

MEMORANDUM Prepared by ASHLEY TOMLINSON, Attorney
Laura Dale & Associates, P.C.
1800 St. James Place, Suite 620
Houston, Texas 77056
(713) 600-1717
atomlinson@dalefamilylaw.com

RE: Sean and David Goldman International Child Abduction Prevention and Return Act of 2014 (ICAPRA), 22 U.S.C.S. §§9101-9141

On August 8, 2014, the “Sean and David Goldman International Child Abduction Prevention and Return Act” (hereinafter “ICAPRA”) was signed into law. ICAPRA is a reaction to what Congress perceived as ICARA’s (and, therefore, the Hague Convention’s) failure to adequately combat international parental child abductions (“IPCA”). The law signifies a perhaps well-intentioned attempt to supplement and enhance implementation of ICARA. Yet, ICAPRA has both its merits and flaws.

I. BACKGROUND

a. The History: Congressional Reaction to a “Low” Number of Returned Children

ICAPRA is the first piece of federal anti-ICPA legislation enacted since ICARA and the International Parental Kidnapping Crime Act (hereinafter “IPKCA”) were signed into law in 1988 and 1993, respectively. Congress was moved to action after hearing stories about the legal hurdles U.S. parents must overcome to retrieve their children from other countries (notably, Sean Goldman’s abduction to Brazil and the ensuing high-profile legal battle). In its findings, Congress noted that over 1,000 outgoing abductions are reported every year to the Department of State. Of the reported outgoing cases, approximately one-half of the children abducted to fellow Convention countries are returned to the United States. Congress expressed concern that a child’s return depends, in part, on the participation and compliance of multiple, independent actors in each state:

“Compliance of the United States and other Convention countries, the performance of their judicial systems as reflected in the legal process and decisions rendered to enforce or effectuate the Hague Abduction Convention, and the ability and willingness of their law enforcement authorities to ensure the swift enforcement of orders rendered pursuant to the Hague Abduction Convention.”

Congress further noted in its findings that that 40% of reported abduction cases involve children taken to countries with which the U.S. does not have any reciprocal return obligations, either under the Convention or other multi/bilateral agreements. Perhaps dismayed by these statistics, Congress concluded that the most effective way to stop IPCAs (whether to Convention or non-Convention countries) is while they are in progress using tools already available to Federal, State and local law enforcement.

b. Purpose: Prevention, Resolution and Enforcement

ICAPRA has three general objectives: (1) prevention; and (2) resolution of pending cases; and (3) enforcement of existing obligations. In keeping with these objectives, Congress identified ICAPRA’s specific “purposes,” which include:

1. Assist left-behind parents in quickly resolving cases and maintaining safe and predictable contact with their child while an abduction case is pending;
2. To enhance the prompt resolution of abduction and access cases;
3. To detail an appropriate set of actions to be undertaken by the Secretary of State to address persistent problems in the resolution of abduction cases;
4. To establish a program to prevent wrongful abductions; and
5. To increase interagency coordination in preventing international child abduction by convening a working group composed of presidentially appointed and Senate confirmed officials from the Department of State, the Department of Homeland Security, and the Department of Justice.

II. KEY PROVISIONS

ICAPRA attempts to achieve the foregoing purposes by enacting three categories of key provisions: (1) Department of State Actions; (2) Actions by Secretary of State; and (3) Prevention of International Child Abductions

a. Title I – Department of State Actions (22 U.S.C.S. §§9111-9114)

Under Title I of ICAPRA, Congress outlined specific actions to be taken by the Department of State. These include an expansion of the reporting requirements, additional assistance to left-behind parents, and establishment of new bilateral agreements with non-Convention countries.

i. Reporting Requirements

ICAPRA requires the Department of State to continue its existing obligation to compile an annual report. ICAPRA, however, provides a much more detailed list of what the Department of State is required to include in its annual reports. Unlike ICARA’s reporting requirements, ICAPRA mandates that the Secretary of State include the following information in addition to general information about noncompliance:

1. Descriptions of other procedures for resolving abductions in each country in which there are pending return cases;
2. An explanation of the failure or delay in submission of abduction and access cases from the Central Authority of a foreign country to its judicial or administrative authorities;
3. The number of unresolved cases in which law enforcement have not located the child, failed to undertake serious efforts to locate the child, and failed to enforce a return order;
4. Recommendations to improve the resolution of abduction and access cases in countries in which there are unresolved cases.

