵ “By the late 1980s, mediation of custody and visitation disputes became mandatory in more than 33 state jurisdictions”. Peter Salem and Ann L. Milne, “The Association of Family and Conciliation Courts”, *Family Court Review*, XLI (2003), p. 150. By 1998, over half of the counties in the United States had court-affiliated parental education programs, a remarkable change since court-affiliated programs only began a mere twenty years earlier. Andrew I. Shepard, *Children, Courts, and Custody: Interdisciplinary Models for Divorcing Families* (2004), p. 68. 46 states have parenting classes for divorcing couples, ranging from four to twelve hours of curriculum. See Elizabeth Bernstein, “When It’s Just Another Fight, and When It’s Over”, *Wall Street Journal* (3 April 2012).

⁴⁴⁶ In 1968, nineteen states had “some form of court-connected counseling services.” Salem and Milne, note 445 above (2003), p. 147.

⁴⁴⁷ *Ankenbrandt*, 504 U.S. at 698-700.

⁴⁴⁸ *Ibid.*, p. 694.

⁴⁴⁹ See text accompanying notes 31-37 above.

occurring. Many other areas of federal “family law” exist, although not labeled as such, from which federal courts are presumably already getting expertise. Federal statutes that regulate the family include “federal social security law, employee benefit law, immigration law, tax law, Indian law, military law, same-sex marriage law, child support law, adoption law, and family violence and abuse law”.⁴⁵⁰ In addition, federal courts hear tort suits and contract claims “having domestic relations overtones”.⁴⁵¹ This reality makes it extremely unlikely that there would be any effect at all from additional Hague Abduction Convention cases.

CONCLUSION

Other factors probably could be analyzed before drawing a conclusion, but this article has tried to analyze a sufficient number of the central considerations so that its conclusion is well grounded. The evidence and analysis suggest that the *status quo* should remain unchanged: concurrent jurisdiction in Hague Abduction Convention cases should exist. Although none of the potential disadvantages to exclusive federal jurisdiction have much merit (for example, risking harmful amendments to ICARA, decreasing the convenience of parties, increasing the workload of the federal courts, or threatening the domestic relations exception to federal diversity jurisdiction), the gains from exclusive federal jurisdiction appear more illusory than real (for example, increasing expertise, increasing speed of adjudication, increasing uniformity, providing better court services such as interpreters and *pro bono* counsel, and making the Central Authority and liaison judge jobs easier). To be sure, federal jurisdiction does convey some real benefits to some litigants, and should not be eliminated either. Plaintiff choice is “ubiquitous” in “the American legal landscape” and “concurrent jurisdiction clearly serves the interests of plaintiffs in whose name, presumably a federal cause of action is created in the first instance”.⁴⁵² Although this recommendation for maintaining the *status quo* is not an exciting conclusion, it reflects the best policy choice at this time.

⁴⁵⁰ J. E. Hasday, “The Canon of Family Law”, *Stanford Law Review*, LVII (2004), p. 875; Hasday, “Federalism and the Family Reconstructed”, *UCLA Law Review*, XLV (1998), pp. 1375-1385.

⁴⁵¹ 32A Am. Jur. 2d *Federal Courts* § 805 (2014).

⁴⁵² Solimine, note 9 above, p. 405.