EGERVARY v. YOUNG

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MEMORANDUM

I. INTRODUCTION

This case is a Bivens action alleging the violation ofplaintiffs due process rights during an international childcustody dispute and has been the subject of four priormemorandum opinions. See Egervary v. Young, No. 96-3039, 1997WL 9787 (E.D.Pa. Jan. 7, 1997) (Troutman, J.) ("Egervary I");Egervary v. Rooney, 80 F. Supp.2d 491 (E.D.Pa. 2000) (O'Neill,J.) ("Egervary II"); Egervary v. Rooney, No. 96-3039, 2000 WL1160720 (E.D.Pa. Aug. 15, 2000) (O'Neill, J.) ("EgervaryIII"); and Egervary v. Young, 152 F. Supp.2d 737 (E.D.Pa.2001) (O'Neill, J.) ("Egervary IV"). Presently before me are:1) the federal defendants' motion to dismiss the amendedcomplaint for improper venue pursuant to Rule 12(b)(3); 2) thefederal defendants' motion to dismiss the amended complaint forinsufficient service of process pursuant to Rule 12(b)(5); 3)the federal defendants' motion to dismiss the amended complaintfor failure to state a claim pursuant to Rule 12(b)(6) on twogrounds, statute of limitations and qualified immunity; and 4)the federal defendants' motion for summary judgment pursuant toRule 56 on the grounds that they had no personal involvement inthe alleged constitutional tort. For the reasons stated below,the motions will be DENIED.

II. BACKGROUND

A. Oscar's Alleged Abduction and Return to Hungary

Plaintiff Egervary was born in 1955 in Hungary, where hesuffered political oppression at the hands of the then-communistgovernment because his father was a church official.[1]See Egervary Aff. (June 9, 1994) §§ 1-2. In 1980, he emigratedto the United States as a political refugee. Id. He became aU.S. citizen in 1987. Id. ¶ 3.

In 1990, Egervary became romantically involved with AnikoKovacs, a Hungarian national who came to the U.S. to studymusic. Id. ¶ 4. They briefly returned to Hungary in 1991 to bewed by Egervary's father. Id. Thereafter, they establishedtheir marital residence in Hackensack, New Jersey. Id. ¶ 5.Their son, Oscar Jonathan Egervary, was born on IndependenceDay, July 4, 1992. Id. ¶ 6.

In February 1993, Kovacs, a concert violinist, traveled toHungary with Oscar to perform in a concert to be held inBudapest that March. Id. ¶ 7. They were scheduled to return tothe U.S. on April 6, 1993, and Egervary had purchased a ticketto fly to Hungary and escort them back. See Egervary Aff.(July 7,

1994) ¶ 2. A few days before, however, Kovacs calledEgervary and said she needed to stay until the beginning of Mayto perform in another concert. Id. Shortly before she andOscar were to return in May, Kovacs again called Egervary andsaid that she would be staying in Hungary because she had anopportunity to take a teaching position in Budapest until theend of the year. Id. Shortly thereafter, she separated fromEgervary and informed him that she would not return to the U.S.and would not return Oscar to this country. Id.

In June and July of that year, Egervary traveled to Hungary inan attempt to reconcile with his wife and bring Oscar home.Id. In July, Kovacs returned to the U.S. with Egervary for ashort time, but she insisted on leaving Oscar in Hungary withher parents. Id.

In August, Egervary returned to Hungary and stayed for threemonths in another attempt to reconcile with his wife. Id.During that stay, he took a job teaching English in order tosupport himself. Id. He stayed there from approximately Augustto November of 1993. Id. He brought some personal belongingsfrom the U.S., but he did not plan on establishing residencethere and did not register with the Hungarian government as aresident. Id.

In September, Kovacs took Oscar to an undisclosed location inHungary in an apparent attempt to hide the child from hisfather. See Egervary Aff. (June 9, 1994) ¶ 8. At that time,she left Egervary a letter that, in part, stated: "I'd like tonotify you in this farewell letter that I've moved out from you,together with Ossika [i.e., Oscar] . . . I moved to a locationunknown to others deliberately and I didn't move to my parentson purpose." See Egervary Aff. (July 7, 1994) ¶ 3. Egervarysearched for his son for approximately three months. Id.During that time, he consulted with the American Embassy inBudapest and was told that if he could find Oscar he was free totake the child back to the U.S. Id.

On December 18, 1993, Egervary found Kovacs and Oscar leavingher parents' apartment house in Budapest. Id. According toEgervary, Oscar's clothing was "dirty and ragged" and the boyappeared undernourished. See Egervary Aff. (June 9, 1994) ¶ 9.Egervary took Oscar from Kovacs and left Hungary with him thenext day. Id. Upon their return to the U.S., Egervary set upresidence with his son in Monroe County, Pennsylvania. Id.

On May 13, 1994, members of the Pennsylvania State Police andU.S. Marshals arrived at Egervary's home with an order signed bythe Honorable William J. Nealon of the United States DistrictCourt for the Middle District of Pennsylvania. Id. ¶ 10.Pursuant to the order, Oscar was removed from Egervary's custodyand delivered to defendant Frederick P. Rooney, Esq. Id.Rooney then took Oscar to the airport, flew him to Europe, andreturned the child to his mother. See Rooney Dep. at 169. Allparties concede that Egervary was given no notice of oropportunity to be heard in the ex parte Hague Convention/ICARAproceedings that led to the order.

B. The Hague Convention/ICARA Proceedings

1. The Law

The Hague Convention on the Civil Aspects of InternationalChild Abduction is a multilateral international treaty onparental kidnaping adopted by the United States and othernations in 1980. The goal of the Convention is to "protectchildren internationally from the harmful effects of theirwrongful removal or retention and to establish procedures toensure their prompt return to the State of their habitualresidence." See Hague Convention, Preamble. The Conventionreflects "a universal concern about the harm done to children byparental kidnaping and a strong desire among the ContractingStates to implement an effective deterrent to such behavior."Feder v. Evans-Feder, 63 F.3d 217, 221(3d Cir. 1995). The Convention is "designed to restore the`factual' status quo which is unilaterally altered when a parentabducts a child." Id.

The United States has implemented the Hague Convention byenactment of the International Child Abduction Remedies Act("ICARA"), 42 U.S.C. § 11601 et seq. ICARA vests state anddistrict courts with concurrent jurisdiction over claims arisingunder the Convention and empowers those courts to order thereturn of kidnaped children. See 42 U.S.C. § 11603. An ICARAhearing is not a custody hearing. See Blondin v. Dubois,189 F.3d 240, 245 (2d Cir. 1999) (under ICARA, a district court has"the authority to determine the merits of an abduction claim,but not the merits of the underlying custody claim"), quotingFriedrich v. Friedrich, 983 F.2d 1396, 1400 (6th Cir. 1993);Hague Convention, Article 19 ("A decision under this Conventionconcerning the return of the child shall not be taken to be adetermination on the merits of any custody issue."). An ICARAproceeding merely determines which nation should hear theunderlying custody claim. See Blondin, 189 F.3d at 246.

An ICARA petitioner bears the burden of proving by apreponderance of the evidence that the child in question hasbeen wrongfully removed from the nation of his or her "habitualresidence" immediately before the removal. See42 U.S.C. § 11603(e)(1)(A); Hague Convention, Articles 3 and 4.[2] Ifthe petitioner establishes that the removal was wrongful, thechild must be returned unless the respondent can establish oneor more of four defenses: 1) the ICARA proceedings were notcommenced within one year of the child's abduction; 2) thepetitioner was not actually exercising custody rights at thetime of the removal; 3) there is a grave risk that return wouldexpose the child to "physical or psychological harm or otherwiseplace the child in an intolerable situation"; or 4) return ofthe child "would not be permitted by the fundamental principles. . . relating to the protection of human rights and fundamentalfreedoms." Id.; Hague Convention, Articles 12, 13 and 20. Thefirst two defenses can be established by a preponderance of theevidence; the last two must be established by clear andconvincing evidence. Id.; 42 U.S.C. § 11603(e)(2).

ICARA also provides that notice "be given in accordance withthe applicable law governing notice in interstate child custodyproceedings." See 42 U.S.C. § 11603(c). Courts interpretingthis provision have found the "applicable law" to be theParental Kidnaping Prevention Act, 28 U.S.C. § 1738A ("PKPA"),and the Uniform Child Custody Jurisdiction Act, 23 Pa.C.S.A. §5341, et seq. ("UCCJA"). See Brooke v. Willis, 907 F. Supp. 57,60 (S.D.N.Y. 1995); Klam v. Klam, 797 F. Supp. 202, 205(E.D.N.Y.

1992). Both PKPA and UCCJA provide for "reasonablenotice and opportunity to be heard." See 28 U.S.C. § 1738A(e);23 Pa.C.S.A. § 5345. This generally means "a plenary hearing atwhich both sides are heard." Klam, 797 F. Supp. at 205.However, because there is an inherent risk of flight during thependency of a petition, courts "may take or cause to be takenmeasures under Federal or State law, as appropriate, to protectthe well-being of the child involved or to prevent the child'sfurther removal or concealment before the final disposition ofthe petition." See 42 U.S.C. § 11604(a).

The Convention also provides that "a Contracting State shalldesignate a Central Authority to discharge the dutieswhich are imposed by the Convention upon such authorities."See Hague Convention, Article 6. The Bureau of ConsularAffairs of the U.S. Department of State has been designated theCentral Authority for the United States. See 22 C.F.R. § 94.2.The Convention describes the duties of such Central Authorities:

Central Authorities shall cooperate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures

(a) to discover the whereabouts of a child who has been wrongfully removed or retained;

(b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

(c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

(d) to exchange, where desirable, information relating to the social background of the child;

(e) to provide information of a general character as to the law of their State in connection with the application of the Convention;

(f) to initiate or facilitate the institute of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;

(g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisors;

(h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

(i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

See Hague Convention, Article 7. See also 22 C.F.R. § 94.6.

State Department regulations implementing the Conventionfurther clarify these duties. The regulations provide that StateDepartment officials are "prohibited from acting as an agent orattorney or in any fiduciary capacity in legal proceedingsarising under the Convention." See 22 C.F.R. § 94.4(a). Theymay, however, "[a]ssist applicants in securing informationuseful for choosing or obtaining legal representation, forexample, by providing a directory of lawyer referral services,or pro bono listing published by legal professionalorganizations, or the name and address of the state attorneygeneral or prosecuting attorney who has expressed a willingnessto represent parents in this type of case and who is employedunder state law to intervene on the applicant's behalf." See22 C.F.R. § 94.6(d).

2. The Proceedings

Sometime prior to Oscar's removal from the United States onMay 13, 1994, Kovacs had sought and received the StateDepartment's help in retrieving her son, who, she claimed, hadbeen kidnaped from Hungary by his father. On May 10th or11th,[3]defendant Virginia Young of the Bureau of Consular Affairs hadcontacted defendant Rooney and asked him to represent Kovacs infiling an ICARA petition. See Rooney Dep. at 55-56. In whatappears to be a follow-up letter to a phone conversation earlierthat day, Young wrote:

Dear Mr. Rooney,

The case I hope you will be able to accept is that of an almost-two-year-old child, Oscar Egervary, who, according to the information we have, was quite brutally kidnapped by his father and brought to the U.S. The mother, your client-to-be, is a violin soloist in Budapest and the father in the U.S. is unemployed, so I'm sorry but it doesn't look like there's any money anywhere.

The child was born in the U.S. but the family apparently decided to go back home, and apparently the father gave up job [sic] and belongings to relocate. And then seems to have changed his mind. I figure the Hague applies in that the child lived a month or two longer in Hungary than he did in the U.S. and the information seems to indicate that Hungary had been established as the place of residence when the father did the kidnapping . . .

I hope you can help. Thanks for your consideration of this case.

See Young Ltr. (May 10, 1994).[4]

Rooney accepted the case, and immediately began receivingassistance from Young. See Rooney Dep. at 62. He had neverhandled a Hague Convention case in the United States. SeeRooney Dep. at 23-25, 30, 61-62.[5] He therefore neededassistance "in trying to figure out how to best file the order."Id. at 62. He "had to rely on them to help [him] through it"because he "was not extremely well-versed on The Hague."

Some of this assistance consisted of written materials. On theday he took the case, Young faxed Rooney Hungarian governmentdocuments regarding Egervary's alleged abduction of his son andKovacs' subsequent Hague Convention petition to the Hungariangovernment. Id. She also sent him model ICARA pleadings thathad been published by the ABA. Id. at 63-64. Those modelpleadings contained three different options for effecting thereturn of the child. See Federal Defendants' Br. (July 9,2001) at Exhibit G ("Model Petition") and Exhibit H ("ModelWarrant"). All three of those options suggested an initial exparte proceeding without notice to the allegedparent-kidnapper, followed by seizure of the child and a promptpostdeprivation hearing with notice. Id. See also infra PartIII-E-3-a.

The federal defendants' assistance to Rooney was not, however,limited to transmission of those written documents. Between May10th and May 13th, Rooney spoke to Young, and possibly also todefendant James Schuler, "a bunch of times." See Rooney Dep.at 62, 74. There were "a bunch of phone calls" about "where thechild was" and "how to get an order together." Id. at 62-63.As defendant James Burke, Rooney's associate, later describedit, "they seemed to be calling constantly . . . I remember thephone calls was [sic] constantly coming in and it was the StateDepartment . . . they were calling all the time it seemed like."See Burke Dep. at 26-27. During this period, Rooney neverspoke with Kovacs or any member of her family. See Rooney Dep.at 86-89.

On May 13, 1994, Rooney, Burke, and local counsel JeffreyNallin filed an ICARA petition in the Middle District.[6]The petition was similar to the model pleadings that Young hadsent Rooney earlier that week, but there was one difference. Inaddition to the three options that provided for seizure of thechild without notice followed a postdeprivation hearing withnotice, Rooney included a fourth option that eliminated thepostdeprivation hearing. Specifically, the fourth optiondirected "any peace officer within the Commonwealth ofPennsylvania" to "take into protective custody Oscar JonathanEgervary and deliver him to Petitioner's agent [i.e., Rooney]for immediate return to the physical custody of Petitioner[i.e., Kovacs]." See Federal Defendants' Br. (July 9, 2001) atExhibit F.

After filing the petition, Rooney met with Judge Nealon, towhom the petition had been assigned. According to Rooney, whenhe arrived in Judge Nealon's chambers someone from the StateDepartment had already called to inform the Court that a HagueConvention petition was going to be presented that day:

Q: In your Answers to Interrogatories I believe you said, and I don't have them in front of me but I will get them if there's a question about this, I believe that you said that the State Department had

contacted the court to arrange for you to appear before Judge Nealon.

A: I don't know if they called to arrange. They called to inform the court that a petition would be presented involving a Hague matter. I don't know who called, I don't know with whom they spoke; I just knew that by the time we got there the judge was aware or the judge's chambers was aware of someone coming in with a petition. I also think that we may have called, someone from my office may have called, to advise the judge that we were on our way to Scranton.

Q: What made you think that someone from the State Department had contacted chambers?

A: I may have recalled the secretary saying, Oh, yes, we got a call from the State Department saying that a petition was going to be brought in.

See Rooney Dep. at 120-21. See also Rooney Interrogatories(July 17, 1998) at 7(c); Rooney Amended Answers (undated) at7(c).

During the meeting, Rooney argued that Judge Nealon shouldorder the fourth option, i.e., the immediate return of the childto his mother in Hungary. Judge Nealon, however, doubted whethersuch an order would be lawful:

Q: . . . What reservations did the judge express?

A: I think he questioned whether or not he had the authority to order the return of the child, and I said all I could tell him is that in my experience in foreign jurisdictions, and I mean domestic foreign, not Pennsylvania, that under the UCCJA that with a certified copy of a court order that you could go from Pennsylvania to retrieve children in California with a certified Pennsylvania court order without having to invoke the whole process of hearings in California.

Id. at 125-26.

Because of these reservations, Rooney called the StateDepartment and spoke to Schuler to confirm that Judge Nealon hadthe authority to order the immediate return of the child:

Q: Did you speak to him [i.e., Schuler] about it [i.e., the relief requested] before it was presented to the court or after?

A: In between.

Q: Meaning what?

A: I went in and I saw Judge Nealon. I spoke to him about the situation, presented him with the

petitions and the order, and to the best of my recollection he then had a status conference or had to do something, and so he adjourned our meeting. I waited and during that period of time I spoke to Jim Schuler because the judge was specifically concerned about whether or not he had the authority to allow the child to be returned. While it was my impression that he did, in order to assure the judge that, in fact, my interpretation of his authority was correct, I called Schuler from the Judge's chambers and I said, Jim, Judge Nealon appears to be willing to sign an order for the child to be returned, but he wants to just be sure that that's within his authority and Schuler said to me he's the judge. He's got the authority to make whatever decision he wants.

Q: Tell me, as best you remember, what was said during that telephone conversation.

A: That I was in the judge's chambers and that he had a petition and one of the options was the return of the child to Hungary, and that he had some concern about whether or not that was in his discretion. I said to you before, his answer was he's the judge. Basically this is not verbatim, but he's the judge. He can do whatever he feels is appropriate.

Q: Did you, during that conversation, advise Mr. Schuler that no notice of this, the filing of this petition, had been given to Mr. Egervary?

A: No, but I think that we would have assumed that that was the case simply because in most Hague matters notice is not given to someone who has been determined to be an abducting parent for fear that upon notice of something pending that there would be a flight with a child. It would have been highly irregular to give notice to a parent in this situation for fear that the child would then be taken someplace else.

Id. at 115-16, 131-32.

Rooney also states that after his conversation with Schuler hediscussed other options with Judge Nealon:

Q: And what was discussed during that second meeting in chambers with the judge?

A: We talked about alternatives that he had under the order that I had presented, and that in instances children are taken into protective custody and that the child could have been held by social services in Monroe County. I don't remember what else could have been done right now, but that he could have gone into a juvenile shelter, that he could have been taken into protective custody.

Q: And you described those alternatives to the judge?

A: Correct.

Q: And then what was said?