ICAPRA's annual reporting standards also include a specific requirement for the Secretary of State to notify Congress of noncompliant countries. Under the notification requirement, the Secretary of State must include in its annual report a list of each country that has engaged in a "pattern of noncompliance in cases of child abduction during the preceding 12 months." Noncompliance means the persistent failure: (1) of a Convention country to implement or abide by the Convention; (2) of a non-Convention country to abide by bilateral procedures established between the United States and that country; and (3) a non-Convention country to work with the Department of State to resolve abduction cases. The notice must also identify all actions that have been taken by the Secretary of State with respect to that country, the basis for the Secretary's determination of noncompliance, and whether noneconomic policy options to resolve noncompliance have reasonably been exhausted.

In addition to the annual report, ICAPRA also requires the Secretary to submit written notification to the Member of Congress representing the legal residence of a left-behind parent if that parent: (1) reports an abduction; and (2) consents to such notification.

ii. Assistance to Left-Behind Parents

ICAPRA mandates the implementation of additional standards and methods for improving assistance to left-behind parents. First, ICAPRA requires all U.S. diplomatic and consular missions abroad to take the following actions:

1. Maintain a consistent reporting standard with respect to abduction and access cases;
2. Designate at least one senior official in each mission to assist left-behind parents who are visiting the country or are otherwise trying to resolve their abduction or access case;
3. Monitor developments in abduction and access cases.

The Secretary of State, as a department, must develop and implement written strategic plans for engagement with any Convention or non-Convention country in which there are 5 or more pending abduction cases.

iii. Bilateral Procedures

By February 4, 2015, the Secretary of State was required to initiate a process to develop and enter into bilateral procedures with non-Convention countries that are unlikely to become Convention members. The Secretary was also required to initiate the same process with Convention countries that have unresolved abduction cases that occurred before the Convention entered into force between the U.S. and that country. These bilateral procedures are to include the following elements:

1. Identification of the Central Authority
2. Identification of a judicial or administrative authority that will adjudicate abduction and access cases;
3. Identification of the law enforcement agencies;
4. Identification of the procedures that have been implemented to ensure the immediate enforcement of an order for the child's return (including by conducting an investigation

to ascertain the child's location, providing protection to the child, and retrieving the child and making appropriate arrangements for the child's return)

5. Implementation of a protocol to effectuate the return of an abducted child within 6 weeks after the application has been submitted to the judicial or administrative authority;
6. Implementation of protocol for the establishment and protection of the rights of interim contact during pending cases;
7. Implementation of protocol to establish periodic "welfare" visits between the child and a U.S. embassy or consular official.

b. Title II – Actions by the Secretary of State (22 U.S.C.S §§9121-9125)

Title II establishes a series of sometimes compulsory mechanisms to enforce other countries' compliance with the Convention or bilateral agreements. These enforcement mechanisms are implemented through the Secretary of State and operate independent of the Hague Conference, even if the noncompliant country is a Convention country. The mechanisms consist of two steps: (1) determinations; and (2) actions.

1. Determinations by the Secretary of State

ICAPRA requires the Secretary of State to make the two categories of determinations:

- a) Category 1: Unresolved Cases – For each abduction or access case relating to a child whose habitual residence in is in the United States that remains pending or is otherwise unresolved on the date that is 12 months after the date on which the State Department submits the case to a foreign country, the Secretary of State shall determine whether the government of the foreign country has failed to take appropriate steps to resolve the case.
- b) Category 2: Patterns of Noncompliance in Abduction Cases – By April 30 of each year, the Secretary of State is required to review the status of abduction and access cases in each foreign country to determine whether the government of each country has engaged in a pattern of noncompliance for the preceding 12 months. The Secretary's findings are to be included in its annual report. Further, the Secretary of State must seek to determine the agencies or instrumentalities of the government of each country determined to have engaged in a pattern of noncompliance that are responsible for the pattern of noncompliance.

