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## Who's Afraid of Big Government- The Federalization of Intercountry Adoption: It's Not As Scary As It Sounds

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## COMMENTS

### WHO'S AFRAID OF BIG GOVERNMENT? THE FEDERALIZATION OF INTERCOUNTRY ADOPTION: IT'S NOT AS SCARY AS IT SOUNDS

The problems involved with intercountry adoption are evident and grossly extensive.<sup>1</sup> The federal government should assert absolute control over intercountry adoption so the current arduous procedure may be substantially simplified. As the process exists, first, the sending countries subject prospective parents to exacting evaluations for parental fitness.<sup>2</sup> Second, inconsistencies between foreign and domestic law can cause an abandoned or unwanted child to be legally unadoptable.<sup>3</sup> Third, the U.S. government requirements of immigration, orphan status, and citizenship create substantial obstacles to adoption of foreign-born children. Finally, federal and state law inconsistencies cause further unnecessary difficulties.<sup>4</sup> This is largely due to the individual states' own criterion for concluding the adoption.<sup>5</sup> "The greatest flaw in the existing system of transnational adoption is its division of authority between state and federal authorities in determining a child's adoptability."<sup>6</sup>

In response, this comment offers and examines one solution that may not alleviate all of the complications, but suggests that authorizing more federal power

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1. This article owes its inspirations to a number of sources both personal and scholarly. The pioneering works of Elizabeth Bartholet in *FAMILY BONDS: ADOPTION AND POLITICS OF PARENTING* (1993), and *International Adoption: Propriety, Prospects, and Pragmatics* 13 J. AM. ACAD. MATRIM. LAW 181 (1996), and Richard R. Carlson in *Transnational Adoption of Children*, 23 TULSA L.J. 317 (1988) has been particularly important to me. The spirit and learning of those works infuse this article. While I cite these works at specific points, I feel the presence of those works in every word I write. I can only hope that by standing on the shoulders of those giants, I have offered my own contribution to this area of the law.

2. See ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING* 33 (1993) [hereinafter BARTHOLET, *FAMILY BONDS*].

3. See Stacie I. Strong, *Children's Rights in Intercountry Adoption: Towards a New Goal*, 13 B.U. INT'L L.J. 163, 175 (1995).

4. See Richard R. Carlson, *Transnational Adoption of Children*, 23 TULSA L.J. 317, 318-20 (1988).

5. See *id.* at 351-52. States generally require two determinations to grant an adoption decree for a foreign child. The child must be adoptable and the parents must be deemed suitable to adopt. See *id.* at 352.

6. *Id.* at 371.

over intercountry adoptions would appreciatively simplify the process. As the process could exist, first, the receiving country via the federal government, would administer a thorough home study to protect against baby brokering and ensure parental fitness. Second, the sending country would administer any and all procedures it requires and provide proof to the receiving country that it and its citizens have relinquished all claim on the child. Third, the federal government through its embassies would finalize the adoption and citizenship requirements abroad. In total, the process would be conducted with less ambiguity and would be completed with greater efficiency. This comment demonstrates that reform is necessary because it serves the best interest of the child. The federalization of intercountry adoption is not as scary as it sounds.

### I. BACKGROUND

Intercountry adoption has increased from 8,102 children in 1989 to 13,620 children in 1997.<sup>7</sup> Last year over half of the internationally adopted children came to the United States from Russia (3,816), China (3,597), and South Korea (1,654).<sup>8</sup> This year an estimated 12,000 orphaned children will be adopted by U.S. citizens.<sup>9</sup> Adoption professionals have proposed that domestic adoptions have become less desirable because of open adoptions.<sup>10</sup> An open adoption is one in which the birth parents' and the adoptive parents' identities are revealed to each other.<sup>11</sup> In addition, intercountry adoption has become a sensible alternative to prospective adoptive parents because of the decline in the number of adoptable American children.<sup>12</sup>

The original purpose of adoption was to provide childless couples with heirs to "avoid extinction of the family" and "perpetuate rites of family religious worship."<sup>13</sup> Modern adoption and particularly international adoption, now serves a more reciprocal function of meeting the needs of children who would otherwise be without homes and families, as well as the adults who would otherwise be without children. However, even though children in other countries are in need of homes and the United States has adults who are willing to adopt, the arduous international adoption process

7. See *Immigrant Visas Issued to Orphans Coming to the United States Top Countries of Origin* (visited Aug. 18, 1998) <[http://travel.state.gov/orphan\\_numbers.html](http://travel.state.gov/orphan_numbers.html)>.

8. See *id.* Other sending countries beginning with the country of most children relinquished to U.S. citizens in 1997 include: Guatemala, Romania, Vietnam, India, Colombia, Philippines, Mexico, Bulgaria, Haiti, Latvia, Brazil, Ethiopia, Lithuania, Poland, Bolivia, Hungary, and Cambodia. See *id.*

9. See *Health Law Seen as Bar to Foreign Adoptions*, SEATTLE TIMES, July 28, 1997, at B3.

10. See Liz Stevens, *The Adoption Option: Going Abroad to Find a Child is Becoming More Practical*, FORT WORTH STAR-TELEGRAM, Dec. 26, 1996, at 1.

11. See *id.*

12. See Stephanie Sue Padilla, *Adoption of Alien Orphan Children: How United States Immigration Law Defines Family*, 7 GEO. IMMIGR. L.J. 817, 818 (1993). The ratio of prospective American adoptive parents to available American children was estimated at eleven to one. See *id.* The reason for the decline in the number of American children available for adoption includes but is not limited to a decline in the U.S. birth rate, the availability of adoption, and policies and groups that oppose transracial adoption of children. See *id.*

13. Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 446 (1971).

delays and interferes with the future benefit to both parties.<sup>14</sup> The law purports to protect the interest of children but instead has become a barrier to many children waiting for homes in the United States.<sup>15</sup> Several articles have been written on the extensive process involved, but no solutions have been thoroughly analyzed.<sup>16</sup>

## II. THE PROCESS OF INTERCOUNTRY ADOPTION: AN OVERVIEW

### A. *The Foreign Governments*

Prospective parents and adoptees must satisfy three governmental entities in order to successfully complete the process of intercountry adoption. In the United States, prospective parents must comply with the regulations of the federal government, the foreign government, and finally the individual state government.<sup>17</sup> The sending country, that which relinquishes the child for adoption,<sup>18</sup> is the first governmental entity for future parents to satisfy. Both sending and receiving countries vary on what qualifies as and what determines relinquishment. Therefore, a sending country may consider a child available for adoption, but the receiving country may not accept the child.

For example, South Korea has a sophisticated process wherein detailed documentation eliminates ambiguity as to the availability of a child for adoption under its laws.<sup>19</sup> However, that documentation still may not comply with the standards for an American state's adoption.<sup>20</sup> Furthermore, some countries have no adoption law and facilitate adoption through custom and tradition often without any documentation.<sup>21</sup> Lack of documentation, though not a problem for the sending country, can generate problems for a state adoption proceeding in the United States. The problem arises because most states require consent to grant an adoption. Consent occurs when the courts officially and justifiably terminate the rights of the natural parents in order to serve the best interest of the child.<sup>22</sup> Therefore, without

14. See generally Elizabeth Bartholet, *International Adoption: Propriety, Prospects and Pragmatics*, 13 J. AM. ACAD. MATRIM. LAW. 181, 184-85 (1996) [hereinafter Bartholet, *International Adoption*].