A: Well, I remember the judge mentioning, it was Friday and it may have been difficult to get protective services in at that time, given the time of day or the fact that it was a Friday. That I remember. And I told him that I didn't know anyone else in the area. I didn't know if there was any other family members with whom the child could be left, and that given those circumstances, whatever his decision was I would abide by it and respect it, but I told him if the child, if he ordered the return of the child, that I would take the child to Hungary.

Id. at 133-34.

Judge Nealon's testimony agrees with much of Rooney'stestimony, but it differs on a few key points.[7] Accordingto Judge Nealon, Rooney: 1) portrayed himself as representingthe State Department; 2) stated that he was seeking to have theJudge enforce a Hungarian court order; 3) had already madearrangements to return the child to Hungary that day; and 4)never suggested any remedy that would require Judge Nealon toconduct a hearing on the matter:

Q: What did Mr. Rooney tell you about them [i.e., the papers that had been filed in support of the petition]?

A: Well, capsulizing what he told me and I have to use this word advisedly whether he said he was retained, I thought he said he was retained, at least that's the impression I got, by the State Department to present this petition that there had been a proceeding in Hungary where a — at which the father was represented. And the court awarded custody to the mother and that the father went over to Hungary, kidnaped the youngster and took the youngster back and was now located in Cresco in Monroe County. And what he was seeking to do was enforce the Hungarian Court judgment by signing the warrant and picking up the child. And once again, and you people can flush it out later, it was indicated to me that this was the appropriate remedy and that the arrangements had been made to take the child and return, I think, that day to Hungary. It was a very critical period, according to him, that something had to be done promptly.

Q: Was that because arrangements had already been made to take the child back?

A: Well, that had been represented that the arrangements had been made. Now, the extent of them I don't know. Whether he said he had an airplane ticket or could get an airplane ticket or something along that line I don't know. But it was really an emergency matter according to him.

A: And let me — I know the petition mentions hearings, but at no time did he suggest a hearing to me. I want to be empathic about that. That this — that while hearings may have been required in a normal kidnaping context, here was a court order out of Hungary and that he had been retained by the State Department to implement this and pick up this child and have her returned to Hungary. It

was an interpretation of international law. And I remember being concerned about it and saying that I want to find out if this is the official State Department position. I don't have experience in these matters and I'm willing to take their representation if they say that no hearing is required, no notice is required, and that the child should be immediately picked up and turned over to Mr. Rooney for prompt return to Hungary.

Q: When you said that to Mr. Rooney what did he do?

A: He made a phone call and came back and said, yes, they said that is the remedy they're seeking and that is the appropriate remedy.

Q: During that meeting did Mr. Rooney show you a copy of the language of the Hague Convention on international child abduction to support that position?

A: I can't say that he did, but once again in a sophisticated legal area where — with which I have little familiarity I was prepared to rely upon the representation of the Department of State of the United States of America was telling me as a Judge that this was the remedy that was being sought. See, and I know there's dispute about the hearing, but the easiest thing in the world for me to do would be to order a hearing. I mean, if he came in and said one of your options is a hearing, I would have ordered that immediately. That would be the appropriate thing to do. I had to be talked out of it. And I was talked out of it by saying this is what the State Department says that that — the appropriate remedy and the remedy they're seeking is the immediate taking custody of the youngster and taking him right back to his mother in recognition of a valid order from Hungary. I can't conceive of why I would ask him to call the State Department if I was going to set a hearing. Why would I need to ask the State Department about a hearing? The only reason I wanted to call the State — to have the State Department called was he was telling me there was no need for notice and no need for a hearing. And the word came back that this was correct that is what they were seeking and that was the appropriate thing for me to do.

See Nealon Dep. at 16-20, 22-24.

Judge Nealon also repeatedly emphasized that he ordered theimmediate return of the child because he was relying upon whathe perceived to be the State Department's representation thatthat remedy was appropriate:

Q: Now, among the other choices available on this second page are choices which would enable the child to be taken into protective custody immediately and then released to either a juvenile shelter or to the mother or her agent and kept in this district pending a hearing. Did you discuss those options with Mr. Rooney or did Mr. Rooney suggest those as viable alternatives?

A: No. He did not suggest them. He did not suggest them. The only request he was making, as I said,

was for the immediate action by the law enforcement officer to take the child into custody. See a hearing would have been the easiest thing in the world for me to do. If he had said you can hold a hearing, I'd say fine, let's set it down. About custody, I'd be willing to turn custody over to him. That would be no problem. I wouldn't be the least bit interested in what the State Department had to say at that point. There would be no need for me to make an emergency phone call. The State Department could make their arguments at the hearing, so I — they were never presented to me as alternatives . . . And as I say — maybe it's too much trust, but you're inclined to rely on the expertise of a federal department that purportedly has expertise in that area. But I did have qualms about it. I mean, I just didn't sit down and sign it. I said I want you to get an assurance that this is the appropriate thing to do.

Q: And is it accurate to say that the reason that you wouldn't rely on that is because it would be important to know what the person from the state Department knew about the case, what he had been told about the case and what he had actually said about the case?

A: Absolutely. If it weren't for the involvement of the State Department I would not have taken the action I did take.

Id. at 26-28, 139-40

After Judge Nealon signed the order, Rooney and Burke went tothe U.S. Marshal's office to get the Marshal's assistance inexecuting the order. See Rooney Dep. at 157. While waiting inthe Marshal's office, Rooney called the State Department toupdate them on what was happening. See Burke Dep. at 70-71.Rooney and Burke then accompanied the Marshals to Egervary'shome. See Rooney Dep. at 157. The attorney's remained parkedon the public road outside of Egervary's residence while theMarshals retrieved the child. Id. at 158-159. The Marshalsbrought the child to Rooney and Burke, who immediately drove thechild to Newark International Airport. Id. at 160. On the wayto the airport, Rooney again called the State Department to givethem an update. See Burke Dep. at 70-71. In fact, as Burkelater testified, Rooney was "continuously in conversation" withthe State Department throughout that day. Id. at 71.

While they drove to Newark, Rooney directed Lori Mannici,Esq., an associate in his office, to make travel arrangementsfor the trip to Europe. See Rooney Dep. at 156. Because Rooneydid not have Oscar's passport, those travel arrangementsincluded contacting the State Department to arrange for thechild to be removed from the country without passport. Id at165-66. Mannicci testified that she could not remember anythingabout contracting the State Department to arrange for thepassport waiver, includingto whom she spoke. See Mannicci Dep. at 30-31. However, herhandwritten notes from that afternoon include — on two separatepages — notations with "Ginny" Young's home telephone number.Id. at 19, 22-23 and Exhibits 9 and 10.

Rooney accompanied the child to Frankfort, Germany, and Kovacswas waiting for them in the airport

when they arrived. SeeRooney Dep. at 169.

Sometime thereafter, Egervary filed a motion forreconsideration before Judge Nealon. See Egervary II,80 F. Supp.2d at 504-507. At that time, Rooney sought a follow-upletter from Schuler in order to "reassure" himself. See RooneyDep. at 194. Schuler's letter to Rooney stated:

Dear Mr. Rooney,

This is to thank you for effecting the prompt return of the child Oscar Egervary to his mother in Hungary under the auspices of the Hague Convention on the Civil Aspects of International Child Abduction, and to briefly review the background of the case . . .

Oscar Egervary was born in the United States July 4, 1992, and at the age of approximately eight months was taken by his parents to Hungary, where both mother and father are citizens. (The father is also a U.S. citizen.) The parents separated in the summer of 1993 and the mother was granted temporary custody by a Hungarian court pending the couple's divorce.

Hungarian police reports indicate that in December 1993 the father and his brother accosted Mrs. Egervary in the street in Budapest and kidnapped the child. Mrs. Egervary attempted to hang on to the departing car, but fell off. She immediately filed a police report, and soon after filed an application for the return of her son under the Hague Convention which was received in this office in March, 1994.

At the time of his abduction, Oscar Egervary had lived for 10 months in Hungary and eight months in the United States. In addition, the information provided this office indicated that the parents had intended resettlement in Hungary, in that their car and personal effects had been sent there and an apartment in Pennsylvania had been vacated.

It seemed clear that Oscar Egervary's country of habitual residence was Hungary and that Mrs. Egervary's claim of unlawful removal and retention of her child under Article 3 of the Hague Convention was a valid one.

We located your name on a list of persons who had previously handled Hague Convention matters, and asked you to represent Mrs. Egervary. You agreed to assist on a pro bono basis.

Article 2 of the Convention asks that "the most expeditious procedures available" be utilized in effecting the implementation of Convention Precepts.

We are grateful for your prompt, humane and professional assistance. I hope we can continue to request your help whenever cases of international abduction to or from Pennsylvania are brought to our attention. Thank you again for your assistance.[8]

See Schuler Ltr. (June 1,1994).

C. The History of This Action

Plaintiff filed the complaint in this action on April 17, 1996in the Eastern District ofPennsylvania. It named Rooney, Burke, and Nallin (the "attorneydefendants"), as well as Young and Schuler (the "federaldefendants"). Count I alleged that the defendants violatedplaintiffs due process rights under the Fifth Amendment bydepriving him of custody of his child without notice oropportunity to be heard; Count II alleged that the defendantsconspired to violate those rights.

The case was assigned to the Honorable E. Mac Troutman. ByMemorandum and Order dated January 7, 1997, Judge Troutman foundthat venue was lacking in this District and gave plaintiffthirty days in which to move to transfer the case to the MiddleDistrict pursuant to 28 U.S.C. § 1406(a). See Egervary I, 1997WL 9787, at *4-*5. Judge Troutman reasoned that venue would liein this District, if at all, under 28 U.S.C. § 1391(b)(2), i.e.,if "a substantial part of the events or omissions giving rise tothe claim" occurred in this District. Id. at *4. JudgeTroutman acknowledged that Rooney maintained his law offices inthis District and that plaintiff alleged that the federaldefendants had "contacted, encouraged, and directed" theattorney defendants in this District. Id. However, he did notfind this alleged contact to be sufficiently substantial under §1391(b)(2). Id. at *5. Pursuant to Judge Troutman's Order,plaintiff thereafter moved pursuant to § 1406(a) and the actionwas transferred.

In the Middle District, the case was assigned to Judge Nealon,who had heard the underlying ICARA petition. However, during acase management conference on December 11, 1997, Judge Nealonrealized that he might be called as a witness and immediatelyrecused himself. See Order (December 16, 1997). Thereafter,all of the remaining judges in the Middle District also recusedthemselves, and the Honorable Sue L. Robinson of the UnitedStates District Court for the District of Delaware wasdesignated to preside over the case in the Middle District.

By Order dated August 17, 1998, Judge Robinson dismissed thefederal defendants from the case because she concluded thatplaintiff had not sufficiently alleged thatthe proceedings before Judge Nealon were "in any way directedby, approved of, or even within the knowledge of" the federaldefendants. See Order (August 17, 1998) at 5-6. With thefederal defendants dismissed from the case, venue in the EasternDistrict became proper pursuant to 28 U.S.C. § 1391(b)(1).Therefore, upon unopposed motion by plaintiff, Judge Robinsontransferred the case back to the Eastern District pursuant to28 U.S.C. § 1404(a), and it was reassigned to me.

Prior to the close of discovery, the attorney defendants fileda motion for summary judgment arguing that: 1) Egervary's dueprocess rights had not been violated; and 2) even if his rightshad been violated he could not recover in a Bivens suitbecause of certain defenses (namely, waiver, collateral attack,lack of damages, and immunity). By Memorandum and Order datedJanuary 21, 2000, I rejected these arguments. See Egervary II,80 F. Supp.2d at 492. Specifically, I found that Egervary had

afundamental liberty interest in the custody of his son (id. at498-99) and therefore could not be deprived of custody withouteither prior process (id. at 501-02) or a prompt,state-initiated postdeprivation hearing (id. at 502-04). Ialso noted that the essential facts necessary to establish aviolation of his due process rights were not in contention.Id. at 509. I therefore ordered the attorney defendants tobrief whether summary judgment should be entered against them onthe question of liability on the Bivens claim. Id. at 510.

In response to that Order, the attorney defendants arguedthat: 1) they were not state actors and/or federal agents whocould be held liable in a Bivens suit; and 2) even if theywere federal agents, they could assert a good faith defense toliability that precluded the entry of summary judgment againstthem. By Memorandum and Order dated August 15, 2000, I acceptedthese arguments in part and rejected them in part. See EgervaryIII 2000 WL 1160720. Specifically, I found that Nallin couldnot be held liable as a federal agent because he did notparticipate in executing the order that led to the deprivationof plaintiffs due process rights. Id. at *4-*6. Rooney andBurke, on the other hand, did participate in the execution ofthat order and therefore could be deemed federal agents for thepurposes of Bivens. Id. at *5. However, given the Court ofAppeals' decision in Jordan v. Fox, Rothschild, O'Brien &Frankel, 20 F.3d 1250, 1277 (3d Cir. 1994), I held that theycould assert a good faith defense to liability. Id. at *6. Ifurther concluded that whether they had acted in good faith wasa jury question that precluded the entry of summary judgment inplaintiffs favor on the question of liability. Id.

After the summary judgment issues were resolved, Rooney andBurke were deposed for the first time. Rooney testified to anumber of previously undisclosed facts regarding the federaldefendants' alleged participation in the deprivation ofplaintiffs due process rights. For example, Rooney testifiedthat: 1) defendant Young asked Rooney to represent Kovacs, seeRooney Dep. at 55-56, and sent him Hungarian governmentdocuments regarding the alleged abduction and model ICARApleadings (id. at 63-64); 2) while he was preparing the ICARApetition he consulted with the State Department "a bunch oftimes" (id. at 62); 3) someone from the State Department hadcalled Judge Nealon's office that morning to inform the Courtthat a petition was going to be filed (id. at 120-21); 4) hespoke with Schuler while he was in Judge Nealon's chambers inorder to confirm that the child could be removed from Egervary'scustody and returned to Hungary without a hearing (id. at115-16, 131-32); and 5) the State Department arranged for awaiver of the child's passport so that he could be removedimmediately from the country (id. at 165-66). On this basis,plaintiff argued that Rooney's testimony had undermined therationale for Judge Robinson's earlier order dismissing thefederal defendants from the case and moved for leave to file anamended complaint reasserting claims against them. I grantedthat motion on March 6, 2001. Thereafter, the federal defendantsfiled a motion for reconsideration arguing that leave to amendwas not appropriate. I denied the motion for reconsideration onMarch 23, 2001:

. . . Rule 15 requires that leave to amend be freely given "when justice so requires." The federal defendants were dismissed from this case by Judge Robinson because she concluded that "plaintiff

cannot prove that [the federal defendants] had any personal involvement in" the deprivation of plaintiffs due process rights. See Order dated August 17, 1998. There now is testimony that could give rise to a conclusion that these defendants were personally involved. Accordingly, I conclude that justice will be served by allowing the amendment.

See Order (March 23, 2001) at 3-4.

The amended complaint was filed on March 23, 2001. The federaldefendants subsequently moved to dismiss the amended complaint,arguing that: 1) venue is lacking in this District; 2) theoriginal complaint was not properly served; 3) the amendedcomplaint is barred by the statute of limitations; and 4) theycannot he held liable because of the defense of qualifiedimmunity. While the motion to dismiss was pending, the federaldefendants filed a motion for summary judgment alleging thatthey had no personal involvement in the constitutionaltort.[9]

III. DISCUSSION

A. Venue

The federal defendants first argue that the amended complaintshould be dismissed for improper venue pursuant to Fed.R.Civ.P.12(b)(5). Specifically, they argue that: 1) the law of the casedoctrine precludes me from reconsidering Judge Troutman's 1997finding that venue is lacking in this District; and 2) ifconsidered on the merits, venue is lacking. I disagree.

1. The Law of the Case Doctrine

The Court of Appeals has recognized that the law of the casedoctrine "expresses the practice of courts generally to refuseto reopen what has been decided, not a limit to their power."Zichy v. City of Philadelphia, 590 F.2d 503, 508 (3d Cir.1979), quoting Messinger v. Anderson, 225 U.S. 436, 444, 32S.Ct. 739, 56 L.Ed. 1152 (1912). "A judge need not follow aprevious decision of the same issue in the same case if `unusualcircumstances' exist that permit a different conclusion."Hayman Cash Register Co. v. Sarokin, 669 F.2d 162, 169 (3dCir. 1982), quoting Evans v. Buchanan, 555 F.2d 373, 378 (3dCir. 1977). One "commonly recognized exception . . . exists ifnew evidence is available to the second judge when hearing theissue." Id. In such a situation, "the question has not reallybeen decided earlier and is posed for the first time; the secondjudge ought, therefore, to be free to render a decision." Id.,quoting UnitedStates v. Wheeler, 256 F.2d 745, 748 (3d Cir. 1958).

When Judge Troutman decided the venue question in 1997, heconsidered plaintiffs general allegation that "Rooney and Burkemaintained their legal offices in this district, and as such,defendants Young and Schuler . . . contacted, encouraged, anddirected Rooney in this district." See Egervary I, 1997 WL9787, at *4. He did not, however, have available to him theevidence since produced in discovery regarding the nature andextent of those contacts and how those contacts relate to thealleged due

process violation. Specifically, Judge Troutman didnot know that:

• Young contacted Rooney in his office in the Eastern District and asked him to represent Kovacs. See Rooney Dep. at 59-60. She later faxed him copies of model pleadings published by the American Bar Association and Hungarian government documents related to Kovacs' allegations. Id. at 6264.

• While he was preparing the ICARA petition Rooney consulted with the State Department "a bunch of times" from his office in the Eastern District. Id. at 62;

• Rooney "relied" on the federal defendants' assistance in preparing the petition because he "was not extremely well-versed on The Hague." Id.;

• This reliance included finding out "where the child was" and establishing the facts to be presented in the petition. Id. at 62-63, 86-89. In fact, Rooney never spoke to Kovacs or her family prior to presenting the petition. Id. at 74; and

• After Rooney had taken custody of Oscar, he directed his associate Lori Mannicci, working from his office in the Eastern District, to make arrangements to remove the child from this country, including consulting with the State Department for a passport waiver. Id. at 156, 165-66; Mannicci Dep. at 8.[10]

This new evidence is sufficient to justify reconsideration ofvenue under the law of the case doctrine and, in my view, issufficient to establish venue in this District.

