TESTIMONY

OF

PATRICIA E APY

BEFORE THE

U.S. HOUSE OF REPRESENTATIVES

TOM LANTOS HUMAN RIGHTS COMMISSION

HEARING

ON

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Co- Chairmen McGovern and Smith, and distinguished members of the Commission,

My name is Patricia Apy.[1] I am honored to have been invited to appear before this Commission for the third time in my career. My first appearance was a decade ago, and a full five years before the enactment of the Sean and David Goldman International Parental Kidnapping Prevention and Return Act, 22 USC 9111 ET. seq. (the "Goldman" Act). Between December of 2009 and August 8, 2014 when the Act was executed by President Obama, there were conducted in this body and in Committees and Subcommittees no fewer than six different hearings. The Goldman Act was introduced by Co-Chairman Christopher Smith in December of 2009. Over the following five years six different versions of the legislation were authored, negotiated and marked up. Important hearings addressing specific components of the proposed legislation solicited testimony not only from the United States Department of State, Office of Children's Issues, Special Advisors on Children's Issues to the Secretary of State, Special Advisors to the Department of Defense, Former U.S. Diplomats, International family law practitioners, Law professors and academics, subject matter advocates addressing particular populations vulnerable to enhanced risk of child abduction, such as

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active duty military members and victims of domestic violence , Non-Governmental organizations (NGOs) and most importantly parents and grandparents who with their children were the victims of international child abduction.

The Testimony elicited at these hearings repeatedly demonstrated that the earliest observations made by the Hague Conference on Private International Law, included in its compilation of recommendations for continued "good practice" remained salient, "Preventing abduction is a key aim of the 1980 Convention and it is widely acknowledged that it is better to prevent an abduction than to have to seek the child's return after abduction." Hague Conference "Guide to Good Practice" https://www.hcch.net/en publications-and studies details 4/pid=3639.

When first I testified, I had just completed my work on the arduous yet successful international litigation to repatriate Sean Goldman, an American child whose Brazilian mother abducted him five years earlier from his home in New Jersey. I have continued to concentrate my practice in international and interstate child custody litigation, where threat of wrongful removal or retention of children unfortunately remains common place.

When this body held the very first hearing to substantively consider actions by Congress that might be made to assist in preventing child abduction and recovering its victims, testimony revealed that the resolution of such cases were

significantly hampered by lack of compliance by Treaty "partners" (countries who had ostensibly enacted the Convention, but who were unable or unwilling to apply its provisions.) Such left-behind parents had little legal or diplomatic recourse. In the Goldman case, extraordinary Congressional and Executive efforts had been brought to bear in censuring the recalcitrant Brazilian response to what all jurists involved , had unanimously identified as an international child abduction, and insisting on Treaty compliance. However, replicating such actions in each and every case was deemed impractical and unlikely. Clearly an objective assessment of Treaty reciprocity by the appropriate authorities at the Department of State, had to be made and then communicated regularly to Congress for their oversight and action. Additionally, a mechanism for diplomatic deterrence for non-compliance needed to be created, and utilized.

Parents, attorneys, jurists, and members of law enforcement, working to prevent parental abduction, lacked objective and accurate information with which to assess the legitimate obstacles to recovery of children, were those children taken and retained abroad. That assessment is crucial to an analysis of "risk" of child abduction. (Linda Girdner, Ph.D , "Judges Guide to Rick factors of Child Abduction" presented on March 20, 1995 at the 22nd National Conference on Juvenile Justice National Council of Juvenile and Family Court Judges and the National District Attorneys Association; Uniform Child Abduction Prevention Act

(Statutory Text, Comments, Un-Official Notations) Linda Elrod, J.D., Reporter, 41 Family Law Quarterly 23 , 2007)).

With regard to countries that were not signators to the Abduction Convention, there was nothing other than anecdotal information. Finally, there was, at that time, no reliable mechanism to effectively enforce or prevent the physical removal of a child from the United States of America, even in the circumstance where a Judge had entered an order for preventative measures prohibiting travel.

What the Goldman case had demonstrated was that in the case of a Non-compliant country, no individual parent could be expected to be in a position to litigate their private case and then be forced to fight a diplomatic battle which appropriately belonged at a nations-state level. What this Committee's work illuminated was that there were hundreds of parents and children, similarly situated to Sean and David Goldman, and without legislative action, there would be thousands more.