15. See *id.* at 185.

16. See, e.g., Carlson, *supra* note 4, at 335-57; Rosanne L. Romano, *Intercountry Adoption: An Overview for the Practitioner*, 7 TRANSNAT'L LAW. 545 (1994); see also, BARTHOLET, FAMILY BONDS, *supra* note 2, at 161-62 (suggesting solutions to the problems of intercountry adoption including: eliminating immigration standards that have a narrow orphan definition; requiring U.S. courts to recognize foreign adoption decrees; eliminating a duplicative adoption process within the states; making U.S. citizenship automatic when the adoption is finalized; continuing with additional agreements, such as the Hague Convention, that pressure all countries to simplify and expedite the adoption process).

17. See Carlson, *supra* note 4, at 335-57. See also Erika Lynn Kleinman, *Caring for Our Own: Why American Adoption Law & Policy Must Change*, 30 COLUM. J.L. & SOC. PROBS. 327, 331 (1997).

18. See Kleinman, *supra* note 17, at 331.

19. See Carlson, *supra* note 4, at 339.

20. See *id.*

21. See *id.* at 338.

22. See, e.g., ARIZ. REV. STAT. ANN. § 8-106 (West Supp. 1997); COLO. REV. STAT. § 19-5-207 (1997); HAW. REV. STAT. § 571-51 (1993); KAN. STAT. ANN. § 59-2136 (1994 & Supp. 1997); MASS GEN. LAWS ANN. ch. 210, § 3 (West 1998); MICH. COMP. LAWS ANN. § 710.43 (West 1998); N.M. STAT. ANN. § 32A-5-16 (Supp. 1998); OR. REV. STAT. § 109.312 (1997); TEX. FAM. CODE ANN. § 162.010 (West Supp. 1996).

documentation state courts may be reluctant to find the requisite consent to legally grant the adoption.<sup>23</sup>

Sending countries generally have three steps to determine whether a child is available for adoption: (1) notarized documentation for entry;<sup>24</sup> (2) a favorable home study evaluation;<sup>25</sup> and, (3) a formal or conclusive adoption proceeding.<sup>26</sup> First, a sending country may have a threshold requirement before a prospective parent is permitted to even enter the country.<sup>27</sup> Though procedures differ somewhat among sending countries, the parents may be required to submit notarized copies of their mental and physical health, character references from employers and ministers, and police reports revealing an absence of criminal activity.<sup>28</sup> Second, sending countries often administer their own home study to determine parental fitness.<sup>29</sup> The home study may consist of examinations of the prospective parents by foreign doctors, psychiatrists, police and courts.<sup>30</sup> Though this process is tedious and mentally exhausting for the parents, it is a reasonable step in the international quest for protecting the best interest of children.<sup>31</sup> Third, sending countries may have some finalization process. For example, China requires the prospective parents to officially adopt the child under Chinese law.<sup>32</sup> However, other countries such as North Korea have no official judicial procedure that releases the child for adoption, and the adoption proceeding is reserved for the receiving country alone.<sup>33</sup> In either situation and as far as the sending countries are concerned, the child is free for the prospective parents to adopt.

Regardless of the fact that the sending countries relinquish all rights to the child, the receiving countries subject the parents and the children to further examination, based on their own requirements for adoptability.<sup>34</sup> Unfortunately, the requirements of the receiving country are often inconsistent with those of the sending country.<sup>35</sup> Sending countries generally require consent to the adoption or abandonment of the

23. See generally *In re Adoption of W.J.*, 942 P.2d 37 (Kan. 1997).

24. See, e.g., BARTHOLET, FAMILY BONDS, *supra* note 2, at 123-24.

25. See, e.g., *id.* at 126-36.

26. See Carlson, *supra* note 4, at 340-41.

27. See BARTHOLET, FAMILY BONDS, *supra* note 2, at 124.

28. See generally *id.* Bartholet adopted two children from Peru and had to obtain notarized copies of all documents mentioned just to enter Peru as a prospective adoptive parent. See *id.* at 123-24. See also Romano, *supra* note 16, at 565-567 (discussing requirements for parents adopting children from Honduras).

29. See BARTHOLET, FAMILY BONDS, *supra* note 2, at 126-36 (describing the difficulties Bartholet personally experienced while adopting her children from Peru).

30. See *id.*

31. See generally Hague Convention Conference on Private International Law: Final Act of the 17th Session, Including the Convention of Protection of Children and Cooperation in Respect of Intercountry Adoption, May 29, 1993 reprinted in I.L.M. 1134 [hereinafter Hague Convention] ("The objects of the present Convention are . . . to establish safeguards to ensure that intercountry adoptions take place in the best interest of the child and with respect to his or her fundamental rights as recognized in international law.").

32. See, e.g., *In re Adoption of W.J.*, 942 P.2d 37, 41 (Kan. 1997) (describing a prospective father's travel to China, adoption of a child under Chinese law, and subsequent return with a foreign adoption decree). See also Carlson, *supra* note 4, at 341.

33. See Carlson, *supra* note 4, at 340.

34. See *id.* at 342, 346.

35. See *id.* at 341.

child by the birth parents.<sup>36</sup> Each sending country has its own threshold for consent;<sup>37</sup> problems occur when those standards do not coincide with the standards of the particular receiving country. Similarly, the standard for abandonment, which may preclude consent, differs among countries.<sup>38</sup> Then U.S. standard for abandonment “does not exist if the parent intends to return to the child at *any* time in the future.”<sup>39</sup> Critics argue that the inconsistent standards between receiving and sending countries can result in what is termed as baby brokering.<sup>40</sup> The goal of the recent Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption (“Hague Convention”)<sup>41</sup> is to abolish baby brokering and facilitate intercountry adoptions in an organized and efficient manner.<sup>42</sup> Therefore, ratification and adherence to the Hague Convention will completely eliminate baby brokering.

### *B. The Federal Government*

Prospective parents must also satisfy the U.S. government’s requirements which are complicated by an amalgamation of both federal and state law.<sup>43</sup> Federal officials make the initial determinations (1) that the prospective parents are fit according to their state’s laws, and (2) that the state court would approve the adoption.<sup>44</sup> Even though the state law almost completely governs adoptions, federal law has reached intercountry adoptions because of its power over immigration and naturalization.<sup>45</sup> This power is exclusive and inherent in the federal government and has been delegated to the Immigration and Naturalization Services (“INS”).<sup>46</sup> The immigration laws authorize immediate entry of relatives of U.S. citizens.<sup>47</sup> However, the potential adoptees are not legally citizens.<sup>48</sup> Nevertheless, the federal government will classify

36. See Strong, *supra* note 3, at 174.

37. See *id.* Consent can most commonly be granted by the following: both biological parents, an unmarried biological mother, the father of an illegitimate child, a stepfather, a widow or widower, a parent whose spouse is unavailable, a guardian, an agency who is accountable for the child, or a child who is over a given age. See *id.*

38. See *id.*

39. See *id.* (emphasis added) (“Abandonment is usually defined as a voluntary act which includes the intent to abandon, as well as the physical surrender of parental duties.”). There are two kinds of abandonment, conditional and unconditional. However, the United States only recognizes unconditional abandonment, as fulfilling an abandonment requirement. See *id.*

40. See *id.* at 175.

41. See Hague Convention, *supra* note 31.

42. See *id.* at arts. 6-8. Articles 6 and 7 require the establishment of central authorities for each country in order to ease the cooperation among states which should in turn protect the children. Article 8 explicitly dictates to the central authorities a duty and power to take “all appropriate measure[s] to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention.” *Id.*

43. See Carlson, *supra* note 4, at 345-46 (stating that the federal standard relies on state law because the government takes into account the laws of the state in which the child is to be adopted in determining parental fitness).

44. See *id.*

45. See Greg Waller, *When the Rules Don't Fit the Game: Application of the Uniform Child Custody Jurisdiction Act and the Parental Kidnaping Prevention Act to Interstate Adoption Proceedings*, 33 HARV. J. ON LEGIS. 271, 287-88 (1996).