2. A Substantial Part of the Events Giving Rise to the Claim

As Judge Troutman observed, "it is clear that neither §1391(b)(1) or § 1391(b)(3) applies in the presentsituation."[11] Egervary I, 1997 WL 9787, at *4. Venuemust therefore be viewed under the requirements of § 1391(b)(2),which provides that "[a] civil action wherein jurisdiction isnot founded solely on diversity of citizenship may . . . bebrought only in . . . a judicial district in which a substantialpart of the events or omissions giving rise to the claimoccurred." This language reflects a 1990 amendment which"changedpre-existing law to the extent that the earlier version hadencouraged an approach that a claim would generally arise inonly one venue." Cottman Transmission Sys., Inc. v. Martino,36 F.3d 291, 294 (3d Cir. 1994). In other words, "the statute nolonger requires a court to select the `best' forum." Id. "Thisexpanded venue statute should be construed broadly." Bowdoin v.Oriel, No. 98-5539, 1999 WL 391486, at * 5 (E.D.Pa. May 5,1999). "The defendant bears the burden of showing improper venuein connection with a motion to dismiss." Myers v. Am. DentalAssoc., 695 F.2d 716, 725 (3d Cir. 1982).

The federal defendants argue that the new evidence summarizedabove "adds nothing of significance" for the purposes ofdetermining venue. They also argue that contacting the StateDepartment for a

passport waiver does not have "anything ofsignificance to do with the alleged deprivation of plaintiffsright to due process." See Federal Defendants' Reply Br. (July9, 2001) at 5-6 n. 3. I disagree.

Courts in this District have previously found that telephonecalls that take place in this District can constitute eventssufficient to establish venue in this District, even where "moresubstantial" events occurred outside of this District. See,e.g., Nowicki v. United Timber Co., No. 99-257, 1999 WL 619648,at *1 n. 1 (E.D.Pa. Aug. 12, 1999) (Yohn, J.) (contractnegotiations via telephone sufficient to establish venue in thisDistrict even though contract was signed in New York and dealtwith property located in the Middle District); Bowdoin, 1999WL 391486, at *5 (Bartle, J.) (in diversity action betweenFlorida and Massachusetts residents, venue was proper in theEastern District because defendant had telephone conversationswith now-deceased, non-party co-conspirator who lived in theEastern District). As was the case in Nowicki and Bowdoin,the telephone calls that took place in this District allegedly"gave rise to" the conduct that occurred outside of thisDistrict. Cf. 28 U.S.C. § 1391(b)(2). The gravamen ofplaintiff's claim against the federal defendants is that theyconspired with, gave substantial assistance or encouragement to,and/or ordered or induced Rooney to take custody of Oscar inviolation of plaintiffs due process rights.[12] That conductis alleged to have taken place by way of telephone calls to thisDistrict, and consistent with Nowicki and Bowdoin that issufficient to establish venue under § 1391(b)(2).

Of particular importance to this conclusion is plaintiffsallegation that arrangements to have the child removed from thiscountry without a passport were made in this District. Thefederal defendants imply that the removal of the child wasirrelevant to the due process violation. However, as I noted inEgervary II, the immediate removal of the child consummatedthe due process violation by making a prompt, state-initiatedpostdeprivation hearing impossible. See Egervary II,80 F. Supp.2d at 502 n. 7, citing Weller v. Dep't of Soc. Servs.,901 F.2d 387, 396 (4th Cir. 1990), and Hooks v. Hooks,771 F.2d 935, 942-43 (6th Cir. 1985). See also infra PartIII-E-3-f.

I therefore conclude that a substantial part of the eventsgiving rise to plaintiff's claim occurred in this District andvenue is proper under § 1391(b)(2).

B. Service of Process

The federal defendants next argue that the amended complaintshould bedismissed for insufficient service of process pursuant toFed.R.Civ.P. 12(b)(5). I disagree.

1. Rule 4 and Pa. R. Civ. P. 403

The starting point for this discussion is Rule 4(i)(2)(b),which states:

Service on an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf on the United States —

whether or not the officer or employee is sued also in an official capacity — is effected by serving the United States in the manner prescribed by Rule 4(i)(1) and by serving the officer or employee in the manner prescribed by Rule 4(e), (f), or (g).

The parties agree that the first part of this Rule wassatisfied, i.e., plaintiff properly served the United Statespursuant to Rule 4(i)(1) by sending copies of the summons andcomplaint to the United States Attorney for the Eastern Districtof Pennsylvania and the Attorney General of the United States.The parties disagree, however, about whether plaintiff properlyeffectuated personal service on the federal defendants pursuantto Rule 4(e), (f), or (g).

The federal defendants first raised the service issue in theirmotion to dismiss the original complaint in 1996. At that time,they argued that plaintiff had attempted to effect service under28 U.S.C. § 1391(e)[13] when in fact he should haveattempted to effect service under Pa. R. Civ. P. 402(a)(1) &(2).[14] See Federal Defendants' Br. (August 7, 1996) at34. Plaintiff responded by arguing that he had not attemptedservice pursuant to § 1391(e). See Plaintiffs Br. (September24, 1996) at 19. Instead, he argued, he had served the UnitedStates pursuant to Rule 4(i)(1) and had served the federaldefendants personally pursuant to Rule 4(e)(1), which providesfor personal service "pursuant to the law of the state in whichthe district court is located." Id. at 20-21. Specifically, heargued, he had personally served Young and Schuler pursuant toPa. R. Civ. P. 403 by sending copies of the summons andcomplaint to their place of business by certified mail.

The federal defendants subsequently filed a reply brief butdid not respond to plaintiffs argument. See FederalDefendants' Br. (October 18, 1996). Judge Robinson later grantedthe motion to dismiss but did not address the service of processissue.[15] See Order (August 17, 1998).

The federal defendants now renew the service of processargument, but their theory has changed. They now agree withplaintiff that the sufficiency of the personal service should beviewed in terms of Pa. R. Civ. P. 403. See Federal Defendants'Br. (May 11, 2001) at 13-14. They argue, however, that plaintifffailed to effect service pursuant to Pa. R. Civ. P. 403 becauseplaintiff cannot prove that an "agent" of the federal defendantssigned the return receipt that accompanied the copies of thecomplaint sent to the federal defendants at their place ofbusiness.

Plaintiff initially responds by arguing that the federaldefendants have waived the opportunity to challenge thesufficiency of process under Pa. R. Civ. P. 403 because theissue was not raised in the original motion to dismiss.[16]I disagree. Fed.R.Civ.P. 12(h)(1) provides that the defense ofinsufficient service of process is waived if it is not raised inthe defendant's first responsive pleading or motion. Plaintiffhas cited no support for the proposition that Rule 12(h)(1)requires every argument in support of the defense to beperfectly fleshed-out the first time it is stated. In my view,the federal defendants properly raised and preserved the defenseand the latest version of their argument in support of thedefense should be addressed on the merits.

I conclude, however, that the present record is insufficientto determine whether plaintiff has satisfied the PennsylvaniaRule. Pa. R. Civ. P. 403 provides:

If a rule of civil procedure authorizes original process to be served by mail, a copy of the process shall be mailed to the defendant by any form of mail requiring a receipt signed by the defendant or his authorized agent. Service is complete upon delivery of the mail.

The Court of Appeals considered this provision in Lampe v.Xouth, Inc., 952 F.2d 697 (3d Cir. 1991). The Lampe Courtfound that "Pennsylvania Rule 403 requires . . . a receiptsigned by the defendant or his authorized agent." Id. at 701.It went on to find that Rule 403 had not been satisfied in thatcase because the plaintiff had not proved that the signatures onthe return receipts that had accompanied copies of the complaintand summons belonged to either the defendants or their agents.Id.

In this case, plaintiff has produced return receipts that weresent to the federal defendants' place of business and signed bysomeone named "L. [or possibly F.] Barton." See Plaintiff'sBr. (June 19, 2001) at 15 n. 7; Affidavit of Gary L. Azorsky,Esq. (May 9, 1996) at Exhibits A and B. No party has offered anyexplanation as to who this individual is. I therefore cannotdetermine whether plaintiff has met the requirements of Pa. R.Civ. P. 403 as set out in Lampe.

2. 22 C.F.R. § 172.2

The parties differ on the appropriate course of action Ishould take if I find that I cannot decide whether plaintiff hassatisfied Pa. R. Civ. P. 403. Plaintiff argues that "[a]t thevery least, Mr. Egervary should be permitted to conduct limiteddiscovery on the question of the identity of the signatory ofthe return receipt card, so as to be able to define thatperson's authority to accept service for the federaldefendants." See Plaintiff's Br. (June 19, 2001) at 17. Thefederal defendants' only response to this request for limiteddiscovery is to characterize it as "lame."[17] SeeFederal Defendant's Reply Br. (July 9, 2001) at 12.

In my view, however, discovery is not the appropriate courseof action because service can be perfected promptly. Allowingplaintiff to perfect service is consistent with the Rules andcase law. Rule 4(i)(3)(A) provides that a court "shall allow areasonable time to serve process under Rule 4(i) for the purposeof curing the failure to serve . . . all persons required to beserved." Similarly, Rule 4(m) provides that a court "shallextend the time for service for an appropriate period" if theplaintiff shows "good cause" for the failure to serve within theprescribed period. Here, the federal defendants' failure toraise the Rule 403 theory until five years after service wasattempted constitutes "good cause." Similarly, the Court ofAppeals has stated that:

Upon determining that process has not been properly served on a defendant, district courts possess broad discretion to either dismiss the plaintiffs complaint for failure to effect service or to simply quash service of process. However, dismissal of a complaint is inappropriate when there exists a

reasonable prospect that service may yet be obtained.

See Umbenhauer v. Woog, 969 F.2d 25, 30 (3d Cir. 1992). Forthe following reasons, I find that there is more than a"reasonable prospect" that proper service may yet be obtained.

The federal defendants have repeatedly quoted a portion of22 C.F.R. § 172.2 for the proposition that "the [State] Departmentis not an authorized agent for service of process with respectto civil litigation against Department employees purely in theirpersonal, non-official capacity." See Federal Defendants' Br.(May 11, 2001) at 15; Federal Defendants' Reply Br. (July 9,2001) at 12. This portion of § 172.2 is not relevant to thiscase. Plaintiff has not made claims against the federaldefendants "purely in their personal, non-official capacity."Rather, plaintiff has made claims against them "in an individualcapacity for acts or omission occurring in connection with theperformance of duties on behalf of the United States." Cf.Fed.R.Civ.P. 4(i)(2)(B).

However, the remainder of § 172.2, to which the federaldefendants have not referred, does apply to this case. Itstates: "[T]he Executive Office of the Legal Adviser (L/EX) isauthorized to receive and accept summonses or complaints soughtto be served upon the Department or Department employees." See22 C.F.R. § 172.2(a). The regulation goes on to state, in thesentence immediately following the one quoted by the federaldefendants, that: "Copies of summonses or complaints directed toDepartment employees in connection with legal proceedingsarising out of the performance of official duties may . . . beserved upon L/EX."[18] See 22 C.F.R. § 172.2(c).

I will therefore deny the federal defendants' motion todismiss pursuant to Rule 12(b)(5) and allow the plaintiff toperfect service pursuant to 22 C.F.R. § 172.2 within 30 days.

C. Statute of Limitations

The federal defendants next argue that the amended complaintis barred by the statute of limitations. I disagree.

The federal defendants concede that plaintiff filed the firstcomplaint within the two year statute of limitations forBivens actions in Pennsylvania.[19] They argue, however,that the amended complaint was filed after the limitationsperiod had run and that "a statute of limitations is not tolledby the filing of a complaint subsequently dismissed withoutprejudice." See Federal Defendants Br. (May 11, 2001) at 17,quoting Cardio-Medical Assoc., Ltd. v. Crozer-Chester Med.Ctr., 721 F.2d 68, 77 (3rd Cir. 1983).[20]

1. Rule 54(b)

In the cases relied upon by the federal defendants, the firstcomplaint had been dismissed without prejudice and a newcomplaint was filed in a separate action. In such situations, astatute of

limitations is not tolled by the filing of the firstcomplaint. Here, however, the complaint was dismissed withprejudice as to two defendants but survived as to the remainingdefendants. This situation is expressly covered by Rule 54(b):

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Fed.R.Civ.P. 54(b) (emphasis added). Because no final judgmentwas entered after Judge Robinson's dismissal order, the actiondid not terminate as to the federal defendants and JudgeRobinson's order was "subject to revision at any time." Id.

In order to avoid the obvious impact of Rule 54(b) on theirstatute of limitations argument, the federal defendants arguethat Judge Robinson's dismissal order was never "revised" withinthe meaning of the Rule:

A fundamental problem with plaintiffs theory is that he never sought to have the court revise Judge Robinson's decision dismissing the Federal Defendants from the case and the Court never determined that, given the facts presented in plaintiffs original complaint, Judge Robinson's ruling was in error or subject to revision.

See Federal Defendant's Reply Br. (July 9, 2001) at 14.

This argument lacks merit. As I stated in my Order of March23, 2001:

. . . Rule 15 requires that leave to amend be freely given "when justice so requires." The federal defendants were dismissed from this case by Judge Robinson because she concluded that "plaintiff cannot prove that [the federal defendants] had any personal involvement in" the deprivation of plaintiffs due process rights. See Order dated August 17, 1998. There is now testimony that could give rise to a conclusion that these defendants were personally involved. Accordingly, I conclude that justice will be served by allowing the amendment.

See Order (March 23, 2001) at 3-4.

The federal defendants are correct that I never held that"Judge Robinson's ruling was in error";

however, I need not makesuch a determination. Viewing the newly discovered evidence inthe light most favorable to plaintiff, it can no longer be saidthat the proceedings before Judge Nealon were not "in any waydirected by, approved of, or even within the knowledge of the[federal defendants]." Cf. Order (August 17, 1998) at 5-6.Nothing in Rule 54(b) states or implies that a valid "revision"of an "order or other form of decision" dismissing fewer thanall of the parties cannot be made unless the court concludesthat the order was in error at the time it was entered.[21]Judge Robinson's order did not terminate the action against thefederal defendants and the amended complaint is not barred bythe statute of limitations if it relates back to the originalcomplaint.

2. Rule 15(c) and the Relation Back Doctrine

Rule 15(c)(2) states: "An amendment of a pleading relates backto the date of the original pleading when . . . the claim ordefense asserted in the amended pleading occurrence set forth orattempted to be set forth in the original pleading." Thisprovision means what it says:

[A]mendments that merely correct technical deficiencies or expand or modify the facts alleged in the earlier pleading meet the Rule 15(c) test and will relate back. Thus, amendments that do nothing more than restate the original claim with greater particularity or amplify the details of the transaction alleged in the preceding pleading fall within Rule 15(c).

See 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane,Federal Practice and Procedure § 1497 (2d ed. 1990).

Rule 15(c)(2) obviously applies to the amended complaint inthis case, which merely restates the allegations of the originalcomplaint with greater particularity. The federal defendants donot discuss Rule 15(c)(2) in their reply brief is limited to thefollowing passage:

Plaintiff argues that his claims against the Federal Defendants in the Amended Complaint relate back to the filing of the original complaint under Rule 15(c)(2) of the Federal Rule of Civil Procedure because the Amended Complaint did not change "the party or the naming of the party" against who [sic] the claim is asserted. See Plaintiff's Brief at 28-29. Plaintiff further argues that even if Rule 15(c)(3) of the Federal Rules of Civil Procedure is applicable, his amended complaint relates back to the filing of the original complaint because there was a "mistake" in the naming of the party. Id. at 29-31. Plaintiff is wrong on both counts.

See Federal Defendants' Reply Br. (July 9, 2001) at 16.Rule 15(c)(2) is never mentioned again, however, and the reader isleft wondering why "plaintiff is wrong on [that] count." Id.Instead, the federal defendants embark on a three pagediscussion of Rule 15(c)(3).[22] There are, however, twoproblems with their discussion. First, Rule 15(c)(3) does notapply to this situation. Rule 15(c)(3) applies to an "amendment[that] changes the party or the naming of the party against whoma claim is asserted." The Advisory Committee notes illustratethe circumstances where the Rule applies:

The problem has arisen most acutely in certain actions by private parties against officers or agencies of the United States. Thus an individual denied social security benefits by the Secretary of Health, Education, and Welfare may secure review of the decision by bringing a civil action against that officer within sixty days. 42 U.S.C. § 405(g) (Supp.III, 1962). In several recent cases the claimants instituted timely action but mistakenly named as defendant the United States, the Department of HEW, the "Federal Security Administration" (a nonexistent agency), and a Secretary who had retired from office nineteen days before. Discovering their mistakes, the claimants moved to amend their complaints to name the proper defendant; by this time the statutory sixty-day period had expired. The motions were denied on the ground that the amendment "would amount to the commencement of a new proceeding and would not relate back in time so as to avoid the statutory provision . . . that suit be brought within sixty days."

See Fed.R.Civ.P. 15 Advisory Committee Notes (1966 Amendment).The present case is not such a situation. Yet, the federaldefendants argue that "plaintiff offers no explanation of hisassertion that his amended complaint did not change `the partyor the naming of the party' against whom a claim is made." SeeFederal Defendants' Reply Br. (July 9, 2001) at 16. Thisargument is incomprehensible for two reasons. First, theexplanation is self-evident. The original complaint namedVirginia Young and James Schuler. See Complaint ¶¶ 2, 3. Theamended complaint also names Virginia Young and James Schuler.See Amended Complaint ¶¶ 2, 3. Second, the federal defendantsthemselves have previously stated that "[h]ere, there was nomistake concerning the identity of the Federal Defendants;plaintiff Egervary brought suit against the Federal Defendantsin his original Complaint." See Federal Defendants' Br. (May11, 2001) at 20.