2. Actions by the Secretary of State

Upon making either of the two categories of determinations, IPCA requires the Secretary of State to take "all appropriate actions" to either resolve a pending case or to put an end to a country's pattern of noncompliance. In all cases, ICAPRA's recommended responses centers around a list of 8 actions. The extent of discretion granted to the Secretary varies, however, depending on whether there is a pattern of overall noncompliance.

a) Actions in Response to Unresolved Cases –

If the Secretary makes a Category 1 determination (i.e. there is a failure by a foreign government to resolve an abduction or access case), ICAPRA generally provides that the Secretary’s chosen course of action should be tailored to the “nature and severity of the governmental failure.” And before taking any action, the Secretary should, if possible, seek to initially respond by communicating with the country’s Central Authority. In the event those communications are not fruitful, the Secretary *should* take one or more of the following 8 actions as “expeditiously as practicable.”

1. a démarche;¹
2. an official public statement detailing unresolved cases;
3. a public condemnation;
4. a delay or cancellation of 1 or more bilateral working, official, or state visits;
5. the withdrawal, limitation, or suspension of United States development assistance;
6. the withdrawal, limitation, or suspension of United States security assistance;
7. the withdrawal, limitation, or suspension of assistance to the central government;
8. a formal request to the foreign country concerned to extradite an individual who is engaged in abduction and who has been formally accused of, charged with, or convicted of an extraditable offense.

The Secretary does have the discretion to substitute any of the 8 actions, if the Secretary determines that the action is “commensurate in effect to the action substituted” and would “substantially further the purpose of this Act.” Should the Secretary decide to take any action, the Secretary *should* also direct the Chief of Mission in that foreign country to directly address the resolution of the case with the senior officials in that government.

b) Actions in Response to a Determination of Pattern of Noncompliance –

Within 90 days² of determining that a country has been noncompliant, the Secretary is *required* to take one or more of the following actions:

1. a démarche;
2. an official public statement detailing unresolved cases;
3. a public condemnation;
4. a delay or cancellation of 1 or more bilateral working, official, or state visits;
5. the withdrawal, limitation, or suspension of United States development assistance;

¹ The Department of State defines “démarche” as a “request or intercession with a foreign official, e.g., a request for support of a policy, or a protest about the host government's policy or actions.”

² The Secretary has the discretion to delay action for up to 180 days to allow for further negotiations, to review corrective action taken by the noncompliant country, or in anticipation that corrective action will be taken within the extended period. However, it seems this extension is not available to Convention countries.

6. the withdrawal, limitation, or suspension of United States security assistance;
7. the withdrawal, limitation, or suspension of assistance to the central government;
8. a formal request to the foreign country concerned to extradite an individual who is engaged in abduction and who has been formally accused of, charged with, or convicted of an extraditable offense.

Again, The Secretary does have the discretion to substitute any of the 8 actions, if the Secretary determines that the action is “commensurate in effect to the action substituted” and would “substantially further the purpose of this Act.”

In addition, the Secretary must: (1) direct the Chief of Mission in that country to directly address the systemic problems that led to such determination; and (2) inform senior officials in the foreign government of the potential repercussions related to such designation. If the Secretary has identified the agencies or instrumentalities responsible for the pattern of noncompliance, the Secretary must “appropriately target actions in response to such noncompliance” and “engage with senior government officials to effectively address such noncompliance.”