46. See *Fong Yue Ting v. United States*, 149 U.S. 698, 713-14 (1893); *Truax v. Raich*, 239 U.S. 33, 42 (1915); *Waldei v. Immigration and Naturalization Serv.*, 938 F. Supp. 362, 364 (1996).

47. See Carlson, *supra* note 4, at 351. See also *Immigrant Petitions*, 8 C.F.R. § 204.3(a)(2) (1998). “A child who meets the definition of orphan . . . is eligible for classification as the immediate relative of a [U.S.] citizen.” *Id.*

48. See 8 U.S.C.A. § 1433 (West Supp. 1998).

a foreign adoptable child as an immediate relative of a U.S. citizen if the child is determined to be an orphan by INS standards.<sup>49</sup> Indeed, the INS views the processing and adjudication of orphan cases as a priority.<sup>50</sup>

### 1. Home Study Requirement

A successful petition for immigration status must satisfy two requirements: (1) the prospective parents can provide a suitable home and environment for the child; and (2) the child is an "orphan" according to the federal regulations.<sup>51</sup> To assess the first federal requirement, a state agency is required to perform an initial home study.<sup>52</sup> The federal regulations require the prospective state of residence to dedicate either a state agency or license an outside agency to execute a home study.<sup>53</sup> After one of these agencies has performed the home study, the agency must submit a favorable recommendation in a petition to the Attorney General for immigration classification.<sup>54</sup> However, subsequent to the home study for immigration status, a state may perform a later home study to evaluate the interaction between the prospective parents and the child.<sup>55</sup>

The federal home study is "a process for screening and preparing prospective adoptive parents."<sup>56</sup> This study must specifically include a personal interview, home visit, assessment of the physical, mental and emotional capabilities of the parents, finance assessment, abuse or violence screening, a child abuse registry check, and a search for evidence of rehabilitation if abuse or violence is found.<sup>57</sup> Failure to disclose abuse or violence, previous rejection for intercountry adoption because of an unfavorable home study, or a criminal history could bar parents from adopting.<sup>58</sup> The study must also contain a detailed description of the prospective living accommodations to ensure the accommodations satisfy any state requirements.<sup>59</sup> Additionally, the home study preparers must summarize the counseling, set up post-placement counseling, approve the parents, and certify their approval statements.<sup>60</sup> Finally, the states review and submit the statements to the INS.<sup>61</sup>

49. See Immigrant Petitions, 8 C.F.R. § 204.3(a)(2) (1998). See also *infra* text accompanying note 63 for the federal regulatory definition of orphan.

50. See *id.* at § 204.3(a)(2).

51. See *id.* See also 8 U.S.C.A. 1101(b)(1)(F) (West Supp. 1998).

52. See Immigrant Petitions, 8 C.F.R. § 204.3(e) (1998). See also 8 U.S.C.A. § 1154(d) (West Supp. 1998).

53. See Immigrant Petitions, 8 C.F.R. § 204.3(b) (1998).

54. See 8 U.S.C.A. § 1154(d) (West Supp. 1998).

55. See Carlson, *supra* note 4, at 353. Discussed *infra* Part II(C)(2) of text.

56. Immigrant Petitions, 8 C.F.R. § 204.3(b) and (e) (1998).

57. See *id.* § 204.3(e)(2).

58. See *id.* § 204.3(e)(2)(D).

59. See *id.* § 204.3(e)(3). Additional examinations of the parents are performed when the prospective adoptee is handicapped or has special needs. See *id.* § 204.3(e)(4).

60. See *id.* § 204.3(e)(5)-(7).

61. See *id.* § 204.3(e)(8). Any home study that is more than six months old at the time of submission to INS must be updated by a licensed agency and the agency must perform another check for abuse and/or violence. See Immigrant Petitions, 8 C.F.R. § 204.3(e)(9) (1998).

## 2. Orphan Requirement

The second requirement is that the child *must* qualify as an orphan.<sup>62</sup> A child becomes an orphan upon the “death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption,” and who has been adopted abroad or is coming to the United States to be adopted by a citizen.<sup>63</sup> Before adoption is finalized, immigration status will allow the orphan to legally enter the United States as an immediate relative but will not grant the orphan citizenship rights.<sup>64</sup>

## 3. Citizenship Requirement

After the adoption process is finalized within the individual state, there exists an additional federal citizenship hurdle. The adoptive parents may file for citizenship on behalf of the child, but the Attorney General will issue a certificate of citizenship only upon proof of four elements.<sup>65</sup> The essential elements are: (1) one parent must be a U.S. citizen; (2) the child must be physically present in the United States; (3) the child must be under eighteen and in the legal custody of the citizen parent; and (4) the adoption must have occurred before the child reached the age of sixteen.<sup>66</sup> Once the application has been approved and the child has taken the oath of allegiance, the child becomes a citizen of the United States.<sup>67</sup> Though this process does not involve a massive amount of bureaucratic red tape, it can take over a year to complete, thus further lengthening the process of intercountry adoption.<sup>68</sup>

### C. The Individual State Governments

The final stage is the actual adoption within the state often referred to as readoption.<sup>69</sup> The requirements for adoptions vary within each state. Most states have two elements for adoption: (1) termination of parental rights of the biological

62. See Immigrant Petitions, 8 C.F.R. § 204.3(a)(2) (1998).

63. 8 U.S.C.A. § 1101(b)(1)(F) (West Supp. 1998).

64. See 8 U.S.C.A. § 1433(a), (c) (West Supp. 1998).

65. See *id.* § 1433(a).

66. See *id.*

67. See *id.* § 1433(b). See also Special Classes of Person Who May Be Naturalized: Children of Citizen Parent, 8 C.F.R. §§ 322.5(a), 337.9(a)-(b) (West Supp. 1998) (noting that children are only required to take the oath of allegiance if they are capable of understanding the oath and if they are incapable of understanding it, the oath may be waived). See also BARTHOLET, FAMILY BONDS, *supra* note 2, at 140-41. By the time the naturalization process was finalized, it had been two years since Bartholet brought her children to the United States from Peru. See *id.* One of her adopted children participated in the naturalization ceremony, but it is unclear if this was a requirement. See *id.*

68. See, e.g., BARTHOLET, FAMILY BONDS, *supra* note 2, at 140.

69. See, e.g., Carlson, *supra* note 4, at 352.



parents; and (2) the court's determination of the best interest of the child.<sup>70</sup>

### 1. Termination of Parental Rights

The termination of parental rights can be either voluntary or involuntary.<sup>71</sup> Voluntary termination exists generally when both natural parents have given written consent.<sup>72</sup> However, with an out-of-wedlock child, voluntary termination can occur in most states with the natural mother's written consent and the natural father's failure to object to the adoption after he has received valid notification.<sup>73</sup> Involuntary termination of parental rights requires "proof of substantial danger and harm to the child" to terminate parental rights without their consent.<sup>74</sup> Even though the sending country may have terminated parental rights under its laws, if the termination does not meet the standards of the receiving state, then a state court may deny the adoption. The state court's authority to deny the adoption at this juncture adversely affects the best interest of the child.