Second, even if Rule 15(c)(3) did apply to this case,plaintiff has met the requirements of that Rule. In mostcircumstances,a plaintiff invoking Rule 15(c)(3) must prove that the newlynamed party "(A) has received such notice of the institution ofthe action that the party will not be prejudiced in maintaininga defense on the merits, and (B) knew or should have known that,but for a mistake concerning the identity of the proper party,the action would have been brought against the party." SeeFed.R.Civ.P. 15(c)(3). However, these requirements generally donot apply to federal defendants. The Rule goes on to state that:

The delivery or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

See Fed.R.Civ.P. 15(c).

The federal defendants admit plaintiff correctly and timelyserved the United States Attorney for the Eastern District ofPennsylvania and the United States Attorney General. SeeFederal Defendants' Br.

(May 11, 2001) at 11. Yet, rather thanacknowledging that that service relieved plaintiff from therequirements of Rule 15(c)(3)(A) and (B), the federal defendantsignore the provision quoted above and engage in an extendeddiscussion of Rule 15(c)(3)(B).[23] See FederalDefendants' Br. (May 11, 2001) at 19-20; Federal Defendants'Reply Br. (July 9, 2001) at 16-18.

I conclude that the amended complaint relates back to theoriginal complaint pursuant to Rule 15(c)(2).

3. Equitable Estoppel

Finally, even if Rules 15(c)(2) and 54(b) did not apply, Iwould hold that the federal defendants are equitably estoppedfrom asserting the statute of limitations because of theirconcealment of their personal involvement in this case.

Under Pennsylvania law, a defendant is estopped from invokingthe statute of limitations where "through fraud or concealment,the defendant causes the plaintiff to relax his vigilance ordeviate from his right of inquiry." Schaffer v. Larzelere,410 Pa. 402, 189 A.2d 267, 269 (1963). The defendant's conduct "neednot rise to the level of fraud or concealment in the strictestsense, that is an intent to deceive; unintentional fraud orconcealment is sufficient." Krevitz v. City of Philadelphia,167 Pa. Commw. 412, 648 A.2d 353, 357 (1994). Courts have held,however, that "[m]ere mistake, misunderstanding or lack ofknowledge is not sufficient to toll the running of the statute."Schaffer, 189 A.2d at 269. Moreover, "mere silence ornondisclosure is not enough to trigger estoppel." Krevitz, 648A.2d at 357. Rather, the adversary "must commit some affirmativeindependent act of concealment upon which the plaintiffsjustifiably rely in order to toll the statute." Id. A courtmay find an estoppel "only in clear cases of fraud, deception,or concealment" and plaintiff has the burden of making such ashowing. Belfi Brothers & Co. v. Safeco Ins. Co. of Am., No.94-0844, 1994 WL 591762, at *4 (E.D.Pa. Oct. 28, 1994).

In my view, the federal defendants concealed their personalinvolvement in this case when in response to the originalcomplaint they immediately moved to stay discovery, anaffirmative act, and dismiss the complaint. In that motion, theyargued that plaintiff had failed "to substantiate his claimswith a single fact showing that defendants Young and Schuler, orany other State Department official, had any involvement in theremoval of the child without notice." See Federal Defendants'Br. (August 7, 1996) at 10. On this basis, Judge Robinsonconcluded that "plaintiff cannot prove that the movingdefendants had any personal involvement in, nor did theyconspire to, deprive plaintiff of his right to due process."See Order (August 18, 1998) at 6. Yet, discovery had sinceyielded more than "a single fact" that arguably shows that thefederal defendants were personally involved in the events ofthis case:

• Young contacted and retained Rooney on behalf of Kovacs. See Rooney Dep. at 59-60. She later faxed him Hungarian government documents and copies of model ICARA pleadings published by the American Bar Association. Id. at 62-64.

• Rooney "relied" on the federal defendants' assistance in drafting the petition presented to Judge Nealon and spoke to them about it "a bunch of times." See Rooney Dep. at 62. He never, on the other hand, spoke with his client, Kovacs, or any member of her family in order to prepare the petition. Id. at 74. The factual representations he later made to Judge Nealon were based entirely on conversations with the federal defendants and the Hungarian government documents that he received from the federal defendants. Id. at 86-89.

• The federal defendants contacted Judge Nealon's chambers on May 13, 1994 to inform the Court that a Hague Convention petition would be presented that day. Id. at 120-21.

• During the presentation to Judge Nealon, Rooney called the State Department and spoke with James Schuler to confirm that Judge Nealon could order that the child be returned to Hungary immediately. Id. at 115-16, 131-32. Rooney also called them thereafter from the Marshal's office and on the road to Newark. See Burke Dep. at 70-71. He was "continuously in conversation" with them that day. Id.

• After the child had been taken from plaintiffs custody, the State Department arranged for a passport waiver so that the child could be removed from the country that same day. See Rooney Dep. at 165-66. See also Mannicci Dep. at 19, 22-23, 30-31.

The federal defendants did not literally misrepresent theextent of their involvement to Judge Robinson, i.e., they didnot specifically deny that they had any personal involvement.Rather, they argued that claims against government officials aresubject to a heightened pleading standard and plaintiff hadfailed to meet that standard. See Federal Defendants' Br.(August 7, 1996) at 16-27. However, in order for equitableestoppel to apply their conduct "need not rise to the level offraud or concealment in the strictest sense." Krevitz, 648A.2d at 357. The federal defendants effectively hid behind theheightened pleading standard, causing plaintiff to do more thanjust "relax his vigilance." See Schaffer, 189 A.2d at 269. Asa result of the federal defendants' strategy, plaintiff wasforced to "deviate from his right of inquiry" by operation of acourt order that at their request initially stayed discovery andlater led to dismissal of the complaint. Id.

The federal defendants respond to this conclusion by arguingthe following:

In their original motion to dismiss, the Federal Defendants argued, as they plainly were entitled to do, that the plaintiffs complaint, on its face, failed to sufficiently state a claim against them for violation of constitutional rights. They also argued, as they were plainly entitled to do, that discovery was not appropriate because they had raised the defense of qualified immunity. These perfectly legitimate arguments by the Federal Defendants cannot form the basis for some claim of fraud or concealment sufficient to justify equitable estoppel or equitable tolling.

See Federal Defendants' Reply Br. (July 9, 2001) at 21.

I agree with the premise of this argument but disagree withthe conclusion. Certainly, the federal defendants had the rightto assert that a heightened pleading standard applied toplaintiffs' claim. Equity, however, should not allow them tobenefit from a strategy that delayed the discovery of evidenceof their personal involvement.

I therefore conclude that the amended complaint is not barredby the statute of limitations.

D. Qualified Immunity

The federal defendants next argue that they are entitled toqualified immunity.[24] I disagree.

Under the qualified immunity doctrine, government officialsperforming discretionary functions are generally "shielded fromliability for civil damages insofar as their conduct does notviolate clearly established statutory or constitutional rightsof which a reasonable person would have known." Harlow v.Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396(1982). The Supreme Court has directed courts evaluating claimsof qualified immunity to proceed in two steps: a court "mustfirst determine whether the plaintiff has alleged thedeprivation of an actual constitutional right at all, and if so,proceed to determine whether that right was clearly establishedat the time of the alleged violation." Wilson v. Layne,526 U.S. 603, 608, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999).

1. Due Process Violation

The Due Process Clause of the Fifth Amendment states that noperson shall "be deprived of life, liberty, or property withoutdue process of law." See U.S. Const. amend. V. "Manycontroversies have raged about the cryptic and abstract words ofthe Due Process Clause but there can be no doubt that at aminimum they require that deprivation of life, liberty orproperty by adjudication be preceded by notice and opportunityfor hearing appropriate to the nature of the case." Mullane v.Central Hanover Bank & Tr. Co., 339 U.S. 306, 313, 70 S.Ct.652, 94 L.Ed. 865 (1950). Neither of these "fundamentalrequisite[s]" of due process is satisfied by mere pretense.Id. at 314, 70 S.Ct. 652. Notice must be "reasonablycalculated, under all the circumstances, to appriseinterested parties of the pendency of the action" (id.), andthe opportunity to be heard "must be granted at a meaningfultime and in a meaningful manner." Armstrong v. Manzo,380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965).

Procedural due process questions are examined in two steps.See Kentucky Dep't. of Corrections v. Thompson, 490 U.S. 454,460, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989). The first step"asks whether there exists a liberty interest which has beeninterfered with by the State." Id. If there is such aninterest, the second step asks "whether the procedures attendantupon that deprivation were constitutionally sufficient." Id.

a. Liberty Interest

An abundance of case law supports the conclusion thatplaintiff had a fundamental liberty interest in the custody ofhis child. See Hollingsworth v. Hill, 110 F.3d 733, 739 (10thCir. 1997) (in a Section 1983 suit brought by a mother whosechildren were removed from her custody without prior notice, themother had "a constitutionally protected liberty interest [inthe custody of her children] which could not be deprived withoutdue process"); Jordan v. Jackson, 15 F.3d 333, 342 (4th Cir.1994) (in a Section 1983 suit brought by parents whose son wasremoved from their custody without prior notice, the court foundthat there "are few rights more fundamental in and to oursociety than those of parents to retain custody over and carefor their children, and to rear their children as they deemappropriate"); Weller v. Dep't. of Soc. Servs., 901 F.2d 387,391 (4th Cir. 1990) (in a Section 1983 suit brought by a fatherwhose children were removed from his custody without priornotice, the father "clearly [had] a protectible liberty interestin the care and custody of his children"); Robison v. Via,821 F.2d 913, 921 (2d Cir. 1987) (in a Section 1983 suit brought bya mother whose children were removed from her custody withoutprior notice, "it was clearly established that a parent'sinterest in the custody of his or her children was aconstitutionally protected interest of which he or she could notbe deprived without due process"); Hooks v. Hooks,771 F.2d 935, 941 (6th Cir. 1985) (in a Section 1983 suit brought by amother whose children were removed from her custody withoutprior notice, the court found that it is "well-settled thatparents have a liberty interest in the custody of theirchildren"); Lossman v. Pekarske, 707 F.2d 288, 290 (7th Cir.1983) (in a Section 1983 suit brought by a father whose childrenwere removed from his custody without prior notice, the father"unquestionably" had a liberty interest in the custody of hischildren); Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir.1977) (in a Section 1983 suit brought by a mother whose childrenwere removed from her custody without prior notice, the courtfound a liberty interest in "the most essential and basic aspectof familial privacy, the right of the family to stay togetherwithout the coercive interference of the awesome power of thestate").

It is also clear that plaintiff had a fundamental libertyinterest in the custody of his son even though his estrangedwife contested legal custody. Courts have recognized a parent'sliberty interest in the physical custody of a child even whenthe parent lacks legal custody. For example, in Farina v. Cityof Tampa, 874 F. Supp. 383 (M.D.Fla. 1994), prospective adoptiveparents sued the city police after officers returned the childto his biological parents without any prior notice or judicialproceedings. Id. at 384-85. The defendants conceded theunderlying facts and acknowledged that the operative lawprovided for notice and opportunity to be heardbefore custody decisions are made. Id. at 385. Defendantsargued, however, that plaintiffs had no protected libertyinterest because they had only physical, not legal, custody ofthe child. The court flatly rejected that distinction and found"no authority in support of [defendants'] distinction betweenphysical and legal custody for procedural due process purposes."Id. at 386. On this basis, the court granted partial summaryjudgment in favor of the plaintiffs. Id. at 387.

Plaintiff therefore had a fundamental liberty interest in thecontinued physical custody of his son.

b. The Constitutional Sufficiency of the Process

Since Egervary had a fundamental liberty interest in thecustody of his son, the child could not be removed from hiscustody without either prior process or a prompt,state-initiated postdeprivation hearing.

Obviously, plaintiffs due process rights would not have beenviolated if he had received notice and opportunity to be heardprior to Oscar's removal from his custody. However, "due processis flexible and calls for such procedural protections as theparticular situations demands." Morrissey v. Brewer,408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). For this reason,courts have found that even though parents have a fundamentalliberty interest in the custody of their children they do notalways have a right to prior process when the state removestheir children from their custody.

Courts agree that "in emergency circumstances which pose animmediate threat to the safety of a child, officials maytemporarily deprive a parent of custody without parental consentor a court order." Hollingsworth, 110 F.3d at 739. See alsoJordan, 15 F.3d at 343 (parents can be deprived or custody ortheir children without prior process "where emergency action isnecessary to avert imminent harm to a child"); Weller, 901F.2d at 393 ("Due process does not mandate a prior hearing whereemergency action may be needed to protect a child."); Doe v.Hennepin County, 858 F.2d 1325, 1329 (8th Cir. 1988) (the statemay intervene on behalf of "abused children" without priornotice); Robison, 821 F.2d at 921 ("officials may temporarilydeprive a parent of custody in `emergency' circumstances");Lossman, 707 F.2d at 291 ("When a child's safety isthreatened, that is justification enough for action first andhearing afterwards."); Duchesne, 566 F.2d at 826 (child can beremoved without prior process in "extraordinary situations").

It is not clear whether the facts in this case justifiedOscar's removal without prior process. In each of the casescited above where an emergency removal was found to bejustified, there was specific evidence of an imminent threat ofsevere neglect or physical abuse. See Jordan, 15 F.3d at 336(neglect); Weller, 901 F.2d at 391 n. 7 (physical abuse);Doe, 858 F.2d at 1326 (sexual abuse); Robison, 821 F.2d at916 (sexual abuse); Lossman, 707 F.2d at 289 (physical abuseand death threats); Duchesne, 566 F.2d at 822 (neglect). Bycontrast, in Hollingsworth, where there were merely generalallegations of "abuse, injury, molestation, and harassment" butno concrete evidence of an "immediate threat," the removalwithout prior process was found to be unjustified. SeeHollingsworth, 110 F.3d at 740. In this case, plaintiff wasaccused of kidnaping his son, a serious offense that arguablyinvolves an inherent risk of further flight. It is unclear,however, whether the bare allegation of parental kidnaping isserious enough to justify emergency action to remove a childfrom his parent's custody without priorprocess. I need not resolve this issue because plaintiff wasalso denied a prompt, state-initiated postdeprivation hearing.

Even when an imminent threat of harm justifies removing achild from his parent's custody without prior process, theremust be a prompt, state-initiated postdeprivation hearing toratify the removal.[25] See Jordan, 15 F.3d at 343 ("[T]herequirements of due process may be delayed where emergencyaction is necessary to avert imminent harm to a child, providedthat post-deprivation process to ratify the

emergency action ispromptly accorded."); Weller, 901 F.2d at 396 ("[E]ven if itis constitutionally permissible to temporarily deprive a parentof the custody of a child in an emergency, the state has theburden to initiate prompt judicial proceedings to ratify itsemergency action."); Hennepin County, 858 F.2d at 1329 ("[T]hestate may intervene on behalf of abused children . . . if thestate provides an adequate postdeprivation hearing.");Lossman, 707 F.2d at 291 ("[W]here the state has a procedurefor a prompt, adversary postdeprivation hearing in a childcustody matter and the hearing is held and establishes that thestate officers acted prudently in removing the child from theparent's custody without a prior hearing, that findingextinguishes a claim that the failure to hold a predeprivationhearing was a denial of due process."); Duchesne, 566 F.2d at826 ("[I]n those `extraordinary situations' where deprivation ofa protected interest is permitted without prior process, theconstitutional requirements of notice and an opportunity to beheard are not eliminated, but merely postponed.").

The federal defendants have not attempted to argue thatplaintiff received either a prior hearing or a prompt,stateinitiated postdeprivation hearing.[26] I thereforeconclude that plaintiffs due process rights were violated andthe federal defendants can be held liable for that violationunless there was no clearly established right at the time of theviolation.[27]

2. Clearly Established Right

The federal defendants are entitled to qualified immunity ifthey did not violate a "clearly established" right "of which areasonable person would have known." Harlow, 457 U.S. at 818,102 S.Ct. 2727. The "contours" of the asserted right "must besufficiently clear that a reasonable official would understandthat what he is doing violates that right." Anderson v.Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523(1987). "Some factual correspondence" to precedent is necessary,but "it is not necessary that there have been a previousprecedent directly in point." Good v. Dauphin County Soc.Servs. for Children and Youth, 891 F.2d 1087, 1092 (3d Cir.1989). "Thus, government officials are not barred from theprotection of qualified immunity if they fail to predictfluctuations in legal debates. They will not, however, begranted immunity if they fail to make obvious inferences from agenerally established right, to its application in particularsituations." Doe v. Delie, 257 F.3d 309, 331 (3d Cir. 2001)(Nygaard, J., concurring in part and dissenting in part). "Insum, an official will not be liable for allegedly unlawfulconduct so long as his actions are objectively reasonable undercurrent federal law." Gruenke v. Seip, 225 F.3d 290, 299 (3dCir. 2000).

a. Federal Law as of May 1994

I conclude that plaintiffs right to due process was clearlyestablished at the time of the alleged violation in May 1994because there was a consensus among federal appellate courtsthat a parent is entitled to notice and opportunity to be heardin a situation like the present one. Of the numerous appellatecourt decisions cited in the previous section, only two,Hollingsworth v. Hill, 110 F.3d 733, 739 (10th Cir. 1997) andJordan v. Jackson, 15 F.3d 333, 342 (4th Cir. 1994), weredecided after the

events in this case. Therefore, if the federaldefendants were reasonably cognizant of federal constitutionallaw in May 1994, as the qualified immunity defenserequires them to be, they should have been aware of thefollowing.

In 1977, in Duchesne v. Sugarman, 566 F.2d 817, 821-22 (2dCir. 1977), a mother brought a § 1983 claim on behalf of herselfand her two minor children against four supervisory levelmunicipal welfare employees and two private child careinstitutions. The mother alleged that the defendants hadviolated her due process rights by taking custody of herchildren without notice or opportunity to be heard. Id. at824. The court concluded that the initial taking of the childrenwas lawful because there was an imminent threat of neglect, themother having been confined to a psychiatric hospital. Id. at825-26. It also held that defendants violated the mother's dueprocess rights because there was no prompt, state-initiatedpostdeprivation hearing. Id. at 828. The state defendantsraised the defense of qualified immunity, but the court remandedthe case so that the district court could address the issueinitially. Id. at 829-30.