This Committee was the first one ***ever*** to address the international abduction of a child to countries which were not Treaty signatories. Testimony identified many countries with whom the United States enjoyed positive partnership in economic or strategic efforts including Japan, India, Pakistan, to name but a few, for which the obstacles to recovery of a child were considered total. It was

urged that renewed efforts at deterring and addressing wrongful removals and retentions to these countries was overdue. Naturally, all agreed that encouraging the adoption of The Hague Convention on the Civil Aspects of International Child Abduction, would be the most efficacious remedy. However, testimony at that time, and subsequently, documented that there were religious, legal and cultural obstacles in many of these countries which would create significant difficulties in their enactment of the Treaty, or their compliance with it. It was urged that using the diplomatic devices of Memoranda of Understandings and other bi-lateral agreements addressing the nuances and individual legal and cultural challenges found in many of the family law systems, could fashion protocols to assist in the return of abducted children, while still working to encourage full participation in the Abduction Treaty.

Significantly, the United States Department of State opposed the enactment of this legislation , urging that its enactment would "threaten the efficacy of the Convention" and be inconsistent with the Department of State's deference to the Hague Conference as a body to which the United States should " continue to delegate its sovereign authority." (Testimony offered by Ambassador Susan Jacobs before the Senate Foreign Affairs Committee) The State Department had a long-standing policy against the use of MOUs or other bi-lateral instruments believing that using them would create a disincentive to consideration of Treaty. Finally,

desperate calls by parents and practitioners for border controls which would reliably enable and authorize law enforcement to prevent the wrongful removal of children from the United States, were met with concerns that such measures were too unwieldy, complicated and expensive.

The Goldman Act – Five Years Later

The heart of the Goldman act, is the comprehensive annual report to Congress which provide is intended to provide objective comprehensive information regarding the number of abduction cases, an assessment of the obstacles which may be presented to the return of a child abducted, and the efforts which have been taken and recommended to be taken in diplomatically and practically addressing those obstacles.

Objective Assessment of Non-Compliance and Actions to be taken

In the 2019 report, nine countries are identified as non-compliant. Of the 9 countries which are cited for their lack of compliance, none of the recommendations included in the report reflect event the lowest level of diplomatic sanction contained in the Federal law.

Of the nine countries included in the report, 8 of them have been included for multiple years as non-compliant, and two of them, Argentina, a Treaty signator and India have both had significant negative developments that may contribute to greater obstacles than those currently identified in the report. Argentina, India, Brazil, Peru and Jordan have all been cited as “non-compliant” from the inception of the revised reporting requirements in 2014. In the case of Argentina and Brazil, both were also cited under the prior reporting requirements applicable only to Treaty Signators.

Nevertheless, the recommendation for all of these countries is limited to one of two standard Departmental Recommendations. Either "The Department will continue to encourage [country] to accede to/ratify the Convention" (Jordan, Lebanon, Egypt, India) or "The Department will continue intense engagement with the Indian authorities to address issues of concern." (India, Argentina, Brazil, Ecuador, Peru). In the case of Argentina, Brazil, Ecuador and Peru, their status of non-compliance, in some cases for multiple years, not only impacts upon the reciprocal obligations of a Treaty partner, but begs the question of why the statutory and diplomatic measures enumerated expressly in the Goldman Act have not been recommended, let alone employed.

Additionally, in reviewing the remaining information contained in the report, one must comment upon the objective standards being employed in accurately assessing the compliance level given the objective information which has been provided. Particularly in the case of a Treaty partner. I would like to focus on just a few examples.

Japan: The report is forced to acknowledge that unless the taking parent voluntarily complies with a return order under the Convention, judicial decisions in Convention cases in Japan are not generally not enforced. An explanation of the "inability" to enforce Convention return orders is described, with the conclusion that enforcement of orders for return under Japanese law is not presently effective. While the report notes the promising information regarding the passage of implementation legislation in Japan to address enforcement challenges, it appears that Japan was removed from the non-compliant list on the promise of successful action, rather than demonstrable predictable application of the Treaty. Further, the accounting of "access" cases, a significant number of which are in actuality abduction cases

pending when Japan ratified the Convention, continues to confound. It seems clear that no access cases have been resolved by judicial process, and meaningful action on "pre-convention cases" remains illusory.

Turkey: The report on Turkey lists that country as Treaty compliant and the recommendation (which is repeated for most compliant countries) "The Department and the Turkish Central Authority will continue the effective processing and resolution of cases under the Convention" indicates no issue with compliance. However, a careful reading of the description indicates significant difficulties with Treaty compliance. The Central Authority is described as having a cooperative relationship, however unspecified delays in communication about actions to resolve Convention cases are identified as an area of concern. Alarmingly, the report indicates that found that the average time to locate a child was ***nine months.*** Further, for three abducted children, the Turkish authorities "remain unable" to locate a child. The report also identifies delays by Turkish officials that "impacted" cases, and noted that the "The Turkish court system does not automatically enforce orders."