### 2. Best Interest Standard

The best interest standard is a universal gauge regarding issues involving children. The United States has signed the Hague Convention and signed and ratified the United Nations Convention on Human Rights of the Child, both of which require the best interest standard.<sup>75</sup> However, the United States also allows the states to develop independent interpretations of the standard. Duplicating the foreign government and the federal government, the state courts (though they do not necessarily require a home study) again review and consider the best interest of the child before finalizing the adoption.<sup>76</sup>

To reach a determination of the best interest states may perform an additional home study which is independent of the initial federal home study.<sup>77</sup> The additional study is justified on the basis that it evaluates the prospective parents with the child.<sup>78</sup> State courts may delay the finalization of the adoption until a social worker submits

70. See Waller, *supra* note 45, at 294.

71. See Carlson, *supra* note 4, at 336-338.

72. See *id.* at 336. In addition, without the necessary and proper relinquishment of the natural parents' rights, an adoption can be found void and then subject to challenge. See *id.* at 336-37.

73. See *id.* at 336.

74. *Id.* at 338.

75. See, e.g., Hague Convention, *supra* note 31; Convention on the Rights of the Child, G.A. Res. 44/25, 1 U.N. GAOR, 44th Sess., Supp. No. 49, at 116, U.N. DOC. A/44/449 (1989); see also Bartholet, *International Adoption*, *supra* note 14, at 192.

76. See Carlson, *supra* note 4, at 346 ("Although a home study is not necessarily binding on state courts, they routinely accept the recommendations of professional home studies. A re-examination of the prospective parents' qualifications by a court is likely only when new and troubling background evidence has come to light or when the prospective parents and child have not adapted well during a trial custody period." (footnote omitted)).

77. See *id.* at 353.

78. See *id.*

an approval of “the compatibility of the [prospective parents] and the child.”<sup>79</sup> Furthermore, the study necessitates expenditure of additional time and money for both the parents and the states. During the “trial custody period” strong emotional bonds develop and create a de facto family in the minds of both the parents and the children.<sup>80</sup> This second study permits a subjective determination of a social worker to be the basis for a court to prevent an adoption.<sup>81</sup> Allowing a court to prohibit an adoption at such a late stage in the process would be emotionally and psychologically devastating to the adoptee and the adopting parents, and adversely affect the “development of a healthy family relationship.”<sup>82</sup> Therefore, this author believes that an additional state home study does not provide additional protection of the best interest of the child, but rather obstructs the universal effort to act in the best interest of the child.

However, as the law stands now, the state adoption process is imperative for intercountry adoption because it affirms the legal recognition of the adoptive family by granting a decree.<sup>83</sup> A state adoption decree also fulfills one of the requirements for the citizenship application.<sup>84</sup> Further, because adoption proceedings are viewed as permanent and are entitled to full faith and credit under the Constitution, the required decrees protect both the parents and the child from any legal challenge to the adoption.<sup>85</sup>

### 3. Conflict Between the State and Federal Government

The state adoption process can be just as tedious as the prior processes. In *In re Adoption of W.J.*, a Kansas trial court originally denied the adoption of an abandoned Chinese girl due to lack of consent and lack of termination of parental rights—both of which are requirements for adoption under the relevant Kansas statute.<sup>86</sup> The Supreme Court of Kansas found that the trial court erred by completely disregarding the valid adoption under Chinese law and the immigration status granted by the INS.<sup>87</sup> The court ultimately looked to the legislative history of the relevant Kansas statute and found that it was intended to simplify the intercountry adoption process.<sup>88</sup> Therefore, the court granted the adoption based upon a valid and sufficient adoption under Chinese law.<sup>89</sup>

What would have happened to this child if the Kansas Supreme Court had

79. *Id.*

80. *See id.*

81. *See id.*

82. *See* Carlson, *supra* note 4, at 353-54.

83. *See id.* at 352.

84. *See* 8 U.S.C.A. § 1433(a)(4) (West Supp. 1998).

85. *See* Waller, *supra* note 45, at 295. *See also* U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.”).

86. *See In re Adoption of W.J.*, 942 P.2d 37, 38 (Kan. 1997).

87. *See id.* at 41.

88. *See id.* at 39-41.

89. *See id.*

denied adoption? The child would be stateless because she would have been precluded from establishing U.S. citizenship and would have also relinquished her Chinese citizenship. "A person not having nationality under the law of any State is called stateless,"<sup>90</sup> and facilitating such status conflicts with the obligation of State Parties to the United Nations Convention on the Rights of the Child to ensure all children have the right to a nationality to avoid statelessness under the U.N. Convention.<sup>91</sup>

The problems involved with intercountry adoption are overt and unnecessarily prolonged. Satisfying three governments to accomplish one goal causes conflicts in authority and results in procedural uncertainties. The problems begin with the foreign countries' rigorous evaluations for parental fitness.<sup>92</sup> Problems compound with the inconsistencies in foreign and domestic law, which may ultimately cause an abandoned or unwanted child to be legally unadoptable.<sup>93</sup> The federal government has instituted further barricades with the requirements for immigration, orphanage, and citizenship. Federal and state authority overlap and the standards each use differ in some respects which in turn generates further conflict.<sup>94</sup> Finally, the individual states who each have their own standards must approve and conclude the adoption.<sup>95</sup> This comment now offers and examines one solution that may relieve some of the burden—the authorization of more federal power over intercountry adoptions.

## II. AUTHORIZING MORE FEDERAL POWER OVER INTERCOUNTRY ADOPTION

Congress, once hesitant and resistant to involve itself in what was typically a state issue, is now acknowledging the need for uniformity in some areas of family law.<sup>96</sup> The extensive intercountry adoption process, involving multiple agencies, governments, documents, translations, and notarizations deters many would-be parents from considering and eventually benefitting from intercountry adoption.<sup>97</sup> This problem demands Congress use its newly acknowledged power to simplify the currently complex intercountry adoption process.

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90. PARRY AND GRANT ENCYCLOPEDIA OF INTERNATIONAL LAW 376 (1986) (citing WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 161 (2d ed. 1979)).

91. See Convention on the Rights of the Child, *supra* note 75, at art. 7 ("The child . . . shall have the right from birth . . . to acquire a nationality . . . State Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.").

92. See, e.g., BARTHOLET, FAMILY BONDS, *supra* note 2, at 126-34.

93. See, e.g., Bartholet, *International Adoption*, *supra* note 14, at 185.

94. See generally Carlson, *supra* note 4, at 346-48.

95. See *id.* at 351-52.

96. See e.g. H.R. JUD. REP. NO. 102-771 (1992) (enacted). See also *United States v. Sage*, 92 F.3d 101 (2d Cir. 1997).

97. See Bartholet, *International Adoption*, *supra* note 14, at 189-90. The expense of intercountry adoption is a burden which will not be thoroughly examined by this comment. However, the cost of an intercountry adoption ranged from \$10,000 to \$30,000. See *id.* at 190.

### A. *The States' Interest*

The states' fundamental interest is the best interest of the child; therefore, the states as well as the federal government want to ensure that the prospective parents are fit for parenting. Previously, the states regulated this through a home study and a background check. The laws concerning home studies for intercountry adoption have been ineffective because they differ among the states. In 1977, Congress, through its power over immigration law, aspired to establish uniform procedures for bringing alien children into the United States for adoption.<sup>98</sup> Congress eventually codified a home study requirement to occur prior to the admission of the child.<sup>99</sup> The pre-entry home study's purpose is used to detect possible abuses of the system, for example, fraudulent motives in the adopting parents.<sup>100</sup> However, in attempts to provide some state discretion, Congress did not preclude the individual states from performing additional and separate home studies.<sup>101</sup> Because allowing state discretion is by definition contrary to the federal law's goal of uniformity, the current system is inadequate.