In 1983, in Lossman v. Pekarske, 707 F.2d 288, 289 (7th Cir.1983), a father brought a § 1983 claim on behalf of himself andhis three minor children against county welfare andlaw-enforcement officers. The father alleged that the defendantshad violated his due process rights by taking custody of hischildren without notice or opportunity to be heard. Id. at289-90. The court concluded that the father had an fundamentalliberty interest in the custody of his children and, therefore,they could not be removed from his custody without notice oropportunity to be heard. Id. at 290-91. It found, however,that the father had received due process in the form of aprompt, state-initiated postdeprivation hearing. Id. at291-92. It therefore affirmed the district court's grant ofsummary judgment in favor of the defendants. Id. at 292.

In 1985, in Hooks v. Hooks, 771 F.2d 935, 937-38 (6th Cir.1985), a mother brought a § 1983 claim against her formerhusband, his parents, two of his friends, officers and employeesof a county sheriff's department, and an employee of the stateDepartment of Human Services. The mother alleged that thedefendants had violated her due process rights by taking custodyof her two minor children without notice or opportunity to beheard. Id. at 938. The court concluded that the mother hadstated a claim for violation of her due process rights, at leastin part because the children had been removed from her custodyand immediately taken to another state, "effectively eliminatingthe opportunity for plaintiff to receive a post-deprivationhearing." Id. at 942. The court also discussed the extent towhich co-conspirators could be held liable to the mother:

Express agreement among all the conspirators is not necessary to find the existence of a civil conspiracy. Each conspirator need not have known all of the details of the illegal plan or all of the participants involved. All that must be shown is that there was a single plan, that the alleged co-conspirator shared in the general conspiratorial objective, and that an overt act was committed in furtherance of the conspiracy that caused injury to the complainant.

Id. at 944. On this basis, the court found that the mothercould not maintain a claim against her ex-husband's friends andparents because they were not alleged to have had knowledge ofthe conspiracy. Id. However, the court allowed the case tocontinue as to the remaining defendants. Id.

In 1987, in Robison v. Via, 821 F.2d 913, 915 (2d Cir.1987), a mother brought a § 1983 claim against a state trooperand an assistant state's attorney. The mother alleged that thedefendants had violatedher due process rights by taking custody of her two minorchildren without notice or opportunity to be heard. Id. at917. In analyzing the defendants' qualified immunity defense,the court stated the following:

To be sure, in 1981, when the Robison children were taken into custody, it was clearly established that a parent's interest in the custody of his or her children was a constitutionally protected liberty of which he or she could not be deprived without due process, which would generally require a predeprivation hearing . . . However, it was, and remains, equally well established that officials may temporarily deprive a parent of custody in emergency circumstances without parental custody or a prior court order.

Id. at 921. The court went on to conclude that due process hadbeen satisfied because there were credible allegations of sexualabuse that justified emergency removal of the child and therewas a prompt, state-initiated postdeprivation hearing the nextday. Id. at 922.

In 1990, in Weller v. Dep't. of Soc. Servs., 901 F.2d 387,389 (4th Cir. 1990), a father brought a § 1983 claim againsttwenty-five defendants, including "agencies of Maryland,employees of the State of Maryland and the City of Baltimore,and his ex-wife and mother-in-law." The father alleged that thedefendants had violated his due process rights by taking custodyof his minor son without notice or opportunity to be heard.Id. at 393. The court held that "a parent is entitled to ahearing initiated by the State before he may be deprived of thecustody of his child, and in an emergency a prompt hearing mayratify the state action." Id. at 398. It also expressed"additional concern" because the defendants had immediatelytaken the son to a different jurisdiction, "thereby reducing thepossibility of a post-deprivation hearing." Id. at 396. Thecourt acknowledged, however, that the defendants could assertqualified immunity and therefore remanded the case to thedistrict court to determine whether the right had been clearlyestablished at the time of the alleged deprivation. Id. at398.

These precedents establish more than just the "contours" ofthe right that was allegedly violated; they are a well-markedroadmap.[28] All of the cases agree that a parent has afundamental liberty interest in the custody of his or her child.All of the cases agree that that interest cannot be infringedupon without either prior process or, in the case of anemergency, a prompt, state-initiated postdeprivation hearing.Two of the cases, Duchesne and Weller, implicitly illustratethat liability for such an unconstitutional deprivation canextend further than the individual who physically takes custodyof the child, and a third case, Hooks, explicitly describesthe limits of conspiratorial liability for such a deprivation.Two of the cases, Duchesne and Weller, declared that theasserted right exists but

remanded to the district court todetermine whether it had beenclearly established at the times of the alleged violations. Athird case, Robison, explicitly stated that the right to dueprocess in such situations had been clearly established as of1981. See Robison, 821 F.2d at 921. Two of the cases, Hooksand Weller, noted that the immediate removal of the childrento another jurisdiction had effectively eliminated thepossibility of a postdeprivation hearing.

The only distinguishing point is that these precedents aroseout of the conduct of state actors acting pursuant to state law,while this case arises out of the conduct of federal agentsacting pursuant to an international treaty and the federal lawthat implements it. Extending these precedents to thissituation, however, is not a "fluctuation in legal debate" thatthe federal defendants could be forgiven for failing to predict.See Doe, 257 F.3d at 331. Rather, applying the Due ProcessClause to the actions of State Department employees is an"obvious inference from a generally established right." Id.

b. Violations of ICARA, State Law, and Federal Regulations

The preceding analysis is a sufficient and independentrationale for finding that the federal defendants are alleged tohave violated a clearly established right. There are, however,additional reasons that may support this finding; namely, thefederal defendants' alleged conduct also likely violated ICARA,state law, and federal regulations. Before I discuss theseviolations, however, I will explain why they may be relevant tothe qualified immunity analysis.

Doe v. Delie is the Court of Appeals' most recent decisionaddressing the qualified immunity defense. In Doe, a formerinmate of the Pennsylvania Department of Corrections claimedthat prison officials had violated his constitutional right tomedical privacy by allowing others to learn that he wasHIV-positive. See Doe, 257 F.3d at 311. The panel ultimatelyaffirmed the dismissal of the claim, but it was divided. JudgeGarth was unwilling to declare that there is a constitutionalright to medical privacy in prison. Id. at 323. Judge Nygaardbelieved that there is right to medical privacy in prison andthat the right was clearly established at the time of thealleged violation. Id. at 330. Judge Roth was of the view thatthere is a right to medical privacy in prison but the right wasnot clearly established at the time of the alleged violation.Id. at 311.

There was also a difference of opinion as to whether aconcurrent violation of state law is relevant to the qualifiedimmunity inquiry. Judge Roth found that such evidence is notrelevant because "[t]he Supreme Court has held that officials donot forfeit qualified immunity from suit for violation of afederal constitutional right because they failed to comply witha clear state statute." Id. at 318. Judge Nygaard disagreed.He argued that an overlapping state law should "raise [an]official's awareness that a parallel federal right may exist"and therefore is relevant to the qualified immunity inquiry.Id. at 334. Judge Garth did not reach the issue.

It is not my function to determine whether Judge Roth's orJudge Nygaard's view is correct.

Cognizant of the disagreement,however, I feel obliged to discuss plaintiffs contention thatthe federal defendants also violated ICARA, state law, andfederal regulations because the Court of Appeals may ultimatelyfind this contention relevant to the qualified immunityanalysis.

First, ICARA provides that notice "be given in accordance withthe applicable law governing notice in interstate child custodyproceedings." See 42 U.S.C. § 11603(c). Courts interpretingthisprovision have found the "applicable law" to be the ParentalKidnaping Prevention Act, 28 U.S.C. § 1738A ("PKPA"), and theUniform Child Custody Jurisdiction Act, 23 Pa.C.S.A. § 5341, etseq. ("UCCJA"). See Brooke v. Willis, 907 F. Supp. 57, 60(S.D.N.Y. 1995); Klam v. Klam, 797 F. Supp. 202, 205 (E.D.N.Y.1992). Both PKPA and UCCJA provide for "reasonable notice andopportunity to be heard." See 28 U.S.C. § 1738A(e);23 Pa.C.S.A. § 5345. This generally means "a plenary hearing atwhich both sides are heard." Klam, 797 F. Supp. at 205.

Klam is instructive. In Klam, a German father alleged thathis ex-wife was unlawfully retaining their children in New Yorkand that the children should be returned to Germany pursuant tothe Hague Convention and ICARA. To that end, he filed an ICARApetition asking that his children be taken into protectivecustody before the mother was notified of the ICARA proceedings.Id. at 203. In support of this request, the petition made aseries of conclusory assertions, including the claim that thechildren were being "wrongfully detained" from the nation oftheir "habitual residence" and that the children would be"carried out of the jurisdiction" and "suffer irreparableinjury" unless the petition was granted. Id. at 204. The courtwas confronted with the issue of whether the petition could begranted ex parte based only on those assertions. Id. at 206.

The court concluded that ex parte relief would violate theprocedural protections of ICARA and gave two rationales for thisconclusion. First, the court looked to a series of cases holdingthat ex parte relief is inappropriate under PKPA and UCCJAabsent "a showing of extraordinary circumstances." Id. Second,the court was hesitant to rely on the unsubstantiatedallegations contained in the petition. Id. It therefore deniedthe ex parte request for interim relief, but stated that itwould allow the father to proceed after the mother had beenserved. Id. at 207 n. 5.

The petition submitted to Judge Nealon was remarkably similarto the petition rejected by the court in Klam. For example, italleged that plaintiffs removal of his son from Hungary inDecember 1993 was a "wrongful removal" from the child's"habitual residence" within the meaning of the Hague Conventionand ICARA. See ICARA Petition of Aniko Kovacs (May 13, 1994) ¶¶2, 5 and 6. The petition also alleged that Egervary would "uponbeing informed of these proceedings . . . further abduct andsecrete the child." Id. ¶ 12. However, Kovacs' petition alsowent a significant step further than the Klam petition. Thepetition asked that Oscar be turned over to Rooney immediatelyand returned to Kovacs, rather than being held pending finalresolution of the ICARA petition. Id. ¶ 13. The petition atissue in this case was, therefore, a more egregious violation ofplaintiffs rights than the petition involved in Klam. Itherefore conclude that the federal defendants' alleged conductviolated the ICARA notice provision.

Second, ICARA provides that a child cannot be "removed from aperson having physical control of the child unless theapplicable requirements of State law are satisfied." See42 U.S.C. § 11604(b). The notice provision of the Pennsylvaniaversion of the UCCJA, 23 Pa.C.S.A. § 5345, states that: "Beforemaking a decree under this subchapter, reasonable notice andopportunity to be heard shall be given to the contestants, anyparent whose parental rights have not been previously terminatedand any person who has physical custody of the child." TheKlam analysis above is sufficient to show that the federaldefendants' alleged conduct also violated this state law.

Finally, there also is evidence from which it could beconcluded that the federal defendants violated the StateDepartment's regulations governing the Hague Convention. Thoseregulations provide that: "The U.S. Central Authority [i.e., theBureau of Consular Affairs where the federal defendants worked]is prohibited from acting as an agent or attorney or in anyfiduciary capacity in legal proceedings arising under theConvention." See 22 C.F.R. § 94.4(a). However, the U.S.Central authority "shall . . . [a]ssist applicants in securinginformation useful for choosing or obtaining legalrepresentation, for example, by providing a directory of lawyerreferral services, or pro bono listing published by legalprofessional organizations, or the name and address of the stateattorney general or prosecuting attorney who has expressed awillingness to represent parents in this type of case and who isemployed under state law to intervene on the applicant'sbehalf." See 22 C.F.R. § 94.6(d).

The federal defendants have repeatedly cited these regulationsas evidence that they could not have engaged in any conduct thatviolated plaintiffs due process rights. See, e.g., FederalDefendants' Br. (August 7, 1996) at 11; Federal Defendants' Br.(May 11, 2001) at 26-27; Federal Defendants' Reply Br. (July 9,2001) at 25.[29] It is clear, however, that the federaldefendants' conduct — even the limited account of their conductthat has been set forth in their briefs — exceeded what theywere authorized to do under the regulations. In their briefs,the federal defendants acknowledge that they: 1) contactedRooney to ask him to represent Kovacs; and 2) sent Rooneywritten materials that would assist him in drafting the ICARApetition. See Federal Defendants' Br. (July 9, 2001) at 2-7("Statement of Undisputed Facts"). Section 94.6(d) does notauthorize the State Department to retain an attorney on behalfof a petitioner or to give substantive assistance to anattorney. Rather, it permits assistance in "securing informationuseful for choosing or obtaining legal representation." When thefederal defendants — by their own admission — helped Kovacs tofind an attorney and then provided that attorney with writteninformation to assist him in drafting the petition the federaldefendants exceeded their authority under § 94.6(d) and becamean "agent" of Kovacs, which is prohibited under § 94.4(a).

To reiterate, the federal case law previously discussed is, inmy view, more than sufficient to establish that the federaldefendants violated plaintiffs clearly established right tonotice and opportunity to be heard. However, if the Court ofAppeals should adopt Judge Nygaard's Doe opinion, there alsois ample evidence that federal defendants violated ICARA, statelaw, and State Department regulations.

3. The Federal Defendants' Reply Arguments

All of the federal appellate decisions discussed in myanalysis of the qualified immunity issue were also discussed atlength in Egervary II. See Egervary II, 80 F. Supp.2d at497-504. When I denied the federal defendants' motion forreconsideration of my order allowing plaintiff to file anamended complaint, I specifically called that discussion totheir attention and stated my belief that the "wealth ofauthorities" cited therein would be probative ofthe qualified immunity decision. See Order (March 23, 2001) at3. Since that time, the federal defendants have filed 105 pagesof briefs on the motion to dismiss and motion for summaryjudgment, yet they have never cited, discussed, or attempted todistinguish any of those cases.

Instead, they have argued for qualified immunity bymischaracterizing the conduct they are alleged to have engagedin and the right they are alleged to have violated. For example,they argue that:

• "Plaintiff's claim against the Federal Defendants boils down to the contention that they offered legal advice that prompted the plaintiffs former wife, a litigant in court proceedings, to seek and obtain relief from Judge Nealon that violated plaintiffs due process rights under the Fifth Amendment." See Federal Defendants' Br. (May 11, 2001) at 25.

• "Plaintiff's claim is limited to the allegation that the Federal Defendants offered inaccurate legal advice to counsel for the plaintiffs former wife concerning the type of relief she, as a litigant, could request from the court." Id. at 26.

• "[T]he Federal Defendants, neither of whom was a lawyer, allegedly gave this legal advice to defendant Rooney, who was a lawyer and who represented the plaintiffs wife in all court proceedings . . . it is inherently illogical to suggest that lay persons should be held responsible for providing allegedly inaccurate legal advice to a lawyer . . ." Id. at 27-28.

• "[T]here plainly was no `clearly established' law that defendants Young and Schuler, neither of whom are lawyers, could be held responsible for violating plaintiff Egervary's constitutional rights for supposedly advising defendant Rooney . . ." Id. at 30.

• "In this case, defendants Young and Schuler may not be held responsible for any of the actions by defendant Rooney in seeking an order from Judge Nealon for the seizure of the plaintiffs son and then executing the Court's order, merely because the Federal Defendants supposedly advised him that he might be able to seek such an order." Id. at 31.

• "[P]laintiff completely fails to address the Federal Defendants' argument that in May, 1994 there was no `clearly established' law that they could be liable to the plaintiff for a violation of his due process rights under the circumstances of this case, where they allegedly offered advice to the attorney for plaintiffs former wife concerning the type of relief which she could seek in court." See

Federal Defendants' Reply Br. (July 9, 2001) at 22.

• "Plaintiff . . . does not offer a single case or any other legal authority to support his claim that the Federal Defendants, neither of whom is a lawyer, may be held liable for allegedly offering inaccurate legal advice to the attorney for a third party . . ." Id. at 24.

Assuming arguendo that plaintiffs claim were "limited to theallegation that the Federal Defendants offered inaccurate legaladvice," it is unclear whether the federal defendants could beheld liable. It is clear that the qualified immunity defensedoes not absolve the federal defendants of liability simplybecause they are not lawyers (as they seem to imply in thepassages quoted above). Rather, the qualified immunity defenseis predicated on the concept that competent government officialswill have a reasonable working knowledge of federalconstitutional law. See Malley v. Briggs, 475 U.S. 335, 341,106 S.Ct. 1092, 89 L.Ed.2d 271 (1986).

It is clear, however, that this case is about more than justoffering inaccurate legal advice. Plaintiff alleges, and basedon the current record a reasonable jury could conclude, that thefederal defendants did the following:

• In violation of State Department regulations, the federal defendants retained a private attorney on behalf Aniko Kovacs. See supra Part III-D2-b;

• The federal defendants conspired with, gave substantial assistance or encouragement to, and/or ordered or induced Rooney to present a petition to Judge Nealon that made false representations of fact and requested removal of the plaintiffs child from his custody without notice or opportunity to be heard. See infra Part III-E;

• The federal defendants contacted Judge Nealon's chambers on the morning that the ICARA petition was filed to alert the Court that Rooney would be presenting the petition that day. See Rooney Dep. at 120-21. See also infra Part III-E-3-b;

• In response to an inquiry from Judge Nealon, the federal defendants communicated through Rooney that the "official State Department position" was that the child could be lawfully removed from his father's custody and returned to Hungary without a hearing. See Rooney Dep. at 115-16, 13132. See also Nealon Dep. at 16-20, 22-24, 26-28, 139-40;

• The federal defendants arranged for a passport waiver so that the child could immediately be returned to Hungary, effectively eliminating the possibility of a postdeprivation hearing. See Rooney Dep. at 165-66; Mannicci Dep. at 19, 22-23. See also infra Part III-E-3-f.

Plaintiffs claim, therefore, is not "limited to the allegationthat the Federal Defendants offered inaccurate legal advice."

E. Personal Involvement

Finally, the federal defendants move for summary judgment onthe grounds that there is insufficient evidence of theirpersonal involvement in the alleged deprivation of plaintiffsdue process rights. I disagree.