In all cases, the Secretary has the authority to forego any of these actions if the Secretary determines and notifies Congress that the government in question has resolved the abduction case or has ended its pattern of noncompliance. The Secretary may also choose not to take any of the prescribed actions if the “national security interests of the United States requires the exercise of such waiver authority.” Finally, the Secretary also has the ultimate discretion to terminate any actions. Any action taken pursuant to ICAPRA terminates when the Secretary submits a written certification to Congress that government has either resolved any pending case or has taken “substantial and verifiable steps” to correct its pattern of noncompliance.

c. Title III – Prevention of International Child Abduction

As noted above, Congress concluded that the most effective way to combat abduction is to prevent parents from wrongfully removing children from the United States. Therefore, in addition to enforcement mechanisms, ICAPRA also includes preventative measures. The law attempts to prevent abductions through increased interagency cooperation and outreach to judicial and administrative authorities abroad.

ICAPRA’s first line of defense is U.S. Customs and Border Patrol (“CBP”). The law amends the Homeland Security Act of 2002 by requiring that the CBP, Department of State, Attorney General and FBI establish an inter-agency program. The purpose of this program is to facilitate communication to CBP in sufficient time to prevent a child’s departure. Ideally, this program would enable CBP to stop a child at the border in cases in which a parent has obtained and presented to the authorities an order prohibiting the child’s removal from the U.S. ICAPRA also mandates the creation of an interagency working group composed of presidentially appointed and Senate confirmed officials from the Department of State, Department of Homeland Security, and the Department of Justice.

Finally, ICAPRA provides authorization for judicial training abroad. The Secretary of State is required to seek to provide training, directly or through another government agency or nongovernmental organization, on the effective handling of abduction cases. Such training programs should be implemented in countries in which there are a significant number of pending, unresolved abduction cases or that have been designated as “noncompliant.” In order to facilitate these programs, ICAPRA appropriates \$1,000,000 to the Secretary of State for each of the fiscal years of 2015 and 2016.

III. ICAPRA: THE PROS AND CONS

ICAPRA is Congress’s response to a frustrating reality: many countries have no reciprocal obligation to return abducted children and some countries fail to implement or adhere to their existing obligations. The Congressional history reveals a general frustration amongst congressmen and their constituents with the failure of some countries to abide by their obligations under the Convention, and the lack of corresponding repercussions or enforcement mechanisms. There was also an expression of overall dissatisfaction with the resources (including competent legal advice) available to left-behind parents. While ICAPRA may represent a noble effort to improve these inadequacies, the benefits of this legislation are also coupled with troublesome flaws.

a. Pro: Additional Resources for Parents

One of the most frequently cited complaints in the testimony gathered by Congress is the lack of resources and guidance available to left-behind parents in foreign countries. ICAPRA takes a significant step by requiring at least one senior official in each mission to assist left-behind parents. Not only can this official help facilitate access, but also help the left-behind parent to locate counsel and/or investigators, contact the appropriate authorities, or otherwise assist parents in navigating a foreign legal system. The bilateral procedures will also likely result in much-needed resources for left-behind parents searching for their children in non-Convention countries. As part of each set of procedures, the Secretary of State should identify procedures in that country for locating and retrieving children, as well as protocol for “welfare” visits between the child and U.S. consular officials.

b. Pro: Strengthening Prevention Measures

As many left-behind parents know, it is sometimes all too easy to remove a child from the U.S. There are very few exit controls in place to stop a parent and child from leaving the country. ICAPRA attempts to provide additional exit controls through interagency coordination. Specifically, ICAPRA calls for the establishment of an inter-agency program to notify CBP in time to stop a child from leaving the country. This program only applies, however, to cases in which there is an order prohibiting the child from leaving the country.

ICAPRA also calls for general interagency coordination through the creation of a working group. The working group’s mandate is broad: “prevent international parental child abduction.” Moreover, the mandate is open-ended; there is no deadline by which the working group must make its recommendations for preventing IPCAs or otherwise implement reforms.

c. Pro: Strengthening Diplomatic Tools to Resolve Pending Cases and Enforce Compliance

According to the Department of State Office of Children's Issues, diplomacy has been central to the Convention's success and to securing the return of more children.³ Perhaps ICAPRA's greatest achievement is the extent to which it creates stronger diplomatic tools. These new tools are now available both inside and outside the Convention structure.