### B. *Federalizing Eliminates the Duplicative Home Study*

Since the federal government presently requires a thorough home study, any additional state home study is unnecessary and duplicative.<sup>102</sup> Further, the federal home study regulations are stringent enough to protect the children. The federal government not only requires evaluations of prospective parents, but also demands an evaluation of any other adults in the home.<sup>103</sup> As proof that the federal requirements are enough to protect children, critics argue that "[t]he thrust and tone of the . . . restrictions are extremely negative, as exemplified by the requirement that prospective adoptive parents be disqualified if there is evidence of 'child-buying' activity."<sup>104</sup>

### C. *Federalizing Eliminates Unnecessary and Burdensome Court Procedures*

If the state courts have the discretion to deny an adoption after the prospective

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98. See Padilla, *supra* note 12, at 834 (citing H.R. REP. NO. 1301 at 6, 95th Cong., 2d Sess. 95 (1979), reprinted in *Immigration and Nationality Acts Legislative Histories and Related Documents*, at 1).

99. See Padilla, *supra* note 12, at 834 (citing *Alien Adopted Children, 1977: Hearings on H.R. 5084, 6488, 1956, 871 Before the Subcommittee on Immigration, Citizenship, and International Law of the House Committee on the Judiciary, 95th Cong., 1st Sess. 31, at 1 (1977)*). See also H.R. NO. 1301 at 2.

100. See Padilla, *supra* note 12, at 834-35. Previously the Attorney General's approval was required, but this legislation added the home study not to replace the Attorney General's power over immigration petitions, but to safeguard against potential problems and to preserve state authority in family matters. See *id.*

101. See Carlson, *supra* note 4, at 346.

102. See generally *Immigrant Petitions*, 8 C.F.R. § 204.3(e) (1998).

103. See *id.* § 204.3(e)(9) (requiring the home study to be completed no more than six months prior to submission to the INS).

104. Bartholet, *International Adoption, supra* note 14, at 187.

parents have met every other requirement necessary to adopt, the result could be disastrous. Such a disaster occurred in *In re Adoption of W.J.*, where the adoptive parents had to appeal the trial court's denial of an intercountry adoption to the Supreme Court of Kansas before the adoption was finalized.<sup>105</sup> Even though the adoption decree was eventually granted, the prospective parents incurred needless mental, emotional, and financial strains due to the additional court proceedings.<sup>106</sup> Besides burdening the prospective parents, this process is a waste of judicial resources.

#### D. Federal Power and Constitutional Challenges

Congress has the power to completely govern intercountry adoption under the Commerce Clause.<sup>107</sup> Presently the federal government shares the power with the states.<sup>108</sup> However, congressional authority under the Commerce Clause is well established and is broad and liberal in its scope,<sup>109</sup> therefore, it can be found to encompass intercountry adoption. Thus, any state challenge to congressional authority would inevitably fail. Further, an example of Congress' power to regulate traditionally state controlled family relations is the Child Support Recovery Act of 1992 ("Act").<sup>110</sup>

This Act evolved from a 1974 Social Security Amendment which established a partnership between the federal and state governments to help collect child support across state lines.<sup>111</sup> The pervasiveness of the problem compelled forty-two state legislatures to enact criminal penalties of up to ten years for willful failure to pay child support.<sup>112</sup> Despite similar state laws, jurisdictional restraints made interstate enforcement futile. Since states' attempts were ineffective, Congress adopted the bill to supplement states' power,<sup>113</sup> thus making willful failure to pay child support a federal crime.<sup>114</sup>

For example, in *United States v. Sage*,<sup>115</sup> the defendant argued that Congress

105. See generally *In re Adoption of W.J.*, 942 P.2d 37 (Kan. 1997).

106. See *id.*; see also Carlson, *supra* note 4, at 353-54 (discussing the possibility of emotional hardship on the children as well as the parents when immigration procedures are delayed and/or there exists a possibility of separation from the adoptive family).

107. See U.S. CONST. art. I, § 8, cl. 3.

108. See Carlson, *supra* note 4, at 345-46. "[F]ederal officials must necessarily range into the territory of parent-child relations; it is here that federal immigration policy overlaps with . . . state law." *Id.* at 345.

109. See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 528-29 (1985) ("The States' continued role in the federal system is primarily guaranteed not by any externally imposed limits on the commerce power, but by the structure of the Federal Government itself."); see also *Maryland v. Wirtz*, 392 U.S. 183, 195-96 (1968) ("[I]t is clear that the Federal Government . . . may override countervailing state interests . . . the Court put to rest the contention that state concerns might constitutionally 'outweigh' the importance of an otherwise valid federal statute regulating commerce." (citations omitted)).

110. See Child Support Recovery Act of 1992, 18 U.S.C.A. § 228 (West Supp. 1998).

111. See *United States v. Sage*, 92 F.3d 101, 104 (2d Cir. 1996); see also H.R. JUD. REP. NO. 102-771, at 5 (1992) (enacted). The resolution was signed into law by President Bush on October 25, 1992.

112. See H.R. JUD. REP. NO. 102-771, at 5-6 (1992) (enacted).

113. See *Sage*, 92 F.3d at 104.

114. See Child Support Recovery Act of 1992, 18 U.S.C.A. § 228; see also *United States v. Sage*, 92 F.3d 101 (2d Cir. 1996).

115. 92 F. 3d 101 (2d Cir. 1996).

exceeded its authority under the Commerce Clause because the activities regulated by the Act were not commercial in nature, nor did they substantially affect interstate commerce.<sup>116</sup> Moreover, he argued that “the Act [was] invalid under the Tenth Amendment as an infringement on the States’ rights to govern domestic relations.”<sup>117</sup>

### 1. The Federal Power Under the Commerce Clause

For example, in *Sage*, the Second Circuit addressed the Commerce Clause argument by applying the well established rationale of *Gibbons v. Ogden*.<sup>118</sup> In *Gibbons*, interstate commerce was not limited to traffic or buying and selling of interstate commodities, rather the Court held:

Commerce . . . is traffic, but it is something more: it is [commercial] intercourse . . . between nations, and parts of nations . . . and is regulated by prescribing rules for carrying on that intercourse . . . [The Commerce power] may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution.<sup>119</sup>

In applying the commerce definition set forth in *Gibbons*, the *Sage* court held that “[the] Act presupposes intercourse, an obligation to pay money, and the intercourse concerns more States than one.”<sup>120</sup> Therefore, the Act was held to be within Congress’ authority under the Commerce Clause.<sup>121</sup>

Intercountry adoption easily falls within the Commerce Clause because the process deals with foreign governments.

[I]n regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power, if it could not pass those lines. The commerce of the United States with foreign nations, is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction, pass through the interior of almost every State in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State.<sup>122</sup>

Because intercountry adoption involves the parents’ obligation to care for, support, and rear the child, and traffic exists among more than one sovereign, the federal

116. See *Sage*, 92 F.3d at 103.

117. *Id.*

118. See *id.* at 105; see also *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824).

119. See *Sage*, 92 F.3d at 189-90, 196.

120. *Id.* at 105.

121. See *id.* at 108.

122. *Gibbons*, 22 U.S. at 195.

government has the sole power to regulate intercountry adoption through the Commerce Clause.