1. The Summary Judgment Standard

Rule 56 empowers a court to grant summary judgment if "thereis no genuine issue as to any material fact" and "the movingparty is entitled to a judgment as a matter of law."Fed.R.Civ.P. 56(c). Initially, the moving party must state thebasis for its motion and identify those portions of the recordwhich it believes indicate the absence of any genuine issue ofmaterial fact. See Celotex Corp. v. Catrett, 477 U.S. 317,323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). When the movingparty does not bear the burden of persuasion at trial, it mayproperly support its motion merely by showing that there is anabsence of evidence to support the nonmoving party's case. Id.at 325, 106 S.Ct. 2548.

In response to a properly supported motion for summaryjudgment, the non-moving party must point to specific factsdemonstrating that a genuine issue exists for trial. SeeFed.R.Civ.P. 56(e). It may not rest upon unsupported allegationsor denials. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242,248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A "mere scintilla ofevidence" supporting the non-moving party's position isinsufficient to create a genuine issue of material fact; theremust be sufficient evidence from which a jury could reasonablyfind for the non-moving party. Id. at 252, 106 S.Ct. 2505."Credibilitydeterminations, the weighing of evidence, and the drawing oflegitimate inferences from the facts" should be left to thejury. Id. at 255, 106 S.Ct. 2505. All evidence must be viewedin the light most favorable to the non-moving party. Id.

I note that the federal defendants' arguments in support oftheir motion misapply the summary judgment standard in a numberof ways. First, although this is their motion for summaryjudgment Young and Schuler have not submitted affidavits givingtheir account of the events in this case.[30] In theirbriefs, however, they make factual claims about their conduct.For example, they claim that the passport waiver was granted bythe duty officer in the State Department's Passport Servicesoffice and that they had no involvement in issuing the waiver.See Federal Defendants' Br. (August 17, 2001) at 16-17. Thereis no evidence in the record to establish those facts, and, as Iwill explain in greater detail below, the record supports theinference that Young had some involvement in obtaining thewaiver. The federal defendants' unsworn denial of that factcannot affect my analysis.

Second, the federal defendants have at times attempted torebut damaging testimony by citing other testimony that, intheir view, explains away the damaging testimony. For thepurposes of a summary judgment motion, however, I must assumethat a jury might give no weight to the explanatory testimony.Therefore, even if I find the explanatory testimony to bereasonable I must find that an issue of fact exists on thatpoint.

2. The Legal Standard for Personal Involvement in a Constitutional Tort

The federal defendants begin their summary judgment argumentby claiming that plaintiff "has never coherently articulated histheory of liability." See Federal Defendants' Br. (August 17,2001). I disagree.

Plaintiff has discussed the legal standard for personalinvolvement in a constitutional tort. See Plaintiffs Br.(August 3, 2001) at 4-5. Specifically, he relies upon Rode v.Dellarciprete, 845 F.2d 1195 (3d Cir. 1988), and Robinson v.City of Pittsburgh, 120 F.3d 1286, 1294 (3d Cir. 1997). InRode, the Court of Appeals held that "[a] defendant in a civilrights action must have personal involvement in the allegedwrongs." See Rode, 845 F.2d at 1207. The Robinson Courtlater discussed the Rode requirement in situations where agovernment employee has supervisory authority over the personwho commits the constitutional tort. See Robinson, 120 F.3d at1294. The Robinson Court also stated in a footnote that whenthe issue arises in other situations, courts should be guided bythe Restatement (Second) of Torts §§ 876 and 877(a). Id. at1294 n. 6.

Section 876 states:

PERSONS ACTING IN CONCERT

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he

(a) does a tortious act in concert with the other or pursuant to a common design with him, or

(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or

(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

Section 877(a) states:

DIRECTING OR PERMITTING CONDUCT OF ANOTHER

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he

(a) orders or induces the conduct, if he knows or should know of circumstances that would make the conduct tortious if it were his own . . .

On this basis, plaintiff has argued that the federaldefendants potentially could be held liable under

any of thesestandards (conspiring with, giving substantial assistance orencouragement to, and/or ordering or inducing the conduct). Inmy view, plaintiffs discussion is coherent and supported byRode and Robinson. The federal defendants, however, have notcited any authority to guide my consideration of their allegedpersonal involvement and have argued for at least threedifferent standards in their briefs.[31]

For the purposes of this motion, I need not decide whichprovision of the Restatement applies to plaintiffs claim. Thefederal defendants' analysis of the record consistently arguesthat there is no evidence that they knew what Rooney was doing,and knowledge of the other party's action is arguably aprerequisite to liability under any of the provisions ofRestatement §§ 876 and 877(a).[32] I find, however, thatthere is ample evidence that the federal defendants' knew ofRooney's actions. Moreover, viewing the record in the light mostfavorable to plaintiff a jury could reasonably conclude that thefederal defendants conspired with, gave substantial assistanceor encouragement to, and/or ordered or induced Rooney's actions.

3. Evidence of Personal Involvement

a. The Retention of and Assistance to Rooney and the Model Pleadings

The starting point for the federal defendants' analysis of therecord is the model pleadings that Young sent Rooney. Innumerous instances, each of which will be discussed in greaterdetail below, the federal defendants argue that they could nothave known that Rooney was seeking an ex parte order becausethe model pleadings did not provide for ex parte proceedings.See, e.g., Federal Defendants' Br. (July 9, 2001) at 13("Rooney's purported assumption that defendant Schuler thoughtthat defendant Rooney was seeking an ex parte order is notworthy of any consideration because it was inconsistent with themodel pleadings pointed out to defendant Rooney by the StateDepartment."). There are two problems with this argument.

First, this argument ignores the extensive contacts thatRooney had with Young and Schuler after he received the modelpleadings. Rooney testified that he "had to rely on them [i.e.,Young and Schuler] to help [him]" because he "was not extremelywell-versed on The Hague." See Rooney Dep. at 62. He thereforespoke tothem "a bunch of times." Id. Burke confirmed that during thedays when Rooney was receiving that help "they [i.e., Young andSchuler] seemed to be calling constantly . . . I remember thephone calls was [sic] constantly coming in and it was the StateDepartment . . . they were calling all the time it seemed like."See Burke Dep. at 26-27. Similarly, on the day of the exparte meeting, Rooney was "continuously in conversation" withthe State Department. Id. at 71. Given this volume of phonecalls after Rooney received the model pleadings, a reasonablejury could infer that the model pleadings were merely thestarting point for the help Rooney received from the federaldefendants.

Second, the federal defendants mischaracterize the contents ofthe model pleadings. They argue that the model pleadings"provided for full notice of all proceedings." See FederalDefendants' Br. (August

17, 2001) at 10. This is incorrect. Themodel pleadings in fact suggest an initial ex parte proceedingwithout notice to the alleged parent-kidnapper followed byseizure of the child and a prompt postdeprivation hearing withnotice.

The model pleadings Young sent Rooney consisted of two parts.The first was a model ICARA petition. See Federal Defendants'Br. (July 9, 2001) at Exhibit G. The model petition contains twoprovisions that are relevant to the present discussion. Thefirst is labeled "Notice of Hearing." It provides: "Pursuant to42 U.S.C. § 11603(c), Respondent shall be given notice pursuantto [state law]." The federal defendants' contention that themodel pleadings provided for "full notice of all proceedings"apparently rests on this provision. However, as my previousdiscussion of 42 U.S.C. § 11603(c) showed, this statute merelyprovides for "reasonable notice and opportunity to be heard" andallows for the seizure of a child without prior notice in"extraordinary circumstances." See supra Part III-D-2-b,discussing § 11603(c) and Klam. Therefore, read in isolationthe "Notice of Hearing" provision of the model petition does notstand for the proposition that the alleged parent-kidnapper willbe given "full notice of all proceedings."

The other relevant provision of the model petition also doesnot support the federal defendants' claim. The model petitionalso contains an optional provision labeled "ProvisionalRemedies." This provision states that the petitioner "believesthat Respondent, upon being informed of these proceedings, willfurther abduct and secrete the child." See Federal Defendants'Br. (July 9, 2001) at Exhibit G. It goes on to state thatbecause of this threat of further flight the petitioner issimultaneously presenting a "petition for warrant in lieu ofhabeas corpus" that provides for the immediate seizure of thechild without prior notice to the alleged parent-kidnapper andplacement of the child in protective custody "until adetermination is made under this petition." Id. This provisionreinforces the conclusion that the model petition does notprovide for "full notice of all proceedings."

The second part of the model pleadings Young sent Rooney was asample of the warrant referred to in the "Provisional Remedies"provision of the model petition. See Federal Defendants' Br.(July 9, 2001) at Exhibit H. The model warrant is essentially anorder with three different options from which the judge canchoose. It is directed to "any peace officer" within the stateand begins by stating that the court believes the child inquestion is being illegally held and that there is reason tobelieve that the parent-kidnapper will carry the child out ofthe jurisdiction. Id. Itthen lists the options for seizing the child. The first optionorders the child to be seized and brought before the court foran immediate hearing. Id. The second option orders the childto be seized and placed in a juvenile shelter until a hearing is"promptly" conducted. Id. The third option orders the child tobe seized and turned over to the Petitioner, who is ordered to"immediately" calendar a hearing and is prohibited from removingthe child from the county. Id. The model warrant also providesthe judge with the option of ordering the same officer whoseizes the child to serve the alleged parent-kidnapper with acopy of the petition, implicitly for the first time. Id.

As was discussed above, the model petition provides for thepossibility that some proceeding will occur before the allegedparent-kidnapper is given notice. The model warrant goes a stepfurther. It provides three specific options for seizing thechild before the alleged parent-kidnapper has been given notice.Read together, these model pleadings do not provide for "fullnotice of all proceedings." Rather, they suggest an initial exparte proceeding without notice to the alleged parent-kidnapperfollowed by seizure of the child and a prompt postdeprivationhearing with notice.

b. The Phone Call to Judge Nealon's Chambers

On two different occasions, Rooney testified that someone fromthe State Department called Judge Nealon's chambers on May 13,1994 to inform the Court that a Hague Convention petition wasgoing to be presented that day.

In his interrogatories, Rooney was asked to "set forth thedate, time and manner in which [the meeting with Judge Nealon onMay 13, 1994] was arranged and the persons involved in makingsuch arrangements." See Rooney Interrogatories (July 17, 1998)at 7(c). Rooney answered: "I believe the State Departmentadvised Judge Nealon's chambers of the pending action. I do notrecall any other specific details." See Rooney Amended Answers(undated) at 7(c).

Similarly, in his deposition the following exchange occurred:

Q: In your Answers to Interrogatories I believe you said, and I don't have them in front of me but I will get them if there's a question about this, I believe that you said that the State Department had contacted the court to arrange for you to appear before Judge Nealon.

A: I don't know if they called to arrange. They called to inform the court that a petition would be presented involving a Hague matter. I don't know who called, I don't know with whom they spoke; I just knew that by the time we got there the judge was aware or the judge's chambers was aware of someone coming in with a petition. I also think that we may have called, someone from my office may have called, to advise the judge that we were on our way to Scranton.

Q: What made you think that someone from the State Department had contacted chambers?

A: I may have recalled the secretary saying, Oh, yes, we got a call from the State Department saying that a petition was going to be brought in.

See Rooney Dep. at 120-21.

This evidence is potentially harmful to the federaldefendants' claim that they had no personal involvement in theICARA proceedings. It is difficult for them to argue that theydid not know what Rooney was doing if they called Judge Nealon'schambers that day to inform the Court that Rooney

was on his waywith an ICARA petition. They therefore attempt to rebut Rooney'stestimony with testimony from Judge Nealon and Burke.

The federal defendants argue that "Judge Nealon's testimonyconclusively rebuts plaintiffs argument that there is a factissue in this case as to whether the Federal Defendants somehowinfluenced Judge Nealon's decision by contacting the judge'schambers to schedule the ex parte hearing." See FederalDefendants' Br. (August 17, 2001) at 2. In support of thatargument, they quote the following questions and answers fromJudge Nealon's deposition:

Q: Now, do you have any information that anyone from the State Department contacted anyone in your chambers about the possible filing of this petition by Mr. Rooney before it was actually filed?

A: I have no information like that. See the procedure is when an emergency matter is filed with the clerk's office they — someone in the clerk's office may and usually does seek some information as to what it's about, and the reason for that is there may be a matter that a particular judge doesn't want to handle or that he may have a conflict.

Q: Do you have any information that anyone from the State Department contacted the clerk's office about this matter prior to its being filed?

A: No, I have not.

See Nealon Dep. at 86-87. Judge Nealon's testimony on thispoint does not "conclusively rebut" Rooney's testimony. JudgeNealon merely stated that he had no information regarding a callfrom the State Department prior to his meeting. That does notnecessarily mean that his secretary did not receive such acall.[33]

The federal defendants also argue that Burke's testimony onthis point "eliminated any confusion." See Federal Defendants'Br. (July 9, 2001) at 8 n. 6. Burke testified as follows:

Q: Did you, at any point before going to court, telephone the court to arrange for the matter to be presented to a judge?

A: I think I talked to — I think I personally got the name of the law clerk from Attorney Nallin and then I don't know if I called him or if Fred called him as to scheduling of this or at least of an understanding of when we could go in to see Judge Nealon.

See Burke Dep. at 41.

There are two problems with the federal defendants' relianceon this testimony. First, there is not necessarily a conflictbetween Burke's and Rooney's testimony. Burke testified that hegot the number

from Nallin and gave it to Rooney but does notremember who actually called.Rooney testified that when they arrived for the hearing, theJudge's staff was expecting them. He possibly remembers theJudge's secretary saying that the State Department had called,but he admits that his office may have "also" called. SeeRooney Dep. at 120-21. Notably, neither Rooney nor Burkeremember placing the call themselves. A jury could reasonablyconclude that there is no actual conflict in this testimony andthat someone from the State Department placed the call.

Second, if there is an actual conflict between Rooney's andBurke's testimony, a reasonable jury could credit the former andignore the latter (or vice-versa). For the purposes of a summaryjudgment motion, I must read the evidence in the light mostfavorable to plaintiff and assume that a jury would creditRooney's testimony. The federal defendants' real objection tothis testimony seems to be that Rooney does not have a vividmemory of what happened and equivocates in his testimony;however, any uncertainty in his testimony is a matter forimpeachment before the jury.

I therefore conclude that there is a material issue of fact asto whether the federal defendants contacted Judge Nealon'schambers.[34]

c. The Federal Defendants' Ignorance of the "Fourth Option"

The parties agree that the petition and warrant Rooneypresented to Judge Nealon differed from the model pleadingsYoung had sent him in one crucial respect. The model pleadingsprovide three options for an initial ex parte proceedingwithout notice to the alleged parent-kidnapper followed byseizure of the child and a prompt postdeprivation hearing withnotice. See supra Part III-E-3-a. The fourth option added byRooney eliminated the postdeprivation hearing. Specifically, itprovided that Oscar would be "take[n] into protective custody. . . and deliver[ed] to Petitioner's agent for immediate returnto the physical custody of Petitioner."[35] See FederalDefendants' Br. (July 9, 2001) at Exhibit F.

The federal defendants initially claimed that Rooney "statedat his deposition that he did not recall even mentioning thefourth option to anyone at the State Department when he decidedto add it to the proposed order." See Federal Defendants' Br.(July 9, 2001) at 8. In support of this assertion, they cited,but did not quote, the following testimony:

Q: Before that conversation with Mr. Schuler do you know whether Mr. Schuler was aware that you had added that paragraph to the standard form for a Warrant in Lieu of Writ of Habeas Corpus?

A: I don't recall. I don't recall if I spoke to Ginny Young about it or if I spoke to Schuler about it.

See Rooney Dep. at 116. Even read on its own, without thebenefit of the additional testimony I will quote below, thispassage does not support the federal defendants' assertion thatRooney did not mention the immediate return option to "anyone"at the State Department. The common sense reading of Rooney'sanswer is that he spoke to either Young or Schuler about it butcould not

remember which it was.

In addition, the federal defendants did not refer to thefollowing testimony, which appears the page before the passagethe quoted above:

Q: Did you discuss with Ms. Young or anyone else at the State Department the paragraph of the warrant in lieu of Writ of Habeas Corpus that you added to the form that you referred to earlier?

A: I did the day the order was presented. I spoke to James Schuler about it.

Id. at 114-15.

These two passages rebut the federal defendants' assertionthat Rooney never mentioned the fourth option to Young andSchuler: Rooney testified that he was unsure which of them hehad spoken to about the fourth option in the days before the exparte hearing, but he was certain that he had spoken to Schulerabout it on the day of the hearing.

In their reply brief, the federal defendants admit, at leastin part, that they misread Rooney's testimony. See FederalDefendants' Br. (August 17, 2001) at 10 n. 2. They now admitthat Rooney told Schuler about the fourth option on the day ofthe meeting with Judge Nealon but do not acknowledge that Rooneymay have informed Young or Schuler about it in the precedingdays. Id.

They now argue that Schuler's knowledge of the fourth optionwas "clearly irrelevant under the circumstances" because Schulerdid not know that Rooney's meeting with Judge Nealon was exparte. Id. As was previously discussed, however, the modelwarrant that Young sent Rooney was designed for the expresspurpose of seizing the child before the alleged parent-kidnapperhad notice. See supra Part III-E-3-a. The federal defendantsconcede that it is "reasonable" to assume that "Schuler wouldhave been familiar with the model pleadings." See FederalDefendants' Br. (July 9, 2001) at 14. Therefore, the fact thatRooney was preceding ex parte was implicit when he toldSchuler that he had added a fourth option to the model warrant.

d. The Federal Defendants' Ignorance of the Ex Parte Nature of the Meeting with Judge Nealon

The federal defendants next argue that the record"conclusively demonstrates" that they did not know that theproceedings before Judge Nealon were ex parte. See FederalDefendants' Br. (July 9, 2001) at 11. I disagree.

As I have previously noted, the federal defendants have notfiled affidavits stating that they did not know that theproceedings were ex parte. Instead, they argue that thatconclusion can be inferred from three facts: 1) during his phonecall from Judge Nealon's chambers, Rooney did not specificallytell Schuler that the proceedings were ex parte; 2) the modelpleadings that Young sent Rooney provided

for "full notice ofall proceedings"; and 3) ex parte proceedings are rare inICARA cases.