One of the most glaring inadequacies of the existing IPCA prevention/recovery regime is the number of countries with which there are no reciprocal obligations to return abducted children. ICAPRA attempts to fill this gap by setting a deadline for the Secretary of State to initiate the development and implementation of bilateral procedures with non-Convention countries. Under ICAPRA's guidelines, these bilateral agreements follow a structure similar to the Convention and provide additional protection to U.S. citizens in countries that, for some reason, are not likely to join the Convention. Such bilateral agreements are not unheard of between Convention and non-Convention countries. In fact, several Convention countries, including the U.S., have existing bilateral agreements with non-Convention countries. The Hague Conference maintains a current list of all such existing bilateral agreements.⁴

ICAPRA also encourages more proactive diplomatic action to improve the implementation and enforcement of the Convention. Specifically, all of ICAPRA's determination and action provisions require the Secretary or the Department to engage their foreign counterparts in a, hopefully, productive dialogue. Even prior to ICAPRA's enactment, the U.S. has participated in multilateral diplomatic conversations to improve implementation in existing treaty countries and to encourage new countries to join the Convention. The U.S. has also engaged in bilateral diplomatic dialogue with treaty partners to improve the Convention's efficacy between two countries. For example, the U.S. has been actively engaged with Mexican officials to improve the Convention's effectiveness between the two countries. In her testimony to the Senate Committee on Foreign Relations, Ambassador Susan Jacobs (Special Advisor for Children's Issues), described the "persistent diplomatic engagement" with Mexico to improve implementation and enforcement of the Convention. Through these bilateral efforts, Mexico went from non-compliant to compliant, with more children being returned than ever before.⁵ By implementing provisions that *require* the Secretary or Department to initiate similar conversations with foreign officials, ICAPRA may help to improve the efficacy of the Convention.

³ http://www.foreign.senate.gov/imo/media/doc/022714_Hearing_Testimony%20-%20Susan%20Jacobs1.pdf

⁴ http://www.hcch.net/index_en.php?act=publications.details&pid=5215&dtid=28

⁵ http://www.foreign.senate.gov/imo/media/doc/022714_Hearing_Testimony%20-%20Susan%20Jacobs1.pdf

d. Con: Circumventing the Hague Conference Through Unilateral Enforcement Mechanisms

While diplomacy is crucial to the Convention, ICAPRA does not necessarily adopt a sound diplomatic approach. ICAPRA questions the existing efficacy of the existing diplomatic structure: the Hague Conference. And, in many ways, ICAPRA supplants the multilateral Hague Conference with unilateral action by the Department of State. This is perhaps the most troublesome aspect of ICAPRA.

At the root of this issue is an ongoing debate about the fundamental notion of national sovereignty. Should the U.S. implement its own domestic laws to more aggressively enforce other countries' compliance with their international obligations? Or should the U.S. continue to participate primarily by delegating its sovereign authority to the Hague Conference? Recent experience suggests that ICAPRA's approach to enforcement may not be constructive. It is arguably a visceral, and not a carefully reasoned, reaction to a complicated international problem. Moreover, the law establishes a precedent for other countries to adopt similar legislation, and possibly trigger a domino effect that would threaten the efficacy of the Convention.

The Hague Conference, of which the U.S. is a member, establishes the overarching structure for the Hague Convention. Through the Hague Conference, member states negotiated, drafted and adopted the Hague Abduction Convention in its present form. Since its inception, Special Commission meetings have convened to address ongoing issues regarding the Convention, including issues of implementation and enforcement.⁶ The Child Abduction Section of the Hague Conference has also coordinated multiple, ongoing efforts to encourage new countries to join the Convention, harmonize practices between members, and address problems of implementation and enforcement. For example, the Child Abduction Section publishes Guides to Good Practice for member countries.⁷

ICAPRA circumvents this structure in favor of unilateral domestic policy. However, an aggressive, unilateral domestic policy may not be the most effective way to ensure compliance with a treaty negotiated through a multilateral nongovernmental organization. In her speech to the Senate on the Committee of Foreign Relations, Ambassador Jacobs emphasized that the Hague Conference, "often viewed by foreign governments as a neutral party, is an invaluable partner" in the effort to persuade countries to ratify the Convention or to promote implementation of and compliance with the Convention.⁸ By circumventing the Convention and