## 2. The Tenth Amendment Challenge

The *Sage* court rejected the Tenth Amendment challenge stating it had not the “faintest merit.”<sup>123</sup> The Tenth Amendment states that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>124</sup> The petitioner argued that the protection of family relations was historically preserved for the states and as such, the Child Support Recovery Act invaded state power.<sup>125</sup> However, the Court noted the Act did not regulate domestic relations *per se*, but only assisted the states’ enforcement of state court orders.<sup>126</sup>

Intercountry adoption is distinguishable from this Act but can still survive a Tenth Amendment challenge.<sup>127</sup> Federal intercountry adoption would create and regulate domestic relations on its own authority. As previously discussed, Congress has the power to regulate intercountry adoption under the Commerce Clause; therefore, the usurpation of state power is in actuality, a battle of concurrent power. The concurrent power under the Commerce Clause is one in which “the [s]tates could pass laws on the subjects of commercial regulation, which would be valid, until Congress should pass other laws controlling them, or inconsistent with them, and that *then* the [s]tate laws must yield.”<sup>128</sup> Federal regulation regarding international adoption, if enacted, must govern and “not yield to that over which it is supreme.”<sup>129</sup>

## 3. Recent Limitation of the Commerce Clause Power: *United States v. Lopez*<sup>130</sup>

The *Lopez* case involved federal legislation that made it a crime to carry a gun within a school zone.<sup>131</sup> This case dealt with a “criminal statute that by its terms has nothing to do with ‘commerce’ . . . however broadly one might define [commerce]”.<sup>132</sup>

123. *Sage*, 92 F.3d at 107.

124. U.S. CONST. amend. X.

125. *See Sage*, 92 F.3d at 107.

126. *See id.*

127. *See id.* (“The Act does not attempt to regulate domestic relations . . . [t]he Act accepts validity of the State court judgement . . . [i]t seeks merely to implement those State policies.”)

128. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, at 15 (1824) (emphasis added). In resolving the contradiction of concurrent power the *Gibbons* court stated that true wisdom of these governments would keep their actions as distinct as possible; however, “the general government should not seek to operate where the States can operate with more advantage to the community; nor should the States encroach on ground, which the public good, as well as the constitution, refers to the exclusive control of Congress.” *Id.* at 17.

129. *McCulloch v. Maryland*, (4 Wheat.) 316 (1819). “This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states; and cannot be controlled by them . . . [t]he people of all the states, and the states themselves, are represented in congress, and, by their representatives, exercise this power.” *Id.* at 426-27, 435.

130. 514 U.S. 549 (1995).

131. *See Lopez*, 514 U.S. 549.

132. *Id.* at 561.

Conversely, federal intercountry adoption legislation would deal with commerce within the power of the Commerce Clause because by its nature, intercountry adoption is not completely local but rather inherently international.

*United States v. Lopez* limited the reach of the Commerce Clause but outlined three categories that Congress could regulate under the commerce power: (1) the regulation of the use of channels of commerce; (2) the regulation and protection of instrumentalities or persons or things in interstate commerce; and (3) the regulation of activities having a substantial relationship to interstate commerce.<sup>133</sup> Intercountry adoption involves the regulation and protection of persons in interstate commerce, like the Child Support Recovery Act; therefore, according to the post-*Lopez* decision in *United States v. Sage*, fulfillment of one of the three categories suffices as a valid use of the commerce power.<sup>134</sup>

#### IV. THE PROPOSED STEPS TO INTERCOUNTRY ADOPTION

##### A. *Step 1: The Receiving Country's Home Study*

Congress can federalize intercountry adoption and simplify the home study process. First, the study should be administered only once at the onset of the process. Once the prospective parents fulfill the original qualifications, they should not be subject to further in-home investigation by either the federal or state government. Home studies most effectively and definitively bar adoption because of prospective parents' past activities. The federal government can determine past activities with little effort and little expenditure, but any supplementary evaluation can and rightfully should be a determination of the sending countries.

Additional home studies are often performed to examine the parents with the child.<sup>135</sup> This further study relies on one examiner's *subjective opinion*. Furthermore examining interaction between the parents and the child is time consuming, expensive, and degrading to the parents who have already undergone several evaluations. The federal government can effectively lessen its process and expense by respecting the autonomy and decisions of foreign governments regarding parental fitness and adoptability.

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133. See *id.* at 558-59.

134. See *United States v. Sage*, 92 F.3d 101, 107 (2d Cir. 1996). The activity being regulated was not purely local because it involved an obligation to make payments that would in effect be in interstate commerce. The Child Support Recovery Act is considered proper use of the Commerce Clause because it falls within one of the categories enumerated in *Lopez* (the second category involving regulation and protection of instrumentalities of, or persons or things in interstate commerce). The Court found no need to see if the Act would be upheld under the other two categories. See *id.*

135. See Carlson, *supra* note 4, at 353. Final decision by state courts are delayed by law or requirements that the court, through social workers, can test the compatibility of prospective parents and the child.



### 1. Respecting Sending Countries' Autonomy

The sending country's resolution as to the parental fitness should be given more weight and more merit by the U.S. Two reasons exist for according more autonomy to the sending countries. First, the sending countries are giving away their youth; therefore, they have the most vested interest in the children. Second, the sending countries have a culturally derived sense or 'natural instinct' as to what is in the best interest of their children. Any evaluation of the interaction between the prospective parents and the adoptive child should be a determination within the sole power of the foreign governments. The concept that the entity or person relinquishing the child should be the one that evaluates prospective parents is similar to the concept of open adoption. Though the idea of open adoption serves to promote future communication between the biological parents and the adoptive parents or the adopted child,<sup>136</sup> it more importantly serves to make the birth mother confident and secure in her decision that relinquishing her child for adoption is within the child's best interest.<sup>137</sup> The natural mother may also possess some natural instinct as to what is best for her child.

The concept of pre-adoption communication is one which can be applied to intercountry adoption. Similarly, though the sending country would not be entitled to any future communication with the children, it should have some intuition of whether the prospective parents are fit to raise its children. Therefore, any evaluation of the parents with the child should be left to the discretion of the sending country.

If the sending country does not participate in some form of post-placement home study, the receiving country has already determined the parents to be fit under the federal requirements.<sup>138</sup> Though not evaluating the relationship between an adoptee and the adoptive parents might be considered a disservice to the adoptee, the stringent federal standards for parental fitness are adequate to protect the adoptees. In other words, if there is a problem with the adoptive parents, it will likely be found before the adoptee ever enters the home.

A double standard exists between natural parents and adoptive parents. An accepted presumption exists that all birth parents are fit. However, adoptive parents are scrutinized because of their infertility and/or their desire to adopt a foreign child. The federal government standard is designed to protect the children from being sold or abused.<sup>139</sup> No person nor any test can guarantee the perfect family. If the job of the federal or state government were to guarantee the perfect family, no citizen should be able to bear a child without being subject to an evaluation which ascertains parental fitness.

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136. See Tammy M. Somogye, *Opening Minds to Open Adoption*, 45 U. KAN. L. REV. 619, 638 (1997).

137. See Jane Maslow Cohen, *Posnerism, Pluralism, Pessimism*, 67 B.U. L. REV. 105, 129 (1987).

138. See *Immigrant Petitions*, 8 C.F.R. § 204.3(e) (1998).

139. Cf. *In re Adoption of W.J.*, 942 P.2d 37, 41 (Kan. 1997).

## 2. Eliminating the Unnecessary Orphan Requirement

Part of respecting the sending country's autonomy would be the elimination of the federal standard that only considers a child eligible for intercountry adoption if he or she is deemed an orphan.<sup>140</sup> For a child to qualify as an orphan under U.S. law, both parents must have died or abandoned the child, or the surviving parent must be unable to care for the child.<sup>141</sup> "Children may be disqualified simply because they appear to have two living 'parents'"<sup>142</sup> and those who have already been adopted by U.S. citizens under the laws of the sending country are only allowed to enter the United States if they meet this orphan requirement.<sup>143</sup>

"The orphan restriction is an anomaly. Virtually all jurisdictions within this country and throughout the world permit children to be surrendered for adoption without regard to whether a child has one parent or two, or whether the parents are able to care for the child."<sup>144</sup> This restriction causes children to be ineligible for adoption even though they are in need of homes.<sup>145</sup> Further, it causes birth parents to abandon their children in order for them to be adopted.<sup>146</sup> Additionally, the facts necessary to determine whether the potential adoptee is an orphan occur late in the process after emotional bonds have already been established between the adoptive parents and the child.<sup>147</sup>

The orphan requirement would be unnecessary if the federal and state governments gave full faith and credit to a foreign adoption decree. Unfortunately, full faith and credit is not given to foreign decrees and no rational explanation exists.<sup>148</sup> The United States recognizes foreign civil judgments under the Full Faith and Credit Clause of the Constitution.<sup>149</sup> The clause also requires states to recognize adoptions granted in sister states.<sup>150</sup> Logically then, there is no reason to exclude foreign adoption decrees from the full faith and credit they deserve.