The federal defendants rely on the following passage fromRooney's deposition:

Q: Did you, during that conversation [from Judge Nealon's chambers], advise Mr. Schuler that no notice of this, the filing of this petition, had been given to Mr. Egervary?

A: No, but I think that we would have assumed that that was the case simply because in most Hague matters notice is not given to someone who has been determined to be an abducting parent for fear that upon notice of something pending that there would be a flight with a child. It would have been highly irregular to give notice to a parent in this situation for fear that the child would then be taken someplace else.

See Rooney Dep. at 131-32.

This passage says what the federal defendants claim it says;namely, during the phone call from Judge Nealon's chambersRooney did not specifically tell Schuler that the proceedingswere ex parte. This fact, however, does not establish thatSchuler did not know that the proceedings were ex parte. Infact, Rooney states that he assumes Schuler knew they were. Thefederal defendants therefore argue that "Rooney's purportedassumption that defendant Schuler thought that defendant Rooneywas seeking an ex parte order is not worthy of considerationbecause it was inconsistent with the model pleadings pointed outto defendant Rooney by the State Department . . . there was nological reason for defendant Schuler to have merely assumed thatdefendant Rooney was proceeding without notice to Mr. Egervary."See Federal Defendants' Br. (July 9, 2001) at 13.

As I have previously discussed, however, those model pleadingsdid not provide for "full notice of all proceedings." Cf.Federal Defendants' Br. (August 17, 2001) at 10. They providedfor an initial ex parte proceeding without notice to thealleged parent-kidnapper followed by seizure of the child and aprompt postdeprivation hearing with notice. See supra PartIII-E-3-a. Therefore, there was a logical reason for Schuler tohave assumed that Rooney was proceeding ex parte; namely, themodel pleading suggested that an in initial ex parteproceeding was appropriate.

The federal defendants also argue that Rooney was wrong toassume that Schuler knew the proceedings were ex parte becauseex parte proceedings are rare in ICARA cases:

The ex parte process utilized by defendant Rooney was not normal or routine, as he apparently believed. This Court has already determined that the ex parte process violated the Due Process Clause of the Fifth Amendment, and the Court has even gone so far as to suggest that the process was so obviously flawed as to likely violate plaintiffs clearly established constitutional rights. See Order of March 23, 2001 at p. 3. It can hardly be argued that defendant Schuler should have merely assumed under the circumstances that defendant Rooney was engaged in a clearly unlawful process

because defendant Rooney failed to specify otherwise.

Id. at 13.

This argument is flawed for two reasons. First, the federaldefendants misstate my earlier findings of why the proceedingswere constitutionally deficient. I did not say that a defendantin an ICARA proceeding must invariably receive prior notice ofthe proceedings. To the contrary, I stated that such defendantsare entitled to either prior process or a prompt, stateinitiatedpostdeprivation hearing. Therefore, Rooney's statement that itis highly unusual to give prior notice to such defendants doesnot necessarily conflict with my earlier findings.[36]

Second, and more importantly, what I have written about thenature of the due process rights that were at stake isirrelevant to what Rooney and Schuler communicated to oneanother that day. Whether Rooney and Schuler thought that priornotice is highly irregular in such situations is a factualquestion that must be answered with reference to the record, notwith reference to my earlier legal determinations.

What is relevant, therefore, is: 1) what the StateDepartment's actual practice in such situations was prior to May1994; and 2) the course of conduct between Rooney and Schulerthat preceded that conversation.[37] Because Young andSchuler have not been deposed and I do not have theiraffidavits, the record is silent as to the State Department'sprior practices in these situations. The record is replete,however, with evidence of the course of conduct between Rooneyand the federal defendants. That course of conduct includednumerous phone conversations and the transmission to Rooney ofmodel pleadings that suggested an initial ex parte proceedingwithout notice to the alleged parent-kidnapper followed byseizure of the child and a prompt postdeprivation hearing withnotice. On this basis, a reasonable jury could conclude thatSchuler knew the proceedings were ex parte.

Finally, Rooney is not the only person to have testified onthis point. In Judge Nealon's deposition, counsel for thefederal defendants read the portion of Rooney'sdeposition quoted above, and the following exchange occurred:

Q: Did Mr. Rooney ever tell that he had not actually given notice to Mr. Schuler when he called him on the telephone in the break in the conference that you had that this was an ex parte hearing?

A: Did he ever say that to me, is that what you're saying?

Q: Yes.

A: No.

Q: And would it have been significant to you if you knew that Mr. Schuler, the representative from

the State Department that Mr. Rooney had spoken to, did not know that it was an ex parte hearing?

A: It would have been, but I don't know how that would be consistent with what I've told you. And that is unless Mr. Rooney isn't reporting properly. The query I presented to Mr. Rooney was to determine if it was the State Department's position, those with expertise in international law, that I should act immediately without notice and without a hearing and order that the custody of the child be turned over to the petitioner.

See Nealon Dep. at 129-30.

Although Judge Nealon was not a firsthand witness to theconversation between Rooney and Schuler, his testimony pointsout that the federal defendants' theory of that conversation isimplausible. Judge Nealon repeatedly testified that he sentRooney out to call the State Department in order to find outwhether it was the Department's position that the child could beimmediately returned without a hearing. See Nealon Dep. at16-20, 22-24, 26-28, 139-40. The federal defendants implicitlyargue not only that Rooney did not report the query properly,but also that Schuler believed that a federal judge had stoppeda full-blown adversarial hearing in order to find whether, inthe State Department's view, the judge could take any action atthat hearing. In other words, as Judge Nealon hinted, the phonecall only makes sense if Schuler understood that Egervary wasnot present. Perhaps Schuler will provide some other plausibleaccount of that phone call when he is deposed, and perhaps ajury will ultimately accept that account. On this record,however, some other explanation cannot be assumed.

e. The Phone Calls after the Meeting with Judge Nealon

Burke testified that Rooney was "continuously in conversation"with the State Department on the day of the meeting with JudgeNealon:

Q: So, is it correct that on your way to the Newark Airport you stopped at the state police barracks?

A: Some barracks or some kind of — yes, to get directions, that's what is my recollection.

Q: Do you know whether Mr. Rooney spoke with anyone at the State Department at that time?

A: You know, he did. He did also in the U.S. Marshal's Office talk to someone from the State Department. And if memory serves me, at the courthouse that day we were continuously — he was continuously in conversation with them. So, that is true, it may be three times. And then if I remember, in the court-house, in the Marshal's Office and then at some point when we were trying to — we were driving to Newark. All that stuff occurred, we were talking to them. I don't know what the substance of the conversations were, though.

See Burke Dep. at 70-71.

The federal defendants discuss these alleged phone calls forthe first time in their reply brief. See Federal Defendants'Br. (July 17, 2001) at 15-16. They argue that: 1) Burke'stestimony is inadmissible hearsay; and 2) the phone calls neverhappened.

Burke's testimony is not hearsay. Fed.R.Evid. 801(c) defineshearsay as "a statement, other than one made by the declarantwhile testifying at the trial or hearing, offered in evidence toprove the truth of the matter asserted." Burke's testimony isnot being offered to prove the truth of what Rooney asserted inthose phone calls. It is being offered to prove that Rooney madethe phone calls.

The claim that the phone calls never happened also fails forthe purposes of this motion. As I have previously noted, thefederal defendants have not submitted affidavits denying thatthey spoke to Rooney at the times mentioned by Burke. Insteadthey argue that Rooney "denied" and "specifically testified"that he did not make those phone calls. See FederalDefendants' Br. (August 17, 2001) at 15. In support of thatclaim, they quote the following testimony:

Q: What contact did you have with the State Department after you left the courthouse on May 13, 1994?

A: I contacted them to tell them that the child had been returned. I know that they appreciated the efforts that I made to get the child back to his mother. I don't know how much more contact there was between then and the time that the motion for reconsideration was filed.

See Rooney Dep. at 175-76.

This is not a specific denial of Burke's testimony. Rooneyseems to be referring to a phone call after he returned fromEurope, not before he went, and he does not eliminate thepossibility of other phone calls. He was never specificallyquestioned regarding Burke's claim that he was continuously inconversation with the State Department on May 13th. Moreover, ifthis was a specific denial of Burke's testimony, a jury couldchoose to accept Burke's testimony over Rooney's.

I therefore find that a jury could reasonably conclude thatRooney made phone calls to the federal defendants after themeeting with Judge Nealon and before his trip to Europe.

f. The Passport Waiver

Rooney testified that after Oscar had been turned over to himhe instructed his associate, Lori Mannicci, to make arrangementsfor their trip to Europe. See Rooney Dep. at 156. Thosearrangements included contacting the State Department to arrangefor a passport waiver so that the child could be removed fromthe country immediately. Id. at 165-66. Mannicci testifiedthat she could not remember anything about contacting the StateDepartment to arrange for the waiver, including to whom shespoke. See Mannicci Dep. at 30-31. However, her handwrittennotes from that afternoon include

— on two separate pages —notations with Ginny Young's home telephone number. Id. at 19,22-23 and Exhibits 9 and 10. Although there are many unansweredquestions about how the passport waiver was obtained, in my viewthe presence of Young's home telephone number in Mannicci'snotes from that day supports the inference that Young had somekind of involvement.

The federal defendants initially did not discuss the passportwaiver, except to dismiss it as irrelevant to the case. See,e.g., Federal Defendants' Reply Br. (July 9, 2001) at 5-6 n. 3(arguing that the passport waiver did not have "anything ofsignificance to do with the alleged deprivation of plaintiffsdue process rights"). I disagree with this assessment. As I havestated previously, the immediate removal of the child from thiscountry consummated the due process violation by effectivelyeliminating the possibility of a postdeprivation hearing. SeeEgervary II, 80 F. Supp.2d at 502 n. 7, citing Weller, 901F.2d at 396, and Hooks, 771 F.2d at 942-43. Simply put, a jurycould conclude that the passport waiver was an overt act takenin furtherance of the alleged conspiracy.

The federal defendants address the substance of the passportwaiver evidence for the first time in their reply brief. SeeFederal Defendants' Br. (August 17, 2001) at 16-17. They nowargue that the waiver was granted by the duty officer in theState Department's Passport Services office and that they had noinvolvement in issuing the waiver. Id. They claim, without anycitation to the record or State Department regulations, thatthey "were not employed by Passport Services and could notthemselves have granted the passport waiver." Id. at 17 n. 3.For the purposes of a summary judgment motion, I cannot considerthese unsworn assertions.

I therefore find that a jury could reasonably conclude thatYoung had some involvement in seeking and/or granting thepassport waiver.

g. Schuler's Follow Up Letter

The federal defendants also discuss Schuler's follow-up letterto Rooney for the first time in their reply brief. See FederalDefendants' Br. (August 17, 2001) at 16. They argue that theletter could not have "encouraged" Rooney's actions because itwas sent a few weeks after he had returned from Europe. Id.That statement is literally true but does not address the realrelevance of the Schuler letter to plaintiffs claim.

The federal defendants have suggested — though, again, havenot provided any affidavits asserting — that Schuler's onlycontact with the Egervary case was the "minute or two" telephoneconversation from Rooney in Judge Nealon's chambers on May 13,1994. See, e.g., Federal Defendants' Br. (July 9, 2001) at 9,12. Schuler's follow-up letter, however, shows far morefamiliarity with the matter than possibly could have beengleamed from that single phone conversation, and, moreimportantly, shows Schuler's willingness to vouch for the facts,legal conclusions, and tactics Rooney used in the proceedingsbefore Judge Nealon.

Schuler begins by stating that he will "briefly review thebackground of the case." See Schuler Ltr. (June 1, 1994) at 1.He then provides a six-paragraph factual narrative that is forall practical purposes identical to what Rooney had presented toJudge Nealon.[38] Id. at 1-2. He then opines on two of thekey legal questions that were at issue in the ICARA proceedings.He asserts that Oscar was a habitual resident of Hungary andthat Egervary's retrieval of the child was an "unlawful removal"under Article 3 of the Hague Convention. Id. at 2. He thenstates that: "Article 2 of the Convention asks that `the mostexpeditious procedures available' be utilized in effectingimplementation of Convention precepts." Id.Though the reason for this quotation is not explicit, it canreasonably be inferred that Schuler's emphasis on the "the mostexpeditious procedures available" was an allusion to Rooney'simmediate return of the child without a hearing.[39]Finally, Schuler concludes by thanking Rooney for his "prompt,humane and professional assistance" in handling the case. Id.

Rooney testified that he had sought the letter as"reassurance" because Egervary had filed a motion forreconsideration before Judge Nealon. See Rooney Dep. at 194.The federal defendants offer no explanation for why Schuler, whosupposedly knew almost nothing about the case, was willing tovouch for Rooney on many of the points disputed in the motionfor reconsideration. For the purposes of this motion, plaintiffis entitled to the inference that Schuler vouched for Rooneybecause they had acted in concert pursuant to a common design.

Based on the forgoing analysis of the record, I conclude thatthere is sufficient evidence from which a reasonable jury couldconclude that the federal defendants conspired with, gavesubstantial assistance or encouragement to, and/or ordered orinduced Rooney to take plaintiffs son from his custody in amanner that violated plaintiffs due process rights.[40]

IV. CONCLUSION

I conclude by noting that before the motion to dismiss wasfiled the federal defendants stated their intention to seek aninterlocutory appeal if I reject their qualified immunitydefense. See Federal Defendants' Br. (March 20, 2001) at 8-9("It is well established that a federal official is entitled toan immediate interlocutory appeal if the Court denies thedefense of qualified immunity . . . Thus, if the FederalDefendants' motion to dismiss on the ground of qualifiedimmunity is denied, they would expect to file an immediate,interlocutory appeal with the Third Circuit.").

Given the arguments presented to me since then, it is unclearwhether the federal defendants are entitled to an interlocutoryappeal. The Supreme Court has held that "a district court'sdenial of a claim of qualified immunity, to the extent it turnson an issue of law, is an appealable `final decision' withinthe meaning of 28 U.S.C. § 1291." Mitchell v. Forsyth,472 U.S. 511, 530, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (emphasisadded). As I noted above, the federal defendants have not cited,discussed, or attempted to distinguish any of the cases uponwhich I have based the qualified immunity decision. Instead,they have argued that plaintiffs factual claim "is limited tothe allegation that theFederal Defendants offered inaccurate legal advice to counselfor the plaintiff's former wife

concerning the type of reliefshe, as a litigant, could request from the court." See FederalDefendants' Br. (May 11, 2001) at 26. This situation is similarto Hurlman v. Rice, 927 F.2d 74, 81 (2d Cir. 1991), whereinthe court found that a district court's order denying qualifiedimmunity was not a final judgment subject to interlocutoryappeal because there were "questions of fact to be answered inorder to determine whether appellants [were] entitled . . . to adefense of qualified immunity." It is not my role to determinewhether the Hurlman analysis precludes an interlocutory appealby the federal defendants, but I realize that it may present aproblem for them.

I will proceed as follows. The accompanying Order staysdiscovery[41] and permits plaintiff to perfect servicepursuant to 22 C.F.R. § 172.2 within 30 days and promptly notifyme in writing when service has been effected. When I receivethat notification, I will enter an additional Order denying thefederal defendants' motions to dismiss and motions for summaryjudgment for the reasons contained in this Memorandum. I willthen certify for immediate appeal pursuant to28 U.S.C. § 1292(b): 1) the Order denying the federal defendants' motions todismiss and motions for summary judgment; 2) the Order inEgervary II (denying the attorney defendants' motions forsummary judgment); 3) the Order in Egervary III (denying inpart and granting in part the attorney defendants' motions forsummary judgment); and 4) the Orders of March 6, 2001 and March23, 2001 (granting plaintiff leave to amend the complaint tore-assert claims against the federal defendants).

If accepted by the Court of Appeals, the certification willeliminate any potential "Hurlman" problem, allow the partiesto avoid multiple appeals, and permit the Court to address allof the intricate and intertwined issues in this action at thesame time. In my view, these Orders involve controllingquestions of law as to which there is substantial ground fordifferences of opinion and immediate appeal from them maymaterially advance the ultimate termination of the litigation.

ORDER

AND NOW, ____ this day of September, 2001, for the reasonscontained in the accompanying memorandum, it is ORDERED that:

1) Discovery is stayed until further Order; and

2) Plaintiff may within 30 days of this Order perfect servicepursuant to 22 C.F.R. § 172.2; and

3) Plaintiff shall promptly notify the Court in writing whenservice has been perfected by filing a certificate of servicewith the Clerk of Court.

1. The father, Oscar Egervary, will be referred to as"Egervary" or "plaintiff." The son, Oscar Jonathan Egervary,will be referred to as "Oscar."

2. The Hague Convention and ICARA also apply if a child hasbeen wrongfully retained outside of the nation of his or

her"habitual residence." Id.

3. It is unclear whether Young's first contact with Rooneyoccurred on May 10th or May 11th. In his deposition, Rooneystated that it was May 11th. See Rooney Dep. at 56. Young'sfollow-up letter to that conversation, however, is dated May10th. See Young Ltr. (May 10, 1994).

4. I note that Egervary's sworn testimony, the only testimonyin this case on these points, refutes most of the factual claimsYoung makes in this letter. Egervary denied that there was any"brutality" on December 18, 1993 when he retrieved Oscar. SeeEgervary Dep. at 53. He also denied that he intended at any timeto relocate to Hungary. See Egervary Aff. (July 7, 1994) ¶ 2.In addition, the claim that Oscar had "lived a month or twolonger in Hungary than he did in the U.S." ignores Egervary'scontention that Kovacs began illegally retaining Oscar inHungary as of May 1993 and hid the child from his father as ofSeptember 1993. Id. ¶ 2; Egervary Aff. (June 9, 1994) ¶ 8.

5. Rooney may have handled one Hague Convention case prior tothe Egervary matter, but that case took place in the Danishcourts. Id. at 23-25.

6. Nallin was named as a defendant, but summary judgment wasentered in his favor in Egervary III, 2000 WL 1160720, at *6.