⁶ http://www.hcch.net/index_en.php?act=conventions.publications&dtid=57&cid=24

⁷ These guides have included guides on both implementation and enforcement:
<http://www.hcch.net/upload/guide28enf-e.pdf>

⁸ http://www.foreign.senate.gov/imo/media/doc/022714_Hearing_Testimony%20-%20Susan%20Jacobs1.pdf

the Conference as neutral bodies through which to negotiate better enforcement mechanisms, ICAPRA runs the risk of alienating our treaty partners.

Multilateral cooperation is critical to the operation of the Convention. The Hague Conference was created as a multilateral nongovernmental body to negotiate instruments of private international law. The traditional function of private international law is to determine jurisdiction, applicable law, and to lead parties to the appropriate national legal system for determining their rights. Also inherent in the concept of private international law is the concern for the equality of states, proper recognition of territorial authority, and to prevent the damaging effect of tit-for-tat treatment between two or more countries. ICAPRA arguably undermines the such objectives as they are reflected in the Hague Convention.

By enacting its own punitive, enforcement mechanisms, ICAPRA potentially creates a precedent for other states to adopt their own punitive measures against the U.S. and other countries (a circumvention of the Convention *en masse*). As noted by the President of the International Centre for Missing & Exploited Children, the U.S. itself has been accused by other countries of not observing reciprocity under the Convention.⁹ In order to avoid this tit-for-tat behavior, the development of enforcement mechanisms should perhaps be developed through the Hague Conference *or* left to carefully measured, discretionary bilateral diplomatic action.

Ambassador Jacobs emphasized to the Senate that “strong diplomatic relationships with governments is the best way to obtain assistance to our requests to the furthest extent allowed by the country’s laws” The U.S. has successfully used its influence and employed diplomatic channels outside the Conference to pressure countries into compliance with the Convention.¹⁰ Yet, according to Ambassador Jacobs, success is most likely achieved through “strong diplomatic relationships” developed through careful diplomacy. It is possible that ICAPRA has gone too far by codifying mandatory punitive actions that erode some of the Secretary’s diplomatic discretion. And most importantly, these possibly heavy-handed enforcement mechanisms were created outside of and in circumvention of the Hague Conference. ICAPRA may prove to be an overly-broad domestic policy to address a problem best resolved through careful, multilateral diplomacy (i.e. the Hague Conference).

d. Pro: Judicial Training

The Hague Conference has long recognized issues regarding implementation, enforcement and consistent application of the Convention. As noted above, the Conference has attempted to address these issues and achieve greater overall harmonization through Special Commission meetings and publications of guides to good practice. In addition, the Conference has taken several other steps to provide training and guidance to judicial and administrative authorities. For example, the Conference has coordinate a multitude of judicial seminars¹¹ and created the

⁹ http://www.foreign.senate.gov/imo/media/doc/022714_Hearing_Testimony%20-%20Ernie%20Allen.pdf

¹⁰ Ambassador Jacobs cites as an example the successful diplomatic efforts by the Department of State and Presidents Clinton and Bush to address the issue of Germany’s ongoing noncompliance with the Convention.

¹¹ http://www.hcch.net/index_en.php?act=publications.details&pid=5214&dtid=46#malta

“International Hague Network of Judges.”¹² The Conference also publishes the Judge’s News Letter, which is written by and for judges with the aim of exchanging the information necessary for efficient judicial cooperation.¹³

ICAPRA also encourages judicial training “on the effective handling of parental abduction cases” and has appropriated \$1,000,000 for training programs in 2015 and 2016. The training programs may be conducted directly by the Department of State or through another government or nongovernmental agency. While judicial training may significantly improve compliance, the funds may be best spent by contributing to existing judicial training programs established by the Hague Conference, a neutral party.

¹² <http://www.hcch.net/upload/haguenetwork.pdf>

¹³ <http://www.hcch.net/upload/newsletter/nl2013tome20en.pdf>