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140. See Barholet, *International Adoption*, *supra* note 14, at 187-88.

141. See 8 U.S.C.A. § 1101(b)(1)(F) (West Supp. 1998). See also *supra* text accompanying note 39.

142. Barholet, *International Adoption*, *supra* note 14, at 187-88 (emphasis added).

143. See *Immigrant Petitions*, 8 C.F.R. §204.3(a)(2) (1998).

144. Barholet, *International Adoption*, *supra* note 14, at 188.

145. See *id.*

146. See *id.* ("It means that birth parents may feel compelled to abandon their children rather than surrender them in an orderly way, in the hope of making them eligible for adoption in the United States.")

147. See *id.*

148. See Barholet, *International Adoption*, *supra* note 14, at 189.

149. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §481(1) (1986) ("[A] final judgment of a court of a foreign state . . . establishing or confirming the status of a person . . . is conclusive between the parties, and is entitled to recognition in courts in the United States.")

150. See 28 U.S.C.A. § 1738 (West Supp 1998) ("The records and judicial proceedings of any court of any such State, Territory or Possession . . . shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed . . . together with a certificate of a judge of the court . . . Such . . . records and judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions . . ."). See also U.S. CONST. art. IV, § 1. cl. 1.

### 3. One, and Only One, Home Study

The United States should perform only one evaluation that serves to verify parental fitness and protect children from abuse and baby brokering. One thorough home study will be effective and will limit expense for both the government and the prospective parents. Some uniform guidelines already exist because the federal government has devised qualifications for prospective parents.<sup>151</sup> Because the present federal standards are thorough and strict, requiring prospective parents to meet those qualifications would adequately protect against baby brokering and potential abuse.<sup>152</sup>

The United States could further abolish supplementary evaluations by respecting the sending country's observation of parent-child interaction as the conclusive proof of parental fitness and best interest of the child. A final reason for respecting the sending country's autonomy is because they have the same goal as the United States—the best interest of the child.<sup>153</sup> This goal is guaranteed if the sending country has ratified the Hague Convention.<sup>154</sup>

The home study can be performed most proficiently by agencies already licensed under current federal standards. Since the federal government presently specifies how such studies should be executed,<sup>155</sup> there would be no need to establish any additional government agencies to administer the home study. Furthermore, having fewer home studies and fewer governmental requirements lowers the cost to taxpayers since it eliminates the need for additional federal and state government investigations.

#### B. Step 2: The Sending Country's Home Study

One argument against relinquishing all power to the federal governments for this kind of evaluation is the fear of child dumping or baby brokering. This fear stems from the fact that the sending countries may want to give away these unwanted or parentless children because they burden state-funded facilities. However, the vast majority of sending countries have enacted rules governing adoption of their children.<sup>156</sup> The assumption that sending countries are not concerned about the

151. See Immigrant Petitions, 8 C.F.R. § 204.3(e) (1998).

152. See generally Immigrant Petitions, 8 C.F.R. § 204.3(e) (1998).

153. See Hague Convention, *supra* note 31, at art. 1.

154. See *id.*

155. See generally Immigrant Petitions, 8 C.F.R. § 204.3(e) (1998).

156. See, e.g., Romano, *supra* note 16, at 564-67. To be eligible for an intercountry adoption a Peruvian child must have been declared abandoned by Peru's Minors Court. Further, Peruvian social workers issue compatibility reports to the courts after a ten day trial custody period with the prospective parents. Honduras prohibits biological parents from relinquishing their children to attorneys or other intermediaries directly. Instead parents must relinquish their children to a court before a child may become eligible for adoption, or the court must have determined the child to be abandoned. In addition, Honduras only accepts prospective parents whose application comes from a licensed adoption agency within the United States that has registered with the Honduras social welfare agency. Both Peru and Honduras complete the adoption process under their laws by issuing an adoption decree; however, the prospective parents are not considered the legal parents of the children under U.S. law until they go through additional adoption processes within their home state. See *id.* at 564-66.

welfare of their orphaned children is false. Some countries require prospective parents to reside in the sending country for several months so its social services can perform an intricate examination of prospective parents.<sup>157</sup> For example, Elizabeth Bartholet was required to spend five months in Peru before she could adopt her children.<sup>158</sup> Further, she was subjected to studies not only by social services, but by doctors, psychologists, local police, and a Peruvian judge.<sup>159</sup>

In addition to lengthy and detailed home studies by the sending countries, the U.S. government has safeguards in place which examine and approve the foreign proceedings for relinquishing their children. The INS is required to investigate and affirm the validity of the sending countries' procedures before issuing a visa,<sup>160</sup> thus protecting against any country's motives which might be against the best interest of the child. As intercountry adoption becomes more common and as more sending countries become party to the Hague Convention, the sending countries will continue to be guided by the international standard and allow adoption approval only when it is the best interest of the children.<sup>161</sup>

### 1. The Status of the Hague Convention

As noted, the Hague Contention supports the best interest of the child, but only sixteen countries have ratified it and thirty countries have signed it.<sup>162</sup> The United States signed the Hague Convention on March 31, 1994, but efforts to ratify have not been completed.<sup>163</sup> The State Department along with INS and the Department of Health and Human Services ("HHS") contributed to the draft legislation issued to President Clinton for comment and clearance.<sup>164</sup> Advocates of the legislation estimate it will be approximately two years before Congress ratifies the Convention.<sup>165</sup>

### 2. The Effect of the Hague Convention on the United States

The Hague Convention will have little effect on the domestic process involved in individual adoptions. Because the goal of the Convention is an international quest to serve the best interest of children by installing safeguards to prevent baby

157. See BARTHOLET, FAMILY BONDS, *supra* note 2, at 120 ("Many of those who have tried to adopt [in Peru] . . . have been required to spend eight months or more in Peru in order to complete the adoption process. . .").

158. *See id.*

159. *See id.* at 126-35. Peruvian social workers visited the home and evaluated the prospective parent with the child. *See id.* Various police agencies performed other examinations of the parent, including a medical examination, a fingerprint check, and a footprint check of the baby. *See id.* The psychiatric examination included four sessions before a final psychiatric determination could be made. *See id.* The Peruvian court finally asserted jurisdiction over the child and eventually granted the adoption. *See id.*

160. *See, e.g., In re Adoption of W.J.*, 942 P.2d 37, 41 (Kan. 1997).

161. *See generally* Hague Convention, *supra* note 31.

162. *See Status of U.S. Efforts to Ratify the Hague Adoption Convention* (visited Aug. 25, 1998) <<http://trave.state.gov/ratify.html>>.

163. *See id.*

164. *See id.*

165. *See id.*

brokering and child abduction, the focus of the Convention does not control states' internal governmental processes for intercountry adoption.<sup>166</sup>

The Hague Convention should act to ease the communication with foreign governments. Those who ratify the Convention are required to create a "Central Authority" to oversee the intercountry adoption process.<sup>167</sup> The Convention sets guidelines and requirements in an effort to assure that no ambiguity exists in the process.<sup>168</sup> Once all legal state processes attain compliance, the sending countries will provide documentation to the Central Authorities to affirm the child's adoptability and the prospective parents' fitness.<sup>169</sup> Similarly, the receiving countries will provide documentation of compliance with all legal processes within their states to ensure a successful adoption and guarantee residence within their country.<sup>170</sup> Therefore, requiring only one authority, the federal government, to complete the legal processes and produce the necessary documentation would prove a sensible and practical process for compliance with the Hague Convention.

### C. Step 3: The Role of the Federal Government

Regardless of the effect of becoming a party to the Hague Convention, intercountry adoption would be more efficient if the federal government had more responsibility in the process. Currently, state courts "[i]n any transnational adoption . . . may question or disagree that a child is adoptable, even though federal immigration officials are satisfied that the child is adoptable and may immigrate as an 'immediate relative.'"<sup>171</sup> If all procedures are finalized at the federal level, before the child immigrates, then the risk of denial at the state level leading to an emotional loss is dissolved. The process should be designed so federal officials make a final ruling of adoptability at the onset of the process, before the sending country's determination and before immigration.<sup>172</sup> Further, U.S. officials could grant an adoption decree and birth certificate finalizing the adoption abroad, thereby eliminating the need for any additional immigration and naturalization proceedings or ceremonies.

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166. See Hague Convention, *supra* note 31, art. 1. ("The objects of the present Convention are . . . to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child. . . and thereby prevent the abduction, the sale of, or traffic of children.")

167. See *id.* at art. 6. The Hague Convention's central authorities will oversee several aspects of intercountry adoption: 1) that the individual states have competent authorities who approve the parental fitness of prospective parents; 2) that consents have not been induced by payment and have been given after the birth; 3) that the child legally can enter and reside permanently in that State; and 4) that the child's State of origin considers the child adoptable and that adoption would be in the child's best interest. See *id.* at arts. 4-5.

168. See generally Hague Convention, *supra* note 31.

169. See *id.* at arts. 16-18.

170. See *id.* at arts. 15, 18.

171. Carlson, *supra* note 4, at 371.

172. See *id.* at 372. An investigation into the child's adoptability is best done in the child's country of origin because that is where witnesses and documentation regarding the child's status is most likely to be readily available. See *id.* "Federal officials stationed overseas are more likely than state court judges to be familiar with the local language, customs, and legal system . . . [which] is undoubtedly useful in conducting an investigation and reviewing evidence of a child's . . . availability for adoption." *Id.*

### 1. What the Federal Government Can and Cannot Do Now

Presently, the federal government plays a substantial role in intercountry adoption; however, some of the duties would be unnecessary if the federal government were allocated greater authority. The federal government, through the State Department, could provide general information about intercountry adoption and visa requirements.<sup>173</sup> The department could also contact the U.S. consular abroad to inquire about the status of a particular case or clarify requirements.<sup>174</sup> Because the State Department protects U.S. citizens from discrimination by foreign authorities or courts,<sup>175</sup> it has an established infrastructure to streamline the federalization of the adoption process. Additionally, since the federal government already determines orphan status of the child, grants visas, and eventually grants citizenship to adoptees, it is equally well equipped to supplant the adoption process. Currently, however, the federal government cannot locate a child for adoption, be directly involved in the foreign government's adoption process, represent the adoptive parents in court, order that an adoption occur, or order that visa be issued.<sup>176</sup> Because the federal government has the foundation to oversee and improve the intercountry adoption process, it should be the authority to finalize the process.

### 2. Intercountry Adoption Should Be Federalized

The federal government should be allowed to finalize the adoption. By this stage of the intercountry adoption process, all of the basic requirements have been satisfied except for the grant of immigration status, visa issuance, and the finalization of the adoption by a state court from which an adoption decree and birth certificate can be obtained.<sup>177</sup> As long as the federal process consists of a reasonable determination by a reliable and valid authority, the child's best interest can be served. Currently, the child's best interests are not served because state courts are allowed to "reconsider freely whether the child is adoptable months after the child's immigration and placement with its prospective adoptive family."<sup>178</sup> During that time, prospective parents and the child may have bonded strongly and removal would be traumatic for the child and the parents.<sup>179</sup> Therefore, a federal process for intercountry adoption is imperative to safeguard the best interest of the child by finalizing the adoption as rapidly as possible.

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173. See *International Adoptions* (visited Aug. 18, 1998) <<http://travel.state.gov/int'ladoption.html>>

174. See *id.*

175. See *id.*

176. See *International Adoptions* (visited Aug. 18, 1998) <<http://travel.state.gov/int'ladoption.html>>. See generally *Immigrant Petitions*, 8 C.F.R. § 204.3 (1998).

177. See 8 U.S.C.A. §1154 (West Supp. 1998).

178. Carlson, *supra* note 4, at 373.

179. See *id.*

### 3. The Finalization of Intercountry Adoptions

Finality of an adoption is essential for all parties involved. If upon a foreign adoption decree or proof by the sending country that all rights to the child have been relinquished, the federal government should grant the adoption. The U.S. embassies should have the power to grant the final decree of adoption. United States embassies are conveniently located in almost every country thus allowing the federal government to expedite its assessment of the sending country's intentions and to obtain foreign documents of proof. Upon knowledge of complete relinquishment of rights and proof of parental fitness, the embassy could approve the adoption and issue the birth certificate. Once the birth certificate has been issued, the child should be considered a U.S. citizen analogous to a child born to U.S. citizens abroad.<sup>180</sup> Currently, a child in an international adoption cannot be considered a citizen because at the time of birth he or she has not been adopted.<sup>181</sup> If, however, embassies could issue birth certificates then they could be applied retroactively, thus entitling the adopted child to the same rights as a natural born citizen while simultaneously condensing a long and tedious process. Additionally, this would pose no additional burden on embassies as they are already charged with issuing reports concerning births of American citizens abroad which have the legal effect of proving U.S. citizenship.<sup>182</sup>

Establishing citizenship eliminates the need to obtain immigration standing and instead, the embassy can issue the child a U.S. passport. If the child enters the United States as a citizen, there will be no need for a state determination or a lengthy naturalization process. Finally, the child's status will have full faith and credit within the states, thus establishing the finality necessary in any adoption for the emotional, mental, and physical growth of the family.

## V. CONCLUSION

Intercountry adoption should be federalized because it would eliminate superfluous processes while still serving in the best interest of the child. By respecting sending countries' autonomy, eliminating the unnecessary orphan requirement, abolishing duplicative home studies, and burdensome court proceedings, the federal government can efficiently and effectively finalize intercountry adoptions and eliminate disastrous and traumatic results stemming from such cases as *In re Adoption of W.J.*<sup>183</sup> The federal government has taken the first step in establishing the home study regulations, and it can further facilitate the adoption process by

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180. See 8 U.S.C.A. § 1401(c) (West Supp. 1998) (stating persons "born outside of the United States . . . of parents both of whom are citizens of the United States and one of whom has had a residence in the United States . . . prior to the birth of such person" shall be deemed "citizens of the United States at birth.").

181. See 8 U.S.C.A. § 1401 (West Supp. 1998).

182. See 22 U.S.C.A. § 2705 (West Supp. 1998).

183. 942 P.2d 37 (1997).

granting citizenship, issuing visas and birth certificates, and awarding the final adoption decree—all through the convenience of the U.S. embassies. Executing intercountry adoption fully at the federal level will be less expensive, less time-consuming, more certain, and more efficient. All of the benefits of federalizing international adoption extend to both the sending and receiving countries, the prospective parents, and most importantly the children. So, now, when it involves the best interest of children, who's afraid of big government?

*Lisa K. Gold*