7. In Egervary IV, I denied the federal defendants' motionfor a protective order to stop Judge Nealon's deposition fromgoing forward while the motion to dismiss on the basis ofqualified immunity was pending. In so doing, I "question[ed]whether I have the power to compel Judge Nealon to testify aboutevents that occurred in his chambers during officialproceedings." See Egervary IV, 152 F. Supp.2d at 742-43. Inoted, however, that I did not have to resolve that questionbecause Judge Nealon had agreed to give his deposition. Id. at744-45. See also Egervary II, 80 F. Supp.2d at 495-96 n. 3.

8. Like Young's earlier letter, Schuler's letter contained anumber of factual assertions that are inconsistent with thesworn testimony and other evidence in this case.

For example, Schuler states that "at the age of eight months[Oscar] was taken by his parents to Hungary." See Schuler Ltr.at 1. Egervary testified that Kovacs alone took Os car toHungary in February 1993, ostensibly so that she could performin a concert, and that they were scheduled to return on April 6,1993. See Egervary Aff. (July 7, 1994) ¶ 2. According toEgervary he had purchased a plane ticket to fly to Hungary andescort them back on that date. Id.

Schuler next states that: "The parents separated in the summerof 1993 and the mother was granted temporary custody by aHungarian court pending the couple's divorce." See SchulerLtr. at 1. In the next paragraph, he recounts the allegedabduction in December 1993. Id. at 2. The chronology of theseevents appears to be misleading. According to Egervary, Kovacsdid inform him that their marriage was over in the summer of1993. See Egervary Aff. (July 7, 1994) ¶ 2. However, Kovacsdid not seek temporary custody from the Hungarian courts untilafter the alleged abduction. See Hungarian Order (December 22,1993) (Exhibit A to the ICARA Petition of May 13, 1994). Infact, temporary custody was granted on December 22, 1993, fourdays after the alleged abduction. Id.

Schuler next states that: "At the time of his abduction, OscarEgervary had lived for 10 months in Hungary and eight months inthe United States." See Schuler Ltr. at 2. This claim ignoresEgervary's contention that Kovacs began retaining Oscar inHungary illegally as of May 1993 and hid the child from hisfather as of September 1993. See Egervary Aff. (June 9, 1994)¶ 8; Egervary Aff. (July 7, 1994) ¶ 2.

Finally, Schuler asserts that "the parents had intendedresettlement in Hungary." See Schuler Ltr. at 2. Egervarytestified, however, that: "Although I moved some of my personalbelongings from the United States to Hungary for use during thatperiod, at no time did I plan to establish residency in Hungary,nor did I register with the Hungarian government as a resident."See Egervary Aff. (July 7, 1994) ¶ 2.

9. In fact, the motion for summary judgment was filed on thesame day as the federal defendants' reply brief in support ofthe motion to dismiss. I will cite the reply brief in support ofthe motion to dismiss as "Federal Defendants' Reply Br. (July 9,2001)." I will cite the brief in support of the motion forsummary judgment as "Federal Defendants' Br. (July 9, 2001)."

10. Plaintiff also argues that Rooney "likely" transportedOscar through the Eastern District on their way to NewarkInternational Airport. See Plaintiff's Br. (June 19, 2001) at8. However, there is no specific testimony on this issue.Moreover, I take judicial notice that the most direct route fromCresco, PA (where Egervary resided) to Newark, N.J. is viaInterstate 80 in Monroe County, a route does not pass throughthe Eastern District. Therefore, I reject this argument.

11. Judge Troutman also observed that the venue provision of§ 1391(e), which on its face would appear to govern this case,does not apply because of the Supreme Court's decision inStafford v. Briggs, 444 U.S. 527, 100 S.Ct. 774, 63 L.Ed.2d 1(1980) (venue provision of § 1391(e) does not apply to actionsfor money damages against federal officials in their personalcapacities). See Egervary I, 1997 WL 9787, at *4.

12. The characterization "conspired with, gave substantialassistance or encouragement to, and/or ordered or induced"tracks the requirements of Restatement (Second) of Torts §§ 876and 877(a). See infra Part III-E-2.

13. Section 1391(e) permits service by certified mail uponfederal officers sued in their official capacity. However, §1391 does not apply to personal-capacity claims against federalofficers (including Bivens claims). See Stafford v. Briggs,444 U.S. 527, 542-45, 100 S.Ct. 774, 63 L.Ed.2d 1 (1980).

14. The federal defendants did not explain why service couldbe effectuated pursuant to Pa. R. Civ. P. 402.

15. The motion to dismiss was filed in 1996 when the case wasbefore Judge Troutman. However, because of the § 1406(a)transfer it was not decided until 1998 when the case was beforeJudge Robinson.

16. The federal defendants deny that their new theory isinconsistent with the theory presented to Judge Robinson in1998. See Federal Defendants' Reply Br. (July 9, 2001) at 10n. 7. As can clearly be seen from the summary of their argumentsthat appears above, that assertion is without merit.

17. I note that the federal defendants have made anadditional argument that, while not made in response to therequest for discovery, would negate the need for discovery ifaccepted. They argue that Pennsylvania law does not permitservice of process at an individual's place of employment. SeeFederal Defendant's Br. (May 11, 2001) at 15. This argumentfails because the Lampe Court clearly implied that service bycertified mail at the defendant's place of business would havebeen acceptable under Rule 403 if the return receipt had beensigned by the defendant's authorized agent. See Lampe, 952F.2d at 701.

18. The regulation also states that: "All such documentsshould be delivered or addressed to The Executive Office, Officeof the Legal Adviser, room 5519, United States Department ofState, 2201 C Street, NW, Washington, DC 20520-6310." See22 C.F.R. § 172.2(a).

19. The statute of limitations for a Bivens action is thestatute of limitations for personal injuries in the state wherethe tortious act occurred. See Napier v. Thirty or MoreUnidentified Federal Agents, 855 F.2d 1080, 1087-88 n. 3 (3dCir. 1988). Under Pennsylvania law, an action for personalinjuries must be commenced within two years of the accrual ofthe cause of action. See 42 Pa.C.S.A. § 5524.

20. Curiously, however, they concede that plaintiff couldstill appeal Judge Robinson's dismissal of the first complaint.Id. at 19 n. 10. If plaintiff prevailed in that appeal, thefederal defendants thereafter would be required to litigate thesame issues they currently face.

21. Moreover, the federal defendants' argument that a courtcannot make a valid revision of an order under Rule 54(b) unlessit finds that the order was wrong when decided makes littlesense when Rule 54(b) is read in para materia with Rule 60(b),which provides, inter alia, for relief from a final judgmenton the basis of newly discovered evidence. If the federaldefendants' view were correct, an unsuccessful plaintiff withnewly discovered evidence could seek relief from a finaljudgment under Rule 60(b) but could not seek to revise anon-final dismissal order under Rule 54(b).

22. Rule 15(c)(3) provides:

An amendment of a pleading relates back to the date of the original pleading when . . . the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

23. Although they never so state explicitly, the federaldefendants' preoccupation with Rule 15(c)(3) seems to be basedon the incorrect assumption that a plaintiff must satisfy allthree subsections of Rule 15(c) in order for an amendment torelate back. The text of Rule 15(c) clearly states, however,that an amendment relates back if it satisfies subsection (1),(2), or (3), though subsection (3) subsumes the requirements ofsubsection (2).

24. The federal defendants originally raised this issue intheir motion to dismiss. However, they later supplemented

thatanalysis in their motion for summary judgment. See FederalDefendants' Br. (July 9, 2001) at 14-17. I will thereforeaddress the qualified immunity issue under the summary judgmentstandard. See Fed.R.Civ.P. 12(b) ("If, on a motion assertingthe defense numbered (6) to dismiss for failure of the pleadingto state a claim upon which relief can be granted, mattersoutside the pleading are presented to and not excluded by thecourt, the motion shall be treated as one for summary judgmentand disposed of as provided in Rule 56."). See also infra PartIII-E-1.

25. In Egervary II, 80 F. Supp.2d at 502-04, I discussed atlength the standard for deciding whether a postdeprivationhearing is sufficiently prompt to satisfy due process and therationale for why a postdeprivation hearing must be initiated bythe state.

26. In Egervary II, I considered and rejected the attorneydefendants' argument that Egervary's motion for reconsiderationfiled before Judge Nealon and the later custody proceedings inHungary satisfied the requirement of a prompt, state-initiatedpost-deprivation hearing. See Egervary II, 80 F. Supp.2d at502-04.

27. Although it is not necessary to show actual prejudice inorder to make a due process claim, I note that plaintiff hadpotentially compelling arguments that may have changed theoutcome of the ICARA proceedings if he had been afforded anopportunity to be heard. As I explained in Egervary II:

Mr. Egervary had compelling, though not necessarily dispositive, arguments that could have been presented if he had been afforded notice and opportunity to be heard.

First, Mr. Egervary maintains that Ms. Kovacs took Oscar out of this country under false pretenses and then refused to return him. See generally Egervary Supplemental Aff. ¶ 2. If these allegations are true, then Ms. Kovacs likely violated the Hague Convention by unlawfully retaining Oscar outside of the country of his habitual residence.

Second, Mr. Egervary could have argued that the Hague Convention did not apply to Ms. Kovacs' claim because Hungary was not Oscar's habitual residence. Under ICARA, Ms. Kovacs had the burden of proving by a preponderance of evidence that Hungary was Oscar's habitual residence. See 42 U.S.C. § 11602(e). In Feder v. Evans-Feder, 63 F.3d 217, 224 (3d Cir. 1995), the Court of Appeals defined "habitual residence" as "the place where [the child] has been physically present for an amount of time sufficient for acclimatization and which has a `degree of settled purpose' from the child's perspective." The "shared intentions" of both the parents are relevant to this inquiry. Id. The Feder Court also specifically criticized a district court decision that found Germany was a child's habitual residence after "what began as a voluntary visit" to that nation turned into a "coerced residence." Id. at 224-25, discussing In re Application of Ponath, 829 F. Supp. 363 (Utah 1993). Consistent with Feder, Mr. Egervary could have argued that Oscar never experienced a degree of settled purpose in Hungary because he lived there for such a short time and was frequently moved around the country because of his mother's attempt to hide the child from his father. In addition, Oscar's parents never had a shared intention of residing in Hungary. Oscar was in Hungary only because his mother took him there, and she may have taken him there under false pretenses. Also relevant to this inquiry is the fact that Oscar is a United States citizen and at that point had spent the overwhelming majority of his life here.

Finally, even if the court rejected these arguments, Mr. Egervary would have had the opportunity to prove by clear and

convincing evidence that Oscar's return would expose the child to "physical or psychological harm or otherwise place the child in an intolerable situation." See 42 U.S.C. § 11603(e)(2)(A); Hague Convention, Article 13. Specifically, Mr. Egervary could have developed the evidence that when he found his son in Hungary in December 1993 the boy "appeared undernourished" and wore "dirty and ragged" clothing. See Egervary Aff. ¶ 9.

The Court makes no finding as to whether Mr. Egervary would have prevailed on any of these arguments. Such a finding would not be possible without a full evidentiary hearing and is likely irrelevant to this case. It is nonetheless clear that plaintiff was deprived of any opportunity to present these arguments.

See Egervary II, 80 F. Supp.2d at 500-01.

28. In addition to these appellate decisions, a number ofdistrict courts and state courts have arrived at similarconclusions in decisions that predate the events in this case.See, e.g., Rubin v. Smith, 817 F. Supp. 987 (N.H. 1993) (motherstated cause of action under § 1983 for a procedural due processviolation where her daughter was taken from her custody after atemporary custody hearing in another state of which she wasgiven no notice or opportunity to be heard); Roe v. Borup,500 F. Supp. 127, 130 (E.D.Wis. 1980) ("Deprivation of child custodywithout a court hearing has been held to state a cause of actionunder section 1983 for a procedural due process violation.");Olson v. Priest, 193 Colo. 222, 564 P.2d 122, 123 (1977)(granting of ex parte motion temporarily changing custody ofchild from mother to father violated mother's due processrights).

29. I note that each time the federal defendants have quoted§ 94.6(d) they omitted the phrase "and who is employed understate law to intervene on the applicant's behalf," a phrase thatis difficult to reconcile with the fact that Rooney, Burke, andNallin were private attorneys who were not "employed under statelaw."

30. Their depositions have yet to be taken.

31. In their initial summary judgment brief, they argue, ineffect, that the proper standard is whether they knew whatRooney was doing. See, e.g., Federal Defendants' Br. (July 9,2001) at 2 (arguing that Young and Schuler were never "informed"by Rooney that he intended to seek an ex parte order). Intheir summary judgment reply brief, the federal defendants firstargue that the proper standard is whether they "authorized orencouraged" Rooney. See Federal Defendants' Br. (August 17,2001) at 25 n. 6. Later in that brief, however, they argue thatthe proper standard is whether they exercised "control" overRooney. Id. at 27, 564 P.2d 122.

32. I note, however, that comment a to Restatement § 877states: "If he intends the result, it is immaterial that thetortious means used are not those originally contemplated,provided the defendant's order or inducement is one of thecontributing factors."

33. The federal defendants go on to argue that they never hadany direct contact with Judge Nealon "that could conceivablyhave influenced him." See Federal Defendants' Br. (August 17,2001) at 4. That statement appears to be true but is notrelevant to plaintiff's claim. Plaintiff does not contend thatthere was any direct contact. He does contend, however, thatthere was indirect contact sufficient to establish that thefederal defendants conspired with, gave substantial

assistanceand encouragement to, and/or ordered or induced Rooney.Moreover, Judge Nealon unequivocally stated: "If it weren't forthe involvement of the State Department I would not have takenthe action I did take." See Nealon Dep. at 140. Therefore,unless Rooney misrepresented the nature and extent of thefederal defendants' involvement, their alleged indirect contactclearly did influence Judge Nealon.

34. In addition, I note that Rooney's testimony is arguablyhelpful to plaintiff's case even if he was wrong about whoactually made the phone call. This testimony arguably showsRooney's state of mind regarding the extent of the federaldefendants' knowledge of his actions. He thought it was at leastpossible that the federal defendants called Judge Nealon'schambers the day of the meeting. Such a call would not have beenpossible if their personal involvement ended with thetransmission of the model pleadings a few days before.

35. The fourth option was similar to the third option, inthat both provided for Oscar to be taken from his father'scustody and placed in his mother's custody. The third option,however, provided that Oscar could not be removed from MonroeCounty pending a hearing, while the fourth option eliminated theneed for (or possibility of) a postdeprivation hearing byordering the child's immediate return to Hungary.

36. In addition, I note that the model pleadings do notnecessarily conflict with my earlier findings. The modelpleadings suggested an initial ex parte proceeding withoutnotice to the alleged parent-kidnapper followed by seizure ofthe child and a prompt postdeprivation hearing with notice. Thisprocedure is consistent with due process if there is anemergency situation sufficient to justify the initial removal ofthe child without notice, a condition that is probably satisfiedin the case of a parental kidnapping if there is a bona fidethreat of further flight.

37. The federal defendants attempt to rebut this conclusionby arguing that: "The immunity test under the doctrine neverinvolves delving into the subjective thought processes orbeliefs of the [government official] at the time of the allegedunconstitutional action." See Federal Defendants' Br. (July 9,2001) at 15. This conclusion follows, they argue, from the factthat qualified immunity depends upon the "objective legalreasonableness" of the government official's actions. Id.Therefore, they conclude, "Young and Schuler's subjectivethoughts at the time of their alleged conduct are irrelevant"and qualified immunity must be judged solely based upon whatRooney "actually communicated" to Schuler in the conversationfrom Judge Nealon's chambers. Id. at 16. This argument isflawed for two reasons. First, assuming arguendo that Youngand Schuler's subjective thoughts are irrelevant, there is noreason why the inquiry into what was "actually communicated"would end with the conversation from Judge Nealon's chambers.Rooney testified that he had spoken to the State Department "abunch of times" in the days before, and Burke testified thatRooney had spoken to the State Department at least three othertimes on the day of the ex parte hearing. See Rooney Dep. at62; Burke Dep. at 70-71. Second, the two cases the federaldefendants cite in support of their argument rebut theconclusion they draw. In Anderson v. Creighton, 483 U.S. 635,641, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), the Court statedthat "the determination whether it was objectively legallyreasonable to conclude that a given search was supported byprobably cause or exigent circumstances will often requireexamination of the information possessed by the searchingofficials." An examination of the "information possessed" by theofficials is an examination of their subjective thoughts.Similarly, in Hunter v. Bryant, 502 U.S. 224, 228, 112 S.Ct.534, 116 L.Ed.2d 589 (1991), the Court stated that thereasonableness of the arrest at issue in that case should havebeen judged according to "the facts and circumstances within[the officers'] knowledge" at the time of the arrest. That isalso an inquiry into their subjective thoughts. Similarly, thequestion in this case, a question ultimately for a

jury, is whatYoung and Schuler knew based upon the facts and circumstances,not whether Rooney uttered the right words.

38. As I have previously explained, that factual narrativeconflicts with the sworn testimony in this case in manyrespects. See supra note 8.

39. The federal defendants argue: "Nor does it [i.e., theletter] provide even indirect evidence that defendant Schulerhad favored the ex parte process followed by defendant Rooney.The letter makes no reference to the ex parte process andthere is no evidence that defendant Schuler had any knowledge ofthe process when he sent the letter." See Federal Defendants'Br. (August 17, 2001) at 16. I disagree. As I have previouslydiscussed, the federal defendants sent Rooney model pleadingsthat provide for an initial ex parte proceeding without noticefollowed by a postdeprivation hearing with notice. During thephone call from Judge Nealon's chambers, if not before, Rooneysays he told Schuler that he had added a fourth option thateliminated the postdeprivation hearing. Given these facts,Schuler' reference to "the most expeditious proceduresavailable" may well be a reference to the procedures Rooneyfollowed.

40. Plaintiff has argued in the alternative that he should bepermitted discovery from the federal defendants pursuant toRule 56(f) and has submitted an affidavit in support of that request.The federal defendants object to this request. I need not reachthis issue because I am denying the summary judgment motion.

41. I am in receipt of correspondence from the attorneydefendants and plaintiff regarding the attorney defendants'subpoena of plaintiff's medical records. The attorney defendantsare entitled to that discovery, but it will be deferred pendingaction by the Court of Appeals.