The Hague Convention, Article 20 specifies "The return of the child under the provisions of Article 12 may be refused if this would not be permitted by fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms." The United States Department of State 2018 Human Rights Report identifies significant challenges directly impacting upon the judicial and administrative resources of the country "restricting the exercise of many fundamental freedoms". Specifically, the report identifies "compromised judicial independence and rule of law." The human rights report acknowledges that, "authorities had dismissed or suspended more than 130,000 civil servants from their jobs, arrested or imprisoned more than 80,000 citizens". The Human Rights Report

cross-references the Goldman Act report, but provides no guidance as the impact that the significant human rights issues directly impacting upon the judiciary or law enforcement are related in any way to the functioning of law enforcement, courts or the Central Authority as contemplated in the Treaty.

Recommendation: While the information presented and the content of the reports continues to improve, the role these reports play in fashioning preventative measures require the Department of State to accurately portray the current status of compliance or cooperation, not its aspirational goals. In cases in which countries have been denominated as persistently non-compliant the provisions of the Act for the recommendation of diplomatic sanctions must be addressed, rather than standard sentences promising increased vigilance

Memoranda of Understanding:

Among the countries listed as non-compliant Lebanon, Jordan and Egypt are all described to have entered "Memoranda of Understanding" regarding child abduction. In all three cases the MOUs are described in the report as related to "encouraging voluntary resolution of abduction cases and facilitation of consular access". There is no objective review regarding existence of a protocol as a result of the MOU, nor an evaluation of how the agreement might be modified or strengthened to enhance compliance. The most recent of these MOU's is 13 years old. The content of the MOU is not easily accessible to practitioners addressing these cases, nor is it clear that practitioners have been solicited to provide subject matter expertise to enhance the successful creation of alternate protocols to address abduction.

The Goldman Act specifically references the use of and negotiation of MOUs for the purpose of either improving the Treaty Compliance of existing Treaty partners, or developing protocols to assist in the location and return of child for Non-

Treaty partners. Yet the recommendations in these reports for all Non-Treaty signators is limited to encouragement to ratify the Convention.

Recommendation: Particularly for countries which for years have been identified as "non-compliant" the device of Memoranda of Understanding and Bi-Lateral agreement must be considered in moving toward compliance and reducing the obstacles to recovery of wrongfully removed or retained children. Existing MOU's should be available and posted for the information of practitioners and jurists seeking the return of such children. MOU's should be evaluated and updated when dated or ineffective. Practitioner's should be consulted to assist in identifying unique process and substantive legal issues which can be ameliorated through an MOU with the continued goal of eventual Treaty compliance.

Prevent Department Program

Most custodial arrangements and disputes are resolved by agreement. Practitioners need to have clarity as to the mechanism to employ and language to include in entering an order to prohibiting the departure of a child from the United States. Judges and lawyers need to have confirmation that the orders that they have entered have been accepted and acted upon, and the border protections initiated, before they release children from other more stringent forms of preventative measures. Right now there is no standard form of order which a Judge can sign to quickly facilitate the placement of a child on the Prevent Departure program and no mechanism to confirm that the child is on the Do Not Depart List. I have attached a proposed form of order that we have used in cases requesting the entry of a child.

Recommendation: A standard form of order for use by Judges , limited to the placement of a child on the Do Not Depart list should be approved by the

appropriate authority , (Department of State or Homeland) and available on the website of the Office of Children's Issues. An expedited standard process to notify the issuing Court that the order has been entered should be confirmed and implemented.

Conclusion:

The recognition that this Commission gave to the issue of international child abduction in 2009 recognized and identified it as an important human rights concern.

In her report to the United Nations Committee on the Rights of the Child, in special session just over twenty years ago, Dr, Nancy Faulkner presented a review of the growing research regarding the impact of child abduction .

Children who have been psychologically violated and maltreated through the act of abduction, are more likely to exhibit a variety of psychological and social handicaps. These handicaps make them vulnerable to detrimental outside influences (Rand, 1997). Huntington (1982) lists some of the deleterious effects of parental child abduction on the child victim:

1. Depression;
2. Loss of community;
3. Loss of stability, security, and trust;
4. Excessive fearfulness, even of ordinary occurrences;
5. Loneliness;
6. Anger;
7. Helplessness;

8. Disruption in identity formation; and

9. Fear of abandonment.

Many of these untoward effects can be subsumed under the problems relevant to Reactive Attachment Disorder, resulting in fear of abandonment, learned helplessness, and guilt.

Steps taken to reduce the instance of international child abduction is consistent with the protection of human rights for all children.

Conclusion

As I have previously testified, my former client David Goldman is not the only left-behind parent, and I am most certainly not the only family lawyer working to see that families and children are protected from the scourge of international parental abduction. The International Academy of Family Lawyers, the American Bar Association, Family Law Section continue to provide incredible insight and advice and a willingness to work with the members of Congress to improve the working of the Treaty, to enhance the diplomatic efforts on behalf of children at the Department of State and bring every abducted child, home.

Thank